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THE
ENGLISH REPORTS

VOLUME XIII

PRIVY COUNCIL

II

CONTAINING

MOORE, P.C., VOLUMES 3 to 7.

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REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, 1839-41. By EDMUND
F. MOORE, Barrister-at-Law. Vol. III.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

MANOEL JOAQUIN SOARES,—*Appellant*; GEORGE RAHN and Others,—*Respondents* ;* The PRINCE OF SAXE COBOURG. *Ladd*. [Dec. 18, 1838].

To justify the resort by a master of a ship to a Bottomry Bond, it is requisite by Maritime Law, that the advances should be merely to enable the ship to refit : or to pay for the repairs and despatch of the vessel for the completion of her voyage : and that the master should be unable to obtain such advances upon personal credit [3 Moo. P.C. 9].

The jurisdiction of the Court of Admiralty in cases of Bottomry Bond, is founded on the existence of necessity, arising from the want of personal credit [3 Moo. P.C. 10, 11].

The sale of a Bottomry Bond, pursuant to public advertisement, by auction, to the lowest bidder, in a foreign port, by the master of a ship, is not sufficient to discharge a purchaser of the Bottomry Bond from making reasonable enquiries that the master is, under the circumstances, justified in granting the Bond [3 Moo. P.C. 10].

A Bottomry Bond on the ship, freight, and cargo, sold at public auction, in a foreign port, by the master and part owner of the ship, there being an agent of the charterer and sole owner of the cargo, willing to advance, on personal credit of the owner of the cargo, for the necessary repairs of the ship, under the circumstances, pronounced against.

Semble.—The master, though the original hypothecator of the ship, and a part owner, is not precluded, by the practice of the Court of Admiralty, from joining his co-owners in impugning the Bond [3 Moo. P.C. 10].

This was originally a cause of Bottomry, promoted and brought in the High Court of Admiralty, by the Appellant, Manoel Joaquin Soares, the London Agent of [2] Messrs. Le Cesne, Guillot and Co., of Lisbon, merchants, the legal holder of a Bottomry Bond, on the ship, *Prince of Saxe Cobourg*, her cargo and freight, against George Rahn, and John Ladd, the principal owners of the ship, and Nathan Mayer Rothschild, the charterer of the vessel, and sole owner of the cargo.

The question arose upon the validity of a Bond taken up at Lisbon by Ladd, the Master of the vessel ; the charterer of the vessel and sole owner of the cargo having an authorized agent there, who it appeared had waited upon the Master, and informed him personally, and also in writing, of his character of agent for the owner,

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy [Sir Thomas Erskine], and the Right Hon. Dr. Lushington.

and expressed himself ready and willing to advance any money necessary to repair the ship on the personal credit of the owner.

It did not, however, appear that the holders of the Bond were aware of this fact at the time the Bond was executed, of which they became the purchasers in the following manner:—

In the month of June 1836, (the ship being in the port of Lisbon, bound, with a cargo of quicksilver, from the port of Cadiz to London,) it was publicly advertised at Lisbon, that on Thursday, the 23rd of that month, a sale by auction would take place at the Exchange of that city at the accustomed hour, to the lowest bidder, of a loan on bottomry, of the sum of 2000 milreis, more or less, which was required to [3] defray the expenses occasioned by the vessel having been forced to put into the port of Lisbon.

At this sale Messrs. Le Cesne, Guillot and Co. attended and became bidders, and after the sale had proceeded in usual course, the Bond was adjudged to them, as having offered to take it at 6 per cent. premium, the lowest rate bid.

The Bond was duly executed for the sum of £642 5s. with interest after the above rate, and the money paid to the Master, whereupon the ship proceeded on her voyage, and arrived in due course in the port of London, when, payment being refused, a warrant was obtained to arrest the ship, and an action commenced upon the Bond at the instance of the Appellant.

The action was resisted and the Bond impeached on the ground that the funds necessary for the repairs of the ship might have been obtained, and were in fact tendered, by the agent of the owner of the cargo and charterer of the vessel, on the personal credit of the owner, and that there was no such case of "unprovided necessity" as justified the resort to a Bond of Hypothecation. Various circumstances also were pleaded and proof produced, showing the Master's knowledge that such credit might be obtained,—of steps taken by him,—by putting the vessel under commission to one James, and allowing him to discharge the cargo for which commission was charged, one moiety being charged by the Master, and which, being contrary to the commercial usage of the owners' (Rothschild's) house, was refused, whereupon the Master had hypothecated the ship, not merely for the amount of the supplies, but to cover such commission.

On the 12th of May 1837, the Judge of the High Court of Admiralty (Sir John Nicholl), by an Interlocutory Decree, pronounced against the force and validity of the Bond (reported, 3 Hagg. Adm. Rep. 387).

From this sentence the holders of the Bond appealed to Her Majesty in Council.

Sir William Follett, Q.C., and Dr. Addams, for the Appellant.—There is no question that the Master of the ship, being a part owner, had a right to consign the vessel to whoever he liked for the purpose of repairing; he was not bound to consign it to the agent of the owner of the cargo. But it is said that the Master might have got the necessary advances for the repairs of the ship from the agent of the owner of the cargo without resorting to a Bottomry Bond. Of this fact Messrs. Le Cesne, Guillot, and Co., the holders of the Bottomry Bond, were entirely ignorant; they knew nothing of the correspondence between the master of the ship and the agent of the owner of the cargo, or of the willingness of the agent to advance the necessary amount for the repairs at the personal credit of the owner of the cargo. The Bond being publicly advertised, Le Cesne, Guillot, and Co. go into the market at Lisbon, where sales of Bottomry are common and matters of frequent occurrence, and the Bond is adjudged to them as having offered to take it at the lowest rate. Such advance was perfectly legal by the usage of Lisbon, and the sale having been allowed to pass off without any warning of any illegality in the Master's conduct, Messrs. Le Cesne, Guillot and Co. did not and could not suspect that any objection would possibly arise to the validity of the transaction. The [5] circumstance of the Bond being advertised for public auction was sufficient to show that there was an unprovided necessity, the publicity of which was sufficient to dispense with inquiries on the part of the lenders as to the actual existence of the ship: even if there was evidence that they made no inquiry.

Ladd, the Master by whom the hypothecation was made, and who is one of the part owners of the ship, now claims an interest and joins with the owners of the cargo in their defence to the Bond: such a defence is collusive and contrary to

justice. If the Bond is not good against the ship and cargo to its whole extent, at any rate it is to the extent of the interest of the Master, who as part owner had a right, so far as his interest in the ship is concerned, to pledge it by Bottomry Bond. Abbott, on Shipping (edit. by Shee, 130). The *Nelson* (1 Hagg. Adm. 176). The Court can regulate the quantum and reduce the Bond. The *Augusta* (1 Dodson, 283).

The Queen's Advocate (Sir John Dodson) and Dr. Harding for the Respondents. — The only question is, whether the ship was in such a state of unprovided necessity as to warrant the Master resorting to a Bottomry Bond. To justify a Master of a ship resorting to a Bottomry Bond there must be a double necessity: first a necessity for repairs, or supplies, and then an absence of personal credit, *Heathorn v. Darling* (1 Moore's P.C. Cases, 5). The *Rhadamanthe* (1 Dodson, 201). The *Alexander* (1 Dodson, 278). A Bottomry Bond can be validly given only where the funds necessary cannot be raised on [6] personal security; in the present case the necessary funds might have been procured on personal credit, the charterer of the ship and sole owner of the cargo having an authorised agent at Lisbon who offered to advance all the necessary funds on the personal credit of the owner. We admit that the owner or part owner, to the extent of his respective interest, may hypothecate the ship, but that is not a Bottomry Bond; a Court of Admiralty has no jurisdiction over it, for there must be maritime risk to give a Maritime Court jurisdiction to entertain the suit.

Sir William Follett, in reply — Referred to *Johnson v. Shipper* (2 Ld. Raym. 892), Abbot, on Shipping (edit. by Shee, 129), and to *Heathorn v. Darling* (1 Moore's P.C. Cases, 5).

The Right Hon. Dr. Lushington (May 10, 1839).—This is an Appeal from the High Court of Admiralty, which by its Decree, bearing date the 12th of May 1837, pronounced against the validity of a Bottomry Bond, the subject of this suit.

There is no material difference between the parties as to the facts of the case. They lie in a very narrow compass.

In the month of May 1836, the vessel being hired by the house of Messrs. Rothschild, of London, with a cargo of quicksilver, left the port of Cadiz, on a voyage to London; in consequence of having sprung a leak, she made for Lisbon, and arrived at Belem, which is about four miles below that port, on the 31st [7] of May, or the first of June. Ladd, the Master, who was a part owner, was informed by a clerk of Finnie and Co., that their house were the agents and correspondents of Messrs. Rothschild; that they were prepared to take charge of the vessel; to make preparations for the repairs, and also to make every necessary advance. To this communication the master replied, that he was already in the hands of the agents of Messrs. Rothschild; and it appears that a Mr. James had (by himself or clerk) already made some application to the Master to consign the vessel to him. On further explanation with the house of Messrs. Finnie and Co., the vessel was placed under their charge, and 600 packages, part of the cargo, unladen. At this time the Master took the vessel from Messrs. Finnie and Co., and consigned it to Mr. Henry James; and it is alleged that his reason for so doing was, that Messrs. Finnie and Co. refused to charge any commission, being accustomed not to do so with respect to vessels freighted by Messrs. Rothschild; at the same time, however, Messrs. Finnie and Co. declared their willingness to make every necessary advance, and to pay all the expenses requisite for setting forth the ship to sea.

Repairs to a small amount were then done, and the cargo was reladen; in the account there appears a charge for commission on the cargo, amounting to £366 13s. 5d., the shipwright's bill being £59 18s. 1d.

In the latter end of June a correspondence took place between Ladd, the Master, and Messrs. Finnie and Co., whether they would advance, on account of Messrs. Rothschild, the amount required to defray the expense of repairs, and other customary and usual charges incurred, to which Messrs. Finnie and Co. replied that upon examination of the accounts, they were [8] willing to pay such expenses and charges as would have been made had the business remained in their hands. In these letters the Master had declared that he must grant a Bottomry Bond on the ship and cargo. The result then is, that Messrs. Finnie and Co. declined to advance money to cover the commission, conceiving the same to be unnecessary, though they were willing to advance for all other necessary expenses.

The Master then advertized for a loan on Bottomry, by public auction. The lowest bidders were Messrs. Le Cesne, Guillot, and Co., who purchased the Bond, at six per cent. premium, and the Master granted to them a Bottomry Bond on ship, cargo, and freight, at that rate of maritime interest. The amount for which the Bond was granted being £642 5s. 0d.

In the Act or Petition it is alleged on behalf of Messrs. Le Cesne, Guillot and Co., that they neither knew, nor had any reason to believe, that the owner of the ship or cargo had any authorized agent or correspondent in Lisbon, or that the Master had any instructions to apply to Messrs. Finnie and Co. in case of need; or that he was furnished with any letter of credit to them, or any introduction whatever to their house of trade.

In considering the law applicable to this state of facts, it may be expedient to advert to the principles on which the validity of Bottomry Bonds have always been made to rest in the Court of Admiralty. In the large majority of cases the Master is neither owner nor part owner of the ship or cargo; when he takes up money on Bottomry, he pledges the property of others, and that, too, upon maritime interest, which frequently is extremely high, and very onerous to the owners. To justify him in such an act, and to warrant the foreign merchant [9] advancing his money on valid security, it is requisite, by the Maritime Law, that the advances shall be merely to enable the ship to refit, or to pay for the repairs and dispatch of the vessel, for the completion of her voyage, and that the master shall be unable to obtain the same on personal credit.

This rule has always been rigidly maintained, and with no other qualification than that which justice and the interests of commerce necessarily call for. If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached, or invalidated, because it might happen, that notwithstanding his reasonable and *bona fide* inquiries, the repairs were not necessary or the money might have been had on personal credit.

In the present case, their Lordships are satisfied that all the advances necessary to be made to enable the ship to complete her voyage might have been had on personal credit; and on the part of the Bottomry Bond holders, it is not alleged that any inquiry was made, as to any of the facts or circumstances relating to the ship; the validity of the Bond, it is said, must be upheld, because the Bond was bought at public auction, by Messrs. Le Cesne, Guillot, and Co., after public advertisement. It is contended, that these circumstances are sufficient to render all inquiry on the part of the lenders on Bottomry unnecessary; but their Lordships cannot assent to this doctrine; which, if admitted, might be attended with consequences very pernicious to the mercantile marine of this kingdom.

[10] In the first place it may be observed, that advertisements, and the sale of Bottomry Bonds, have not for their direct object the publicity of any of the transactions attending the ship, or the credit of the master. The principal object in view by such proceeding is, to produce a Bond at the lowest rate of interest, by inducing public competition; analogous to this is the common practice of sending circulars to different houses of trade, inquiring if they are willing to advance money on Bottomry, and at what rate, for the voyage in question: but we are clearly of opinion, that neither precedent nor principle, nor the consideration of the real advantage of commerce, would sanction us in considering those circumstances as sufficient to dispense with all inquiry on the part of the lenders.

The foreign merchant ought to know, that the master's authority to bind the ship and cargo by a Bottomry Bond is founded on necessity alone; and that it is his duty, before he takes a security so onerously affecting the property of others, to satisfy himself by a reasonable inquiry, that the circumstances of the case justify the master in this exercise of his authority. No such inquiry having taken place in this case, we think that the Judgment of the Court below was right, and that the Appeal must be dismissed.

In the course of the argument it has been said, that the Master, Ladd, being a part owner of this vessel, could not be heard, so far as applied to his own interest, to set up the defence, which might be good for his co-owners; but however that

might be before another tribunal, such argument cannot avail in the Court of Admiralty, because the authority [11] of that Court, in the case of *Bottomry Bond*, is founded upon the existence of, and necessity arising from, the want of personal credit; and unless that fact be established, or, at least, after due inquiry, the credible appearance of such necessity, the Court of Admiralty has no jurisdiction to enforce the Bond. It is not, in the received meaning of the term, *Bottomry Bond* at all, and of other bonds, the Court of Admiralty has no cognizance.

[Mews' Dig. tit. SHIPPING, A. X. BOTTOMRY, 2. VALIDITY. a. b. S.C., below, 3 Hagg. Adm. 387. Explained in *Pontida* (The), 1884, 9 P.D. 177; and see note to *Heathorn v. Darling*, 1836, 1 Moo. P.C. 14. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict. c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

ON APPEAL FROM THE EQUITY SIDE OF THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

SREE MUTTY BISSNOSOONDERY DABEE, and Another. —*Appellants*:
RAJAH BURRODACAUNT ROY,—*Respondent* * [February 12, 1839].

Leave given to restore an appeal dismissed for want of prosecution; the Appellants' agent, though instructed to prevent the dismissal of the appeal, not having received the transcript until after the expiration of a year and a day from the time of the allowance of the appeal, and the Respondent having in consequence thereof obtained an order of dismissal.

This was a motion for leave to restore an appeal which had been dismissed for want of prosecution.

The original suit was instituted by the Respondent against the mortgagees of certain Pergunnahs for redemption of the mortgage, and to set aside the sale of [12] one, made in pursuance of the powers contained in the mortgage deed, as fraudulent and void; and for the usual accounts.

After various preliminary proceedings, and the filing of a supplemental and cross bill, the cause came on for hearing, before Sir John Peter Grant, one of the puisne Judges of the Supreme Court, who on the 11th of April 1835 made a Decree, by which the sale in question was declared null and void; and a reference directed to the master to take an account of the rents and profits of the Pergunnah accrued since the date of the sale.

This Decree was subsequently affirmed on a rehearing (Sir John Malkin, dissentient,) by the whole Court, on the 10th of May 1836.

From this decision, the Appellants appealed to His late Majesty in Council, and having filed their petition for leave to appeal within the six months allowed for that purpose, obtained the final order for such permission on the 9th of February 1837. The Respondent having obtained and forwarded a copy of the proceedings in the suit to his agents in England, and no steps having been taken by the Appellants to prosecute the appeal within the ordinary time, (viz. a year and a day,) the Respondent, on the 12th of May 1838, presented a petition in the usual form, to dismiss the appeal for want of prosecution, accompanied by an affidavit, stating that the Appellants had taken no steps to prosecute the appeal, and praying also for costs. The petition came on for hearing on the 16th, when the Court ordered the appeal to be dismissed with costs, including the costs of the transcript, which were directed

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington. Privy Councillor.—Assessor, Sir Edward Hyde East, Bart.

to be taxed by a Master of the Common Pleas. This order was confirmed by Her Majesty in Council on the 8th of June following.

[13] On the 21st November 1838, the Appellants presented a petition to rescind the order for dismissal, and for liberty to prosecute the appeal. The petition was supported by the affidavit of their agents in England, which after detailing the nature of the proceedings, and the circumstances above stated, proceeded to depose that it appeared from the papers in the cause, that the transcript was not certified by the Chief Justice until the 11th of December 1837; that on the 8th of January 1838 they received a letter from the Appellants' solicitor in India, dated 19th of August 1837, directing them to retain counsel on the appeal, and informing them that the delay which had taken place in procuring the appeal papers, which were very voluminous, containing upwards of 5000 folios, had been occasioned by the Respondent's agent having first bespoke the copy of the transcript, but that they would be forwarded at the earliest opportunity, and instructing them if the Respondent should urge the hearing of the appeal before the papers should reach England, to delay the hearing until their arrival; that on the receipt of the above letter, they made inquiry at the Council office, and ascertained that the Respondent had not at that time taken any steps to dismiss the appeal, and that it was not until the month of July that they discovered that the order of the 16th of May 1838 had been made, but that the same had not, up to that day, been delivered out of the Council office, by reason, as they were informed, of some doubts having arisen respecting the question of costs; that the copy of the transcript did not arrive in England until the month of August, in consequence whereof the agents were unable to take any steps to stay the proceedings to dismiss the appeal: they stated also the [14] value of the property in issue to be of great amount, exceeding 38 lacs of rupees, or £380,000.

In opposition to the motion, an affidavit was made by the Respondent's solicitor, who had lately arrived in England, contradicting the statement respecting the cause of delay in the Respondent's first obtaining his copy of the transcript, and affirming that the Appellants' agent in Bengal had ample notice of the Respondent's intention to proceed to dismiss the appeal for want of prosecution, to enable him to have forwarded the transcript in due time. He stated also that the Appellants being Hindoo women of rank, had availed themselves of the privileges of their caste, and had thrown every impediment in the way of the suit, by evading personal service of the orders of the Court, which had only at last been effected after the whole process of contempt had been exhausted.

Mr. Campbell, and Mr. C. Austin, for the Appellants, now moved to restore the appeal, contending that the Respondent having bespoke the first copy of the transcript, the Appellants were necessarily precluded from forwarding their copy within the limited time; they relied on the discretionary power of the Court to let in the appeal at any time, notwithstanding the period usually limited had elapsed.

Mr. G. Richards, and Mr. Turton, for the Respondent, insisted on the grounds detailed in their affidavit, and the regularity of their proceedings, and objected to the Appellants being let in to appeal under any terms.

[15] Lord Brougham.—We are all of opinion that under the circumstances of the case the laches of the Appellants cannot justify our shutting them out from their appeal, and that the order therefore of the 16th of May 1837 must be rescinded: but upon the terms of their paying the costs incurred by the Respondents in India as well as here, consequent on the order of dismissal, which are not costs in the cause, and giving security to the amount of £500 for the contingent costs here, such security to be perfected within two months.

See *Rajendranarain Rae v. Bijai Govind Sing*, 1 Moore, P.C. Cases, 117, and cases *ib.* 127-133-139.

[S.C. 2 Moo. Ind. App. 128. As to present conditions of appeal from Bengal, to Privy Council, see Letters Patent of the 28th Dec. 1865, arts. 39-42 (Stat. R. and O. Rev. iv. 93-95); *Code of Civ. Proc.* (Act xiv. of 1882), ss. 595, *et seq.*; and *Civ. Proc. Amend. Act* (Act vii. of 1888), s. 57].

ON APPEAL FROM THE COURT OF CHANCERY OF JAMAICA.

WELLWOOD HYSLOP,—*Appellant*: ANTHONY MICHEL JONES,—
Respondent * [May 9, 1839].

Inrolment of Decree, by one of the Defendants to a suit for carrying into effect the trusts of a Will, five months after the Decree, during the infancy and absence of the Plaintiff from the Island, at the cost of the estate: Held by the Judicial Committee on appeal, not to have been done with improper haste, the infants being properly represented according to the practice of Jamaica, and an Order of the Court of Chancery of the Island, under such circumstances, vacating the inrolment, reversed.

This was an appeal from an order of His Excellency the Marquis of Sligo, the Governor of Jamaica, sitting [16] as chancellor, for vacating the inrolment of a Decree made and duly inrolled in the High Court of Chancery in the Island, in a cause wherein the Respondent and his two brothers were Plaintiffs, and the Appellant and Pierre Albert were Defendants.

The object of the suit was the administration of the Will of Anthony Jones, the father of the Plaintiffs, who being infants and under the age of sixteen, the then Chancellor, in conformity to the practice of the Court, (a) nominated and appointed the Register of the Court their *prochein amy* to prosecute the suit on their behalf. The suit was prosecuted in regular form, and the Decree made in due course on the 24th of September 1832, and inrolled on the 28th of February 1833, on motion by the Appellant.

[17] On the 13th December 1834, the Respondent attained his age of twenty-one years and in the month of December 1835 he presented a petition praying that the inrolment of the Decree might be vacated, and the costs thereof paid by the Appellant, with the costs of the petition, and that the Respondent might be at liberty to present a petition for a rehearing of the cause. The grounds stated in the petition were his non-age and absence from the Island, and he also alleged that he was not sufficiently represented in the cause, and that the Decree was not drawn up according to the terms pronounced by the Court; and prayed leave to refer in evidence thereof to the indorsements on the briefs of the Counsel in the cause.

The Appellant filed an affidavit in reply to this petition, setting forth the circumstances under which the cause arose, and the various proceedings taken in it, and

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

(a) In reply to the question of the Commissioners of Enquiry into the Administration of Criminal and Civil Justice in the West Indies, whether the Court of Chancery of Jamaica exercised any and what jurisdiction in regard to infants and the appointment of guardians to their persons and estates, the then Attorney-General of the Island, William Burge, Esq., and the Registrar of the Court, Thomas Groser, Esq., both stated the practice to be, that if the infant is sixteen years of age or upwards, he nominates his own guardian, either by appearing in open court on motion, by waiting on the Chancellor at his house when the Court is not sitting, or by letter, or other notification annexed or subscribed to the petition praying for the appointment; and that when the infant is under that age, or absent from the Island, the application is made by petition and affidavit, where all the circumstances in relation to the affinity of the parties are brought before the Chancellor, and the same is heard, if contested in open court; but if no caveat is entered at the Registrar's Office, a recognizance, conditioned to account, issues as of course, which is entered into with a surety before a Master, and on the return of which, letters of guardianship issue under the broad seal. West Ind. Rep. Jamaica, June 1827, p. 145, 204, 290.

See also Rules xxxii., lxxiii., and lxxv. of the Court of Chancery of Jamaica, by R. Russell, Jamaica 1841.

insisting that they were regular, and according to the usual course of practice of the Court, and that the Respondent's petition ought to be dismissed with costs. Pierre Albert, the other Defendant in the cause, also filed an affidavit to the same effect.

On the 1st of March 1836 the petition came on to be heard before the Governor, as Chancellor, when, after a long discussion, his Excellency was pleased to declare that the petitioner, Anthony Michel Jones, was not represented efficiently in the Island at the time of the enrolment, and that therefore it should be vacated, and the costs of it paid by the Appellant; and it was directed accordingly. Against this order the Appellant appealed to Her Majesty in Council, and prayed that the same might be reversed, for the following reasons:—

I. Because the allegations that the Respondent was [18] not efficiently represented at the time of the enrolment, and that his interests in the cause were neglected, was untrue, and wholly unsupported by any evidence on the part of the Respondent, and were disproved by the Appellant's evidence; and although the professed objection to the enrolment was, that it prevented a rehearing of the cause in the Colonial Court, yet the Respondent had not alleged any error in the Decree, or any particular matter, in respect of which he was aggrieved by the Decree, or entitled to have a rehearing of the cause.

II. Because no case of fraud, or surprise, or irregularity as to the enrolment of the Decree was proved, or even alleged, as a reason for having the enrolment vacated.

III. Because, having regard to the allegations in the petition for vacating the enrolment, the affidavit of the Appellant did not contain any matter which is scandalous or impertinent: nor was the question as to the alleged scandal and impertinence regularly brought before the Court in such a manner as to authorize the Court to pronounce any decision upon it.

The Respondent relied upon the order appealed from, and prayed that it might be affirmed with costs, for the following reasons:—

I. Because the enrolment of the Decree ought not to have been procured by the Appellant, Hyslop, during the infancy of the three complainants, in the suit for whom he had been appointed a trustee; and because the suit was adverse, and the rights and interests of the Respondent, Anthony Michel Jones, and of his two brothers, the other complainants, were not protected in the suit; and the enrolment was otherwise improper.

II. Because the order appealed from was just and [19] proper under the facts which appeared before the Court below, upon the petition and affidavits, and in the proceedings in the cause.

Mr. Burge, Q.C., and Mr. Stuart, Q.C., for the Appellants, argued on the objections set forth in the above reasons, and referred to *Barnes v. Wilson* (1 Russ. and Myl. 486), *Wardle v. Carter* (Myl. and Cr. 283), *Piccott v. Loggon* (5 Ves. 703).

Mr. Rennells and the Respondent, in person, cited *Kemp v. Squire* (1 Ves. Sen. 205). *Anon* (1 Ves. Sen. 325).

Mr. Baron Parke (Dec. 5).—This is an appeal against an order of the Court of Chancery in Jamaica on the petition of the Respondent, by which the enrolment of a Decree was vacated.

A bill was filed by the Respondent and his brother infants, by the Registrar of the Court of Chancery, as their next friend, against the Appellant, and Pierre Albert, as the Executors of their father, for establishing his Will and Codicil, and executing the trusts thereof, and an account and other purposes; and there was also a petition and order for a receiver.

This suit appears to have been fairly instituted by direction of Albert, who had administered a part of the funds himself, and was fearful, and not without apparent reason at the time, that the estate of the infant would suffer by the supposed maladministration of the residue by the Appellant.

In June 1828, the Appellant put in his answer, and Albert put in his in January 1829.

[20] On the 7th of September 1831, the cause was heard, and a Decree made, referring it to the Master to take an account of the Testator's estate.

A report was made, exceptions taken to it, and on the 24th of September 1832,

the cause came on to be heard on exceptions and further directions, and a Decree was pronounced on that day, by which, amongst other things, the Appellant was ordered to be reinstated as executor and trustee, and to carry into execution the trusts of the Testator's Will, and that the receiver should be discharged.

The Decree was duly inrolled on the 28th of February 1833.

On the 13th of December 1834 the Respondent attained his age of 21 years, and on the 31st of December 1835 petitioned the Chancellor to have the inrolment vacated, stating that the Appellant had caused the Decree to be inrolled before his majority, and in his absence from the Island, and where he had no real *prochein amy*, but only a nominal one, the officer of the Court, by which proceedings he was prevented from presenting a petition for a rehearing, and driven to the expensive process of filing an original Bill to impeach the Decree; the petitioner also stated that his estate had been injured by the payment of £600 for costs of the inrolment, and that the suit was conducted on behalf of the said Respondent by Pierre Albert and his solicitor, and that by reason of the infants' interests having been neglected, the petitioner was apprehensive that material errors had crept into the Decree. It contained, however, no statement of any such errors; but prayed that the inrolment should be vacated, the costs paid by the Appellant, and the petitioner allowed to present a petition for rehearing.

The Appellant filed an affidavit in answer to this [21] petition, in which he stated that the suit was carried on against him adversely from beginning to end; that the Decree being in vindication of his character, as trustee and executor, was properly inrolled at the expense of the estate; that the suit was carried on by Albert and his solicitors, but that the interests of the infants were attended to by separate Counsel; that one of them, Mr. Middleton, had indulged in invective against him, beyond the fair liberty of speech. He also denied all collusion with Albert or his solicitors, and all privity to any neglect of the interests of the infants, and stated, that if there was any collusion or neglect, it was the fault of the Counsel, for overlooking it.

Albert also filed an affidavit in answer to the petition, in which he stated, that the suit was carried on by his own solicitor, but that it was instituted for the purpose of protecting the rights of the infants; he also shielded himself from the imputation of negligence, as well as obtaining a discharge from the trusts on a fair investigation of the accounts, which he was advised by Counsel could only be accomplished through the medium of the Court. He also stated that the infants having no male relations, or other person in the Island interested in their welfare, it was only open to pursue the usual course, by obtaining the appointment of the Registrar as *prochein amy*; and though the Registrar did not actually interfere, he had the power of doing so, if he had considered it necessary for the protection of the infants' rights.

On the 1st of March 1836 the petition came on to be heard before the Marquis of Sligo, the then Governor and Chancellor, who was pleased, by his order of that date, to declare that the petitioner was not represented [22] efficiently in the Island at the time of the inrolment of the Decree, which he therefore ordered to be vacated, and the costs paid by Hyslop, the Appellant, together with the costs of the petitioner and Albert; his Lordship also ordered, that the matter in the Appellant's affidavit, impugning the character of the Counsel, should be expunged without a reference to the Master.

The Appeal was against this order, upon two grounds:

First. That the inrolment took place regularly and properly:

Second. That the matter was not scandalous and impertinent, and that the question, as to the alleged scandal, was not brought before the Court, so as to enable it to pronounce any decision upon it.

The second object was scarcely touched upon by the Counsel for the Appellant, and not pressed, and it is unnecessary to give any opinion upon it, as their Lordships are in favour of the Appellant on the other ground.

The order on this petition cannot be supported, on the ground that it was an application to the favour of the Court, to have a regular inrolment vacated, on terms, by reason of the infancy and absence of the Respondent, or by reason of some error or mistake in the Decree, in not agreeing with the notes of Counsel, or

otherwise, for no such case is made out by it. It is indeed suggested, that on account of the neglect of the interests of the infants in the conduct of the cause, some material errors might have arisen from a variance between the notes of Counsel and the Decree, but the particular variance was not alleged, nor any proof given of any such error or mistake. Nor indeed was any such error pointed out at the Bar, in the course of the argument; nor if it had been an application to the [23] favour of the Court, could the order have inflicted the payment of costs upon the Appellant.

The only question as to this order is whether the enrolment of the Decree was regular. If it was, the order cannot be supported, which sets the enrolment aside, and makes the Appellant pay the costs. Supposing the suit to have been regularly instituted, and a proper *prochein amy* appointed, and therefore to be on the same footing as an ordinary suit, it is clear that the enrolment was strictly regular. The Appellant having a Decree in his favour was entitled to have it put in due form and completed by enrolment, and if the practice requires no precise time to intervene, there appears no reason why it should not be done immediately. The case before Lord Hardwicke, (*Anon.* 1 Ves. Sen. 326.) in which he set aside an enrolment as being done too quickly, was doubted by Lord Cottenham in *Wardle v. Carter* (1 Mylne and Cr. 283): but supposing it to be rightly decided, certainly there was no improper haste in this case, as an interval of more than five months intervened. The case before Lord Hardwicke seems to have been an application to the favour of the Court, and it was compared to the setting aside a regular judgment in a Court of Law.

The only objection to the order therefore is, that the suit was improperly constituted, on the ground that the infants had not a proper *prochein amy*.

The answer to that objection is, that there is no dispute about the practice of the Island in such cases; and to that practice we must adhere: and if such practice be wrong, and the infants not properly represented, the effect would be, not that the enrolment would be irregular, but that the whole suit would be [24] ineffectual, and the infants in no way be bound or affected by it.

We are, therefore, of opinion that the Appeal must be allowed, and the order reversed.

[Mews' Dig. tit. INFANT, G. PROCEEDINGS BY AND AGAINST, 4, b.]

RE KAY'S PATENT * [June 13, 1839].

Extension of Patent granted; pending a suit respecting the validity of the original Letters Patent.

This was an application for a prolongation of the term of Letters Patent, granted the 26th of July 1825, to the Petitioner, James Kay, for new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power.

A caveat was entered, and an objection taken on the hearing, that the validity of the Patent was disputed, and was at that time the subject of a suit in Chancery.

The Attorney-General (Sir John Campbell), on the part of the Crown, expressed his opinion that the matter of the Patent not being *res judicata*, but only *lis pendens*, the public had not such an interest as would justify his opposing the extension of the Patent, if their Lordships should think the merits sufficient.

Sir Frederick Pollock, Q.C., for the Petitioner, after proving the usual notices, being about to show the want of adequate compensation, their Lordships called on

Mr. Cresswell, Q.C., the Counsel for the parties [25] entering the caveat, to state the grounds of opposition; which being deemed insufficient, their Lordships granted an extension of the Patent for three years;

* Present: Lord Lyndhurst, Lord Brougham, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

Lord Brougham observing, that if the Judicial Committee had seen that the Patent upon the face of it was manifestly and grossly illegal, they would not advise Her Majesty to grant an extension of it; though such extension would not benefit the party obtaining it, if the Patent in the first instance was invalid: but that if they postponed giving their decision until the result of the suits then pending were known, the Patent would in the mean time expire (see *Bodmer's Patent*, 2 Moore, P.C. Cases, 471; and 2 and 3 Viet., c. 67), and being of opinion, that upon the merits shown, the Patentee ought to have some extension, their Lordships would advise such for the period of three years (the Patent was ultimately determined not to be valid, on the ground that the invention was not new. *Kay v. Marshall*, 1 Myl. and Craig, 373; 1 Beaven, 535; 5 Bing., N.C., 492; 8 Clk. and Fin. 245 [2 Web. P.C. 36].

[*Mews' Dig.* tit. PATENT, F. 2. RENEWAL AND EXTENSION, a. S.C. 1 Web. P.C. 568. On point (i.) as to deduction of law expenses from profits (1 Web. P.C. 572), see *In re Bett's Patent*, 1862, 1 Moo. P.C. (N.S.), 62; *In re Galloway's Patent*, 1843, 1 Web. P.C. 729; *In re Robert's Patent*, 1839, 1 Web. P.C. 575; (ii.) as to no extension where patent manifestly bad, see *In re Stoney's Patent*, 1888, 5 R. P.C. 522. The practice on petitions for extension is now regulated by s. 25 of the Patents Act 1883 (46 and 47 Vict. c. 57), and rules scheduled to O. in C. of 26th Nov. 1897 (Stat. R. and O. 1899, p. 1837).]

[26] IN THE MATTER OF AN APPEAL FROM THE SUPREME COURT
OF THE MAURITIUS.

JAMES LAING (Collector of the Revenue in the Mauritius),—*Appellant*;
C. T. INGHAM and Others,—*Respondents* * [Dec. 5, 1839].

Leave to appeal against a decision pronounced in 1819, and in which no step had been taken for two years previous to the application, refused.

Semble. The Crown has no greater right than the subject to be let in to appeal, in a general case in which its interests are concerned.

This was an application on the part of the Colonial Government, for leave to enter an Appeal against a sentence pronounced by the Court of Appeal, in the Mauritius, on the 4th of February 1819.

In 1817 the property of M. Ducray, a resident in the Island, was seized under legal process, and brought to sale. Various creditors put in claims to be paid out of the proceeds, including the government collector of revenue, who claimed the sum of 8600 piastres, due to the colonial government, from Ducray, for certain duties payable by him in respect of six stills which he had upon his estate.

The collector claimed a preference in respect of this debt, as due to the Crown; which was opposed by the Respondents, who were creditors of Ducray, and whose debt had accrued previous to that due to the Crown.

The claim of the collector was founded on the 2098 article of the Code Civil, which is the law of the Island.

The question came before the Court of First Instance on the 20th of October 1818, when that Court disallowed the claim of priority over the Respondents' debt: resting their judgment on the second part of the same article.

From this decision the Appellant appealed to the Court of Appeal, which on the 4th of February 1819 affirmed the judgment of the Court of First Instance.

No appeal was prayed against this sentence within the time limited by the Charter, viz., fourteen days after the sentence made: but on the 19th of October 1837 an application was made to the Court of Appeal to allow the appeal, which

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Dr. Lushington.

was in effect refused, the Court being of opinion that if it could admit the appeal it had no power to require security for costs from the Crown.

In July 1839 a petition was presented to Her Majesty in Council for leave to appeal against the Decree of the 4th February 1819.

The Attorney-General (Sir John Campbell) now moved for the admission of the appeal under the general power of the Crown to admit appeals notwithstanding the terms directed by the Charter had not been complied with (see Copy of Charter, Clarke's Colonial Law, 594-597). He stated the delay to have been occasioned by the necessity there had been of consulting the Government at home and the law-officers of the Crown upon the legality of the sentence and the expediency of the appeal.

Lord Brougham.—Their Lordships are all of opinion that this application is too late. It is not a question of the sufficiency [28] of the security offered in the Court below: of that, that Court would be the sole judge, *Camberton v. Egreignard* (1 Knapp, P.C. Cases, 251), but whether, two years having elapsed without any proceedings being taken, the Crown shall now be let in to dispute a decision pronounced in 1819. There is no greater right in the Crown, in a general case involving its interests, to come in after such a delay, than there would be in any ordinary subject. The question involved is certainly one of great importance, but it may be raised in another case: it is too late to re-open this.

[Mews' Dig. tit. APPEAL. I. RIGHT TO: GENERAL PRINCIPLES; also tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1, 6 a; also tit. CROWN, 1; LAW OFFICERS. 1. As to conditions of appeal to Privy Council from Mauritius, see Orders in Council of April 13, 1831, and Dec. 12, 1894 (*Mauritius Laws Rev.* I. 97; Stat. R. and O. 1899, pp. 1693, 1701).]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE, AT
FORT WILLIAM, IN BENGAL.

JOHN CALDER,—*Appellant*; ROBERT CRAIGIE HALKET,—*Respondent* *
[Dec. 5, 1839; July 4, 8, 1840].

The 21st Geo. III., c. 70, s. 24, protecting Provincial Magistrates in India from actions for any wrong or injury done by them in the exercise of their Judicial Offices, does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction [3 Moo. P.C. 75].

Trespass will not lie against a Judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the Plaintiff, in every such case, to prove that fact [3 Moo. P.C. 77, 78].

This was an action of Trespass, brought by the Appellant against the Respondent, in the Supreme Court [29] of Judicature, at Fort William, to recover damages for the arrest and false imprisonment of the Appellant, by the Respondent, in his character of Judge and Magistrate of the Foujdarry † Court of the Zillah of Nuddeah, in Bengal.

The Appellant was the manager of a factory at Bayadangah, in the same Zillah, belonging to Mr. David Andrews. Both the Appellant and Respondent were

* Present:—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. Dr. Lushington.

† Criminal. [As to these Courts, see preamble to Bengal Reg. 9 of 1793; Respondent's Case in Printed Cases, p. 5, Morley's Dig. xxxiii.]

European British-born subjects. The proceedings which gave rise to the imprisonment complained of, were as follows:—

On the 29th of July 1834, an affray took place in a village called Dutt Boahleah, within the Zillah of Nuddeah. On the following day, the police Darogah of the adjoining Thanah (police station) of Hanskolly, within which the village of Boahleah is situate, reported the particulars of the riot to the Respondent, as acting Magistrate of the Foujdarry Court of the Zillah of Nuddeah, and transmitted the depositions of the wounded persons as well as of some of the witnesses of the affray.

The Respondent, Mr. Halket, being of opinion that the Appellant was concerned in the riot, directed a Robocarree (or order of instructions for the mode of proceeding in the case) of the Foujdarry Court at Kishnaghur, to be made and passed, by which it was ordered, amongst other things, that a Perwannah should be written and directed to the Darogah, for the apprehension of Mr. Calder.

The Robocarree was signed by the Respondent, and a Perwannah was accordingly issued on the same day, and delivered to the Darogah of the Thanah of Hanskolly. Under the authority of which, the Appel-[30]-lant was detained, and kept under surveillance of two Burlurdanzes (watchlock-men), within the boundaries of Mr. Andrews's factory.

The Appellant was ultimately brought before Mr. Halket, the Respondent, as Acting Judge of the Foujdarry Court at Kishnaghur, and after some days' investigation, admitted to bail; and was eventually bound by recognizance, to appear when called upon. The greater part of the other prisoners charged with being concerned in the riot, were convicted, and sentenced to different periods of imprisonment: but no further proceedings were taken against Mr. Calder.

Upon the 6th of March in the following year, 1835, Mr. Calder commenced an action of Trespass, in the Supreme Court at Calcutta, against Mr. Halket, for assault and false imprisonment. The Declaration contained three counts. The first alleged that the Respondent assaulted and imprisoned the Appellant for thirty-four days, at Bayadangah. The second, that the Respondent had laid hold of the Appellant, and compelled him to go from a house in Bayadangah to a place called Poolia, and from Poolia back to Bayadangah, and then to Kishnaghur, and there imprisoned him for twenty-five days. And the third count alleged that the Respondent had assaulted and imprisoned the Appellant at Kishnaghur, for thirty-four days.

The Respondent pleaded the general issue; and also six special pleas, justifying the said several arrests and imprisonments, as done by him as Magistrate of the district of Nuddeah, in the province of Bengal, and of the Criminal Court of the same district.

[31] The Appellant joined issue upon the first plea, and replied *de injuria* to the six special pleas upon which issue was joined.

The cause came on for trial before the Supreme Court, on the 23rd of July 1835, when several witnesses were examined on both sides, and a verdict was given for the plaintiff, on all the issues joined in the action, with damages to the amount of five hundred sicca rupees, but with liberty for the Respondent to move that the verdict should be set aside, and a *nonsuit*, or verdict for the Respondent, entered instead thereof, upon three several points reserved, viz., 1st, That there was no proof of the arrest of the Appellant by the Respondent's order: 2ndly, That under the provisions of the Statutes 21st Geo. III., c. 70, sec. 24, and 53rd Geo. III., c. 155, sec. 105, and the Bengal regulations in force in the Presidency, the Respondent was not liable to the Supreme Court in an action for damages; the acts proved appearing in evidence to have been acts done by him as Magistrate of the Provincial Court of Kishnaghur; and 3rdly, that under the general issue a sufficient justification was proved.

A rule *nisi* to that effect was granted on the 2nd of November.

On the 24th of November 1835, the several points reserved were argued before the Supreme Court, who were of opinion, that the arrest having taken place under the seal of the Foujdarry Court, and the Appellant being a British-born subject, and not amenable to the jurisdiction of the Foujdarry Court of the Zillah, the Respondent had failed to support his special pleas. They were, however, of opinion, that under the general issue, the Respondent was entitled to avail [32] himself of the pro-

tection of the 24th section of the Statute 21st Geo. III., c. 70, which precluded the Supreme Court from holding jurisdiction in the action against the Respondent, and accordingly adjudged that the verdict should be entered for the Respondent on the general issue, with costs, and costs of motion.

From this judgment the Appellant appealed to Her Majesty in Council.

Mr. M. D. Hill, Q.C., and Mr. C. Buller, for the Appellant.—The judgment of the Supreme Court cannot stand; they admit the trespass, but say they have no jurisdiction to try the question, the Respondent having acted in his magisterial capacity, and not being amenable to the Supreme Court. This is contrary to law, as well as against the true construction of the Acts 21st Geo. III., c. 70, and 53rd Geo. III., c. 155. The rule at law is, that if an action be brought against a Judge of Record for an act done by him in his judicial capacity, he must plead that he did such act as a Judge of Record before he can avail himself of such justification (Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowp. 172). The Respondent pleaded the general issue. Now supposing him to be a Judge of Record, that is clearly insufficient; but he also pleaded specially, that the acts were done by him in his magisterial capacity: yet the Court held these pleas were not supported, but they held the plea of the general issue sufficient, under the 21st Geo. III., c. 70, s. 2 and 24. That Act was passed to explain and amend the previous one of 13th Geo. III., c. 63, under which the Supreme [33] Court was first established: by the second section it is provided, that persons impleaded in the Supreme Court, for acts done by order of the Governor-General in Council, may plead the general issue. But the trespass of the Respondent was not an act so done. The Respondent is a Judge of the Foujdarry Court, and, according to the Bengal Regulation I. of 1772 (Judicial Regs. of 1769 to 1792, para. 5), first establishing that Court, but an officer of police, having no jurisdiction over any but natives: and though appointed by the Governor-General in Council, the acts done by him in his judicial capacity never can be construed to be acts done by the order of the Governor-General, so as to entitle him to plead the general issue. The 24th section of the Act recites, that whereas it is reasonable to render the Provincial Magistrates, as well native as British-born subjects, more safe in the execution of their office, it is enacted that no action for wrong or injury shall lie in the Supreme Court, against any person whatsoever exercising a judicial office in the [Country] Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court. Now, in the first place, this clause applies to the orders of the Court, and not to the individual acts of the Judge; and, in the next place, the judgments, orders, or decrees, intended by the Legislature, are such as the judicial officer has authority to exercise, viz., over natives, and not over British subjects, who are not subject or amenable to the jurisdiction of the Provincial Magistrates. Here the Respondent, a Mofussil Magistrate, issues a Perwannah [34] for the arrest of the Appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it may be, from the report of the Darogah, but of which the Respondent is in utter ignorance. The Act of 21st Geo. III., c. 70, was never intended for such a case as this, nor can it be strained to meet it. If the construction given by the Supreme Court to the 24th section be correct, the Appellant will be without redress at law: he cannot sue the Respondent in the district in which the acts happened, and the Native Courts of Sudder and Nizamut are Courts of Appeal without original jurisdiction. The consequence will be, that the local Magistrates in India will enjoy a protection and immunity not possessed by a Judge of the highest Court of Record in England.

Then it is said that the Respondent, being a justice of the peace, had jurisdiction under the 53rd Geo. III., c. 155, s. 105: but that clause applies only to cases of arrest of a party complained of, after the case has been heard and decided, and a fine imposed and not paid, and no property found within the district from which such fine could be levied. The question then is, whether the Respondent, being, as it is admitted, a Justice of Peace, and as such amenable to the Supreme Court, can be permitted to say that the act done by him was in his capacity of Judge of the Foujdarry Court, and not as a magistrate, and that as such Judge he is entitled to plead the general issue, and to the protection of the 21st Geo. III., c. 70. We do not contend that an action would lie against the Respondent acting within his jurisdiction:

the statute 21st Geo. [35] III., c. 70, protects the Judges of the Native Courts in India in the same manner as those of 7th Jac. I., c. 5, 21st Jac. I., c. 12, s. 15, and 42nd Geo. III., c. 85, s. 6, protect the Judges of our own Courts; but if the act done be out of the jurisdiction of the Judge, then he is not protected. *Bushel's case* (1 Mod. 119); *Hamond v. Howell* (1 Mod. 181, and 2 Mod. 218); *Miller v. Seare* (2 W. Black. 1141). This doctrine was admitted in *Dicas v. Lord Brougham* (6 Carrington and Payne, 249 [3 St. Tr. (N.S.) 569]), and formed the basis of the decision in *Mostyn v. Fabrigas*. If an act is done by a Judge as Judge of Record, in his judicial capacity, then no action will lie against him. *Groenvelt v. Burwell* (1 Lord Ray. 454; 1 Salk. 200). But the Foujdarry Court is not a Court of Record, it is the native Criminal Court, created under the Regulation of 1772, at the same period as the Sudder, which has been held, as we are instructed, by the Supreme Court of Calcutta, not to be a Court of Record. If a party not being a Judge of a Court of Record improperly grants a warrant, on which another is imprisoned, an action lies, *Beardmore v. Carrington* (2 Wilson, 241), *Burdett v. Abbott* (14 East. 1), and he must plead specially. Now though the warrant is sealed with the seal of the Foujdarry Court, the act of granting it was a ministerial and not a judicial act, and being an excess of jurisdiction, an action will lie for it. *Beaurain v. Scott* (3 Camp. 388). The distinction between a ministerial and judicial act was taken and insisted on with great learning and ability in a case in the Court of Common Pleas in Ireland, *Taafe v. Downes, Chief Justice of the King's Bench* (a). The

(a) The case of *Taafe v. Downes, Chief Justice of the King's Bench*, in Ireland, was published in 1815, as a separate report, by Mr. Hutchell, a Barrister—no regular reports of the Court of Common Pleas in Ireland existed at that time, and Mr. Hatchell's book being out of print, and extremely scarce, the Editor ventures to think that a case on so important a point, involving so much constitutional law, ought to be preserved, and that an epitome of it will not be unacceptable to the profession. The limits of a note have compelled the omission of the arguments of Counsel, as well as the judgment of Mr. Justice Fletcher, who differed from the other Judges of the Court: but the authorities relied on, both at the bar and by the learned Judge, are set out, and the judgment of the other Judges taken, from a copy of Mr. Hatchell's Report, in the Editor's possession.

IN THE COURT OF COMMON PLEAS IN IRELAND.

The Right Hon. JOHN, LORD NORBURY, Lord Chief Justice.

LUKE FOX, Esq., EDWARD MAYNE, Esq., WILLIAM FLETCHER, Esq.—Justices.

HENRY EDMUND TAAFFE, Esq., v. The Right Hon. WILLIAM DOWNES, Lord Chief Justice of the Court of King's Bench in Ireland [June 12, Nov. 10, 13, and 24, 1812; Jan. 29 and 30, 1813].

[Mews' Dig. tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, b. *Liability to action*.

Trespass for assault and false imprisonment will not lie against a Judge for acts judicially done by him.

A warrant granted by the Chief Justice of the King's Bench in Chambers, returnable in that Court, to arrest a party for a breach of the peace, is such a Judicial act as will protect him against an action for false imprisonment.

Trespass for assault and false imprisonment.—Plea 1st. The general issue. 2nd. Not Guilty, as to part, and to the residue justification, for that the Defendant was Chief Justice of the King's Bench, and as such issued a warrant under his hand, containing certain recitals, and commanding the persons therein named to apprehend and bring the Plaintiff before him (the Defendant), or any of the Justices of the King's Bench, to be dealt with according to law. That the Plaintiff was arrested under the warrant by a person named in it, brought before the Defendant, and by him delivered to bail for his personal appearance in the King's Bench, on the first sitting day of the then next Michaelmas Term, and for his attendance there, from day to

Plaintiff having been arrested upon a warrant from the Chief Justice, brought an action of assault and for false imprisonment, to which the Defendant pleaded that he was [37] Chief Justice of the King's Bench, and that as such, and in the course of his office of Chief Justice, issued his warrant. The Plaintiff demurred, because the

day, and from term to term, to answer all such matters and things, as should be then and there objected against him, on the part of the King. Joinder on the first plea, and general demurrer to the justification.

For the Plaintiff.—Perrin, O'Connell, and Barnes, who cited 2 Hawkins, Pleas of the Crown 121 and 135; 6 Comyns Dig., 101; Pleader E. 4, 15, 17, 379; Co. Litt. 232 a., 303 b.; 2 Inst. 52; 1 Black. Com. 350; Lambard's Eirenarcha, 6, 12, 14; 1 Edw. III., c. 16; 34 Edw. III., c. 1; 48 Geo. III., c. 58; 2 Hale, Pleas of the Crown, 78 et 61, p. 53, 108, 110; 2 Bacon's Abr. 97; *Windham v. Clere*, Cro. Eliz. 130, 1 Leon. 187; *Hill v. Bateman*, 1 Strange, 710-711; *Mostyn v. Fabrigas*, Cowper, 122; *Groenvelt v. Burwell*, 1 Lord Ray. 454, Comyn 79, 80, 1 Salk. 396; *Hammond v. Howell*, 1 Mod. 184, and 2 Mod. 218; Dr. Bonham's case, 8 Co. 107; *Floyd v. Barker*, 12 Co. 23; *Throgmorton v. Allen*, Tr. 11 Car. B.R. 2 Roll. Abr. 558; Olliet and Bessey's Case, cited 2 Lutwyche, 1568; *Morgan v. Hughes*, 2 Term 225; *Barnardiston v. Soames*, 2 Lev. 114; *Ashby v. White*, Lord Ray. 938; *Rex v. Reily*, Irish Term Rep. 204.

For the Defendant.—Foster, Pennefather, and Radcliffe, who cited Parl. Roll. 1 Hen. 4; Viner's Abr. tit. Judicial, Tit. Judges 1; *Burdett v. Abbott*, 14 East, 123; *Poole v. Gwynne*, Lutw. 935, et 1560; The Marshalsea Case, 10 Co. 69; Co. 4 Inst., 10 Co. 470-71; Bushell's Case, 1 Mod. 119, Vaugh. 135; *Miller v. Seare*, 2 W. Bla. 1141; *Sutton v. Johnston*, 1 Term Rep. 493, 511-12-17-29; *Le Caux v. Eden*, Douglas 594; *Eaton v. Southby*, Willes's Repts. 131; Anon, 6 Mod. 73; 3 Blac. Com. 41; 2 Inst. 55; Lamb. Eirenarcha, 12, 13, 579; 2 Hale's P.C., 5, 586; Dalton's Justice 117; *Pickard v. Paiton*, Siderfin, 276; Noy, 156; 2 Hawkins, 147-8, et 136; Lib. 2, sec. 20; Wilmot's Notes of Opinion, 81, 95, 104; *Pilton v. Darbey*, Comb. 57; *Smith v. Frazer*, 1 W. Blac. 192; *Rex v. White*, Rep. temp. Ld. Hardwick, 42; *Rex v. Burchell*, 1 Strange, 567; *Rex v. Neals*, Rep. temp. Ld. Hardwick, 112; *Grocers Co. v. Arch. of Canterbury*, 2 W. Bla. 770; *Medcalf v. Hodgson*, Hutton's Rep. 120; *Rex v. Almon*, Wilmot's Notes of Op. and Jud. 243; *Dampont v. Sympton*, Cro. Eliz. 520; *Ayre v. Sedgwick*, 2 Rolle Rep. 197-198; *Liddesdale v. Duke of Montrose*, 4 Term. Rep. 248; *Stone v. Lidderdale*, 2 Anst. 533; *Clarty v. Odum*, 3 Term Rep. 681.

Mr. Justice Fletcher, who differed from the other Judges, cited and commented on *Throgmorton v. Allen*; Vin. Abr. Tit. Trespass, vol. 20, p. 477; *Floyd v. Barker*, 12 Coke Rep. 23; *Soames v. Barnardiston*, 2 Lev. 114, 7 State Trials, 437; Lamb. Eirenarcha, cap. 9, p. 54-5, cap. 3, p. 12; *The King v. Almon*; Wilmot's Notes of Op. and Ind. 243; Fitzherbert, N.B., 152; Bisp. Nicholson's Eng. Hist., 1 Ed. 1714, p. 205-6; Seldon, cap. 9, 1; Bracton, Lib. 5, p. 413; Fleta, Lib. 2, ch. 12; 2 Inst. 53; 4 Inst. 81, 182, 174-177; Wilmot on Hab. Corp. p. 100; Fitzherbert in 4 Hen. VIII., fo. 16; Fitz. Abr. Tit. Assize, 17; Finch, 355; Ratnell, 263; 2 Hale, 194; 48 Geo. III., c. 58; 2 Hawk. 135; *Muriel v. Tracy*, 6 Mod. 169, and Vaugh. 137; *Bengough v. Rossiter*, 4 T.R. 505; Bushell's case, 1 Mod. 119; 4 Inst. 73; *Rex v. White*, *Burdett v. Abbott*, 14 East, 1; *Rex v. Almon*, Wilmot, 243, 254; The Rioters' Case, 1 Vern. 175, 1 E. Ca. Abr. 441; *Bridgman v. Holt*, Show. Pa. Ca. 111.

Mr. Justice Mayne (January 30).—In this case, however sorry I am to differ from the learned Judge who has preceded me, in pronouncing the judgment of the Court, upon this important case, yet I am decidedly of opinion, that the demurrer ought to be overruled; and that the plea contains a bar to this action. I feel, that the cause of my differing in opinion from my brother Fletcher, is owing to his arguing on a question, that is not before the Court. It has been argued mostly at bar and bench, as if the question was, whether it was lawful or defensible for a Judge, without any offence committed, or charge made upon oath of crime or suspicion of crime committed, to imprison a subject—*ex mero motu*—out of his mere caprice or malice. Nothing in my apprehension is less like the question before us. The Chief Justice makes no such question. It is not the question here upon the record.

Defendant did not justify by his plea, the issuing the [38] warrant, by setting forth the causes for which, as well as the authority under which, it was issued. The case was elaborately argued by the most eminent men at the Irish bar, and though the Court gave [39] judgment against the demurrer, one of the Judges, Mr. Justice

The action is for assault and false imprisonment. The plea in effect is, that all that is necessary or proper for the Court to inquire into in this action is, that the Defendant is Chief Justice of the King's Bench; and as such, and in the course of his office of Chief Justice, issued a warrant,—legal on the face of it—to cause this Plaintiff to do what was necessary for his answering the charge (in the warrant fully recited) of a criminal offence, fully also recited to have been sworn to; and that the only assault and imprisonment was the constable's bringing the Plaintiff to give bail, in the course of this proceeding. The plea of the Chief Justice does not say, that it is the right of a Judge to imprison without cause; but that it is the right of a Judge not to be called on, in every man's action—upon every exercise of his official authority to become a Defendant, before a Court and Jury—to show and make out the case, by which it was his duty, as a Judge, to imprison the party charged with crime or misdemeanour. But what is the fact to be put in issue? It is this; the plea of the Chief Justice says, "You the Plaintiff, being imprisoned under my warrant, have a right to try by your action, in a Court of Law, whether I am a Judge of the King's Bench; and whether I did more against you, than issue a warrant according to the legal course, upon an alleged criminal charge. If I have done more, you can, on my plea, prove it. If I made a warrant the fraudulent cover for oppression, or corruption, or malice, you can, on my plea, aver that. If I have done anything against you, not in the course of my office, you can say so. If the charge recited in my warrant is no legal charge of an offence, your demurrer will serve you. But I deny your right to try before this Court and a Jury, in this action, the grounds of my judicial acts, or the rectitude or legality of my judgment." The Plaintiff, not content with this answer, demurs: and thereby contends, that the Chief Justice is by law bound, here in this action to come to trial, not only of the matter of fact which he offers for trial, but of all the facts, grounds, detail of proceedings, and circumstances of offence, charged against the Plaintiff; and also, that he must discuss, and bring to decision before this Court, or the Judge at *nisi prius*, the rectitude and reasons of his acts and judgment. The plea brings the case to the same question, as if the Plaintiff had declared, that the Chief Justice, acting as a Judge of the King's Bench, issued his warrant in the regular way, with recital of informations before him on oath, of a crime committed by the Plaintiff; and that he held him to bail, to answer against that charge, in the proper Court. The Chief Justice has done no more than bring on the record what the Plaintiff omitted of these truths. If the Plaintiff had so declared, the Chief Justice, I presume, would have demurred, and I would be of opinion that such demurrer ought to be allowed. It is now the same question, viz. does the imprisonment now appear to this Court to have been a judicial act? If it does, the plea, standing admitted, is a bar.

A second question, scarcely attempted to be made at the Bar, will not require much argument, and little more than an observation, namely, whether an action lies against a Judge, for his judgment or judicial acts.

A third question, rather mentioned than argued, was on the distinction between judicial acts, in Court, and out of Court.

And first, as to the question whether an action lies against a Judge, for his judicial acts. The Chief Justice is by the Common Law a depository of the King's authority, for the purpose of administering justice to the nation—he acts upon oath, and upon high confidence; and immediately with his Court represents the King in that sacred and important duty. The King does justice through his Judges—they are his delegates; and they are accountable to him alone, for the pure and honest performance of their trust; and they and the King are, towards the people in dispensing the law, as it were, one individual authority. There must be some place and part in the stage of proceedings—some point in the administration of the Law, where unqualified confidence is to be reposed and acknowledged; and in the declaring of justice to the nation, that place rests with the King's Judges.

The difference between the Judges of the superior and inferior Courts has not

Fletcher, being dissentient, yet the distinction between the ministerial and judicial acts of a Judge, which formed the ground of his dissent, was [40] not controverted by the other Judges, who only held that the act in question was legal, and could not

been sufficiently attended to. The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his justice done by them, and by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King, and are subject to the control and direction of the superior Courts. An action before one Judge for what is done by another, is in the nature of an Appeal; and is the Appeal from an equal to an equal. It is a solecism in the law, I say, that the Plaintiff's case is against the independence of the Judges. The principle contended for would annihilate that independence. Judges are to be equally independent of the Crown, and of the people. If there must be parties in the nation, and one is inclined to degrade Judges and intimidate them into subjection to their views, it may also happen, that another party may be so inclined the next day: the partisans of a king may wish to reduce them to servility—the partisans of anarchy or revolution, to render them their instruments of a worse despotism, or intimidate them from the performance of their duty, and from restraining the first and insidious efforts towards confusion and rebellion. The honest, good, and constitutional mind will always wish to find them entirely free and unbiassed: and will rather entrust them with a high and unquestionable authority, and if guilty, leave their punishment to parliament alone, than hazard their fortitude and independence by the alarm, and question, pains and expense of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind. The constitutional idea of a Judge is "*dignity*," for the sake of the King and people. There was one case in England, where an attempt somewhat similar to this was made; an action against the Judges at the Sessions in London; and there it was soon decided that no such action lay. Liability to every man's action, for every judicial act a Judge is called upon to do, is the degradation of the Judge: and cannot be the object of any true patriot or honest subject. It is to render the Judges slaves in every Court that holds plea, to every Sheriff, Juror, Attorney and Plaintiff. If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility.

As to the authorities upon the subject, no such action was ever sustained; and save that of *Hamond v. Howell*, 1 Mod. 84, and 2 Mod. 218, so often mentioned, none ever was attempted, but once before, and that in Ireland, where also it was thought of to bring an action against the chief Governor of the country. But, as in the case of the King's Judges, so in that of his representative the Lord Lieutenant of Ireland, the constitutional remedy, if there were misconduct, is before the King and the Parliament. The case attempted in London was the strongest imaginable. The Recorder of London was the Judge: his act was expressly declared illegal by the Court of Common Pleas, upon discussing the case on a *Habeas Corpus*, Vaughan 135. Upon that opinion of the Court, an action afterwards was brought against him in the King's Bench, before Lord Chief Justice Hale, and his brothers: and what were Hale's expressions!—"That the action would not lie. That in the case of an erroneous judgment, though a writ would make void the judgment, it doth not make the awarding the process void to that purpose: and the matter was done in a Court of Justice; and that they would have but a cold business of it," 1 Mod. 119, and afterwards in 2 Mod. 218, the same case came on; and Howell having pleaded the special matter, the Plaintiff replied, *de injuria sua propria*; and to this the Defendant demurred; and what was the opinion of the whole Court? "That the bringing the action was a greater offence than the fining of the Plaintiff, and committing him for non-payment: and that it was a bold attempt, both against the government and justice in general. It was an error in judgment, for which no action will lie."

There is no other reported authority, for there was no other case of such an action attempted: but there is plenty of solemn authority, on the law and principles

be questioned because it was a judicial act. The Chief Justice, however, was a Judge of Record; even, there-[41]-fore, admitting the case to have decided that a Judge could not be questioned for an act ministerial, but in the nature of a judicial act, that decision cannot be relied on here, for there is no pretence for saying that [42] the Foudary Court is a Court of Record, or its Judges any thing higher than

of such an action. Besides Sir Eardly Wilmot and Lord Coke, the authorities of both of whom have been questioned, Rolle, Hale, Hawkins, Blackstone, De Grey, and whoever else at the bar or bench have been referred to on the subject, are decidedly against the monstrous doctrine contended for by the Plaintiff. We find in *Floyd v. Barker*, 12 Co. 23, "Jurors not to be drawn in question, nor Judges. No proof to be admitted against the presumption, that they, as sworn, will do justice. They are guardians of the King's oath, and are to answer to him alone; for otherwise it would tend to the scandal and subversion of all justice; and those who are the most sincere would not be free from continual calumniation. For *Multae incidiæ sunt bonis*." In *Miller v. Seave*, 2 W. Bl. 1141, De Grey, Chief Justice, said, "it is agreed the Judges in the King's superior Courts of Justice are not liable to answer personally for their errors in judgment; and this, not so much for the sake of the Judges, as of the suitors themselves. The protection, in regard to the superior Courts, is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction;" and, again, we find the following passage in 3 Bl. Com. 41.—"Bracton expresses the power and dignity of the King's Bench, when he says, that the Justices of this Court are "*Capitales, generales, perpetui, et majores, a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores*."

And with those ancient and high authorities in our law, is perfectly consistent what is said by Wilmot 104, in answer to the question by the Lords, whether if a Judge, before the Statute of Charles, had refused to grant the *Habeas Corpus*, the subject had any remedy at law, by action or otherwise, against the Judge. "I think," says he, "that the subject had no remedy at law, by action or otherwise, against the Judge, for such refusal. The denying a writ, stands upon the same ground as any other breach of duty." And in page 259, he illustrates his doctrine thus:—"The constitution has provided very apt and proper remedies, for correcting and rectifying the involuntary mistakes of Judges; and for punishing and removing them for any voluntary perversions of justice." It is also laid down in an ancient case, in 1 Rolle's Abr. 92:—"No man shall have an action on the case against a Judge of Record, for giving a false judgment." Again, we have the opinion of an eminent writer on criminal law, and of comparatively modern authority.—Serjeant Hawkins thus expresses himself in Co. Pl. 147: "This Statute (*Habeas Corpus* Act) makes the Judges liable to an action at the suit of the party grieved, in one case only, which is, the refusing to award a *Habeas Corpus* in vacation time; and seems to leave it to their discretion, in all other cases, to pursue its directions in the same manner as they ought to execute all other laws, without making them subject to the actions of the party; and this seems most agreeable to the general reason of the law, which regularly will not suffer a Judge to be liable to an action for what he does as Judge." And observe, here he was speaking of acts done by Judges out of Court. Again, in the same book, page 136:—"No man is liable to an action for what he doth as Judge."

What says my Lord Chief Justice Hale, in Howell's case? "I speak my mind plainly, that an action will not lie. In case of erroneous judgment given by a Judge, shall the party have an action of false imprisonment against the Judge? No; nor against the officer neither—the matter was done in a Court of Justice;" and again, in the same case, 2 Mod. 218, the whole Court treats the action as criminal, and said, "that the bringing the action was a greater offence than fining the Plaintiff; and that it was a bold attempt against the government and justice in general." See how such an action was considered by the bench and the bar, in the celebrated modern case of *Burdett v. Abbott*, the speaker of the House of Commons, in 14 East, 123; Justice Bailey asks the counsel this question, "Would an action lie in the Court of Common Pleas against the Judges of this Court, or any of them who signed a warrant of commitment;" and how is it answered by Burdett's

our Justices of the Peace. In *Tate v. Chambers* (3 Nev. and Man. 523), where a magistrate committed a man under 39th and 40th Geo. III., c. 99, s. 8 (the [43] Pawnbrokers' Act), for re-examination upon a charge of embezzlement, and not of penalty, as provided by the Act, the magistrate was held liable to an action for exceeding his jurisdiction. The proceeding of the [44] Respondent was an act in

counsel, Mr. Holroyd? "Certainly no action would lie against Judges—they are accountable in another way—no ordinary proceedings in the common way can go against them; but, with submission, if they issued a warrant of commitment, in a matter of which they had no *jurisdiction* at all, and that it so appeared on the face of the warrant, an action would there lie against the *officer* who arrested or imprisoned the party upon such warrant." We find also legislative opinions upon this point appearing in the statutes empowering magistrates to plead the general issue, giving in such cases notices to magistrates, limitations of actions, costs, etc. If this action lies here, so it would in any of the most inferior Courts in the kingdom. The Law draws no distinction. It is admitted, that no action lies against a witness for what he deposes in a Court of Justice, because he must be freed and unfettered in giving his evidence, and he is brought there in the course of law, and by the summons of the King.

As to the question, whether the warrant here was a judicial act, the ground of argument arose from a confusion of ideas; because it is stated, that certain other persons, besides Judges, have power to do the like act in certain cases—if it did not occur that another, who is not a Judge of King's Bench, issues such warrants, it would not probably be argued, that when a Judge of King's Bench issues one, it is not a judicial act. Here is an act done by one who is a Judge—done in a matter within his jurisdiction, as a Judge; and *bona fide* intending to act therein, as a Judge. How, then, can it be imagined, that it is not a Judge's act? Why, forsooth, say the counsel for the Plaintiff, the Chief Justice is a Justice of Peace, or a conservator and a Chief Justice distinct; and we tell you, he must have done such an outrageous act as this, in his second person and in his inferior character as a conservator, and not as a Chief Justice. If it could be thought of, as a serious question—as a good ground of defence, the Plaintiff would have replied so, and not demurred; for by so doing, it is admitted, that if there is no legal impossibility of the act being done as Judge, it was done as Judge, and in no other character.

But it is said, that the Act 48 Geo. III., c. 58, is the only authority by which a Judge of the King's Bench can issue any warrant for a misdemeanor, before indictment; and it is truly said, that this warrant is not under that Statute, and is therefore void, or is nothing more than the warrant of a Justice of Peace, in the person of the Chief Justice. But read the Statute; and I ask, does it declare, or even imply, anything against the Judge's power, which he has practised universally, time out of mind; and which power is recognised by the authority of *Hawkins* and *Dalton*? Is not the statute made expressly to extend the kind of proceedings before given in Revenue cases, and to give warrants marked for bail in specific sums; and to give plea and appearance by default? Indeed, if this warrant is void, as a Judge's warrant, I don't see how the Justice of Peace got the power to issue it, or the conservator, mentioned by my brother Fletcher.

A Judge of King's Bench is as much a Justice of Peace, as he is a Constable or Coroner. He has in him the power of all these; but he is not thereby the less a Judge—Justices of Peace are ministerial often—Judges of King's Bench never. It is said, that they are ministerial to the king—why? On the contrary they have his whole legal power, in matters touching the administration of justice; and he cannot act but by them—see the ludicrous consequences of treating them as ministerial, or subjecting them to action. They become amenable to every other species of correction by a Court, attachment, etc. One hour at the bar—the next at the bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from the Judge to the accused—from the corrector to the corrected.

As to another topic relied on in the course of the argument, I must differ from those who have preceded me; for I consider one Judge's act to be the act of all the Court; and my brother must be under some lapse in that respect, in arguing on the contrary

pais and not of record, for which he is not amenable, if he has exceeded his jurisdiction; this, we maintain, he clearly has done; the judgment therefore entered up by the Supreme [45] Court for the Respondent on the general issue must be reversed, and the cause remitted back to the Court to assess the damages due to the Appellant, for the wrong and injury he has sustained.

principle; for in my mind, a Judge in his Chamber does no act, which the Court may not also. Even his bailing, is not like a Justice of the Peace's bailing; but according to his discretion, and he has that power in all cases whatsoever, 2 Inst. 189; nor was he ever thought to be affected by any of the multitude of statutes, on which the power and authority of the Justice of Peace depends—his power is by the common law. How does the warrant of the Court differ from the warrant of the Judge? Not in the least. Consider the nature of side bar rules, and other acts of the same kind—fiats—taking bail—refusing it—granting *habeas corpus*—refusing it—discharging on it—remanding on it, etc. Would an action lie for every one, or for any one of these acts? What distinction is there between these and the most solemn acts of the Court, in respect of the protection of the Judge? And what difference between them and this warrant? None! It is only a confusion of ideas; because it is a thing, which in certain cases can be done by others who are liable to the *examen* of the Courts, by action, which Judges are not—and this doctrine and reasoning is amply sustained by the several cases cited and commented on at the bar, namely, Ca. Temp. Hardw., 42, *Rex v. White*. The arguments of the Judges in *Rex v. Wilkes*, 4 Burr. 2527, and also by the case of *Goldschmidt v. Marryat*, 1 Camp. 562, and Wilmot, in the case of *Rex v. Almon*, p. 268, says, "I can make no difference between a Judge acting in a Court, or judicially out of Court, (speaking as to the protection, privilege, and dignity of a Judge in a case of libel,) he acts by virtue of the patent appointing him a Judge, and of the power which the law gives him in that character and capacity. When he issues his warrant, as conservator of the peace, the Court punishes the officer who disobeys it, by attachment. Why? Because it is the act of a Judge, in his judicial capacity. (Thus confirming the case of *Rex v. White*.) Suppose he was calumniated for issuing such a warrant, would not the Court grant an attachment?" And in p. 254, he again says, "The acts done in Court and out of Court, taken together, form that system of practice, by which the benefit of the law is dealt out to the people." And in p. 100, "Judges issue warrants of their own proper authority, separate from the Court, and out of term." Almost the same words are used by the three Judges in *Wilkes*' case, 4 Burr. 2569, "A great deal that may be done in Court is done by Judges at Chambers, in term time; in vacation a great deal more is done by them in Chambers; because it can be done no where else." This Judge, Sir E. Wilmot, has been on the present occasion, I believe for the first time, assailed in his character for knowledge and integrity; yet, in the parts only of his judgment, in *The King v. Almon* [Wilm. 243], which press on this case, he has other support than my opinion of him—so has the Court in which he sat; and the able reporter of their enlightened and unanimous decisions. With respect to the Book of his opinions, upon which so much has been said—what is its extrinsic merit? What its authority? Does it not prove itself? Has it not as good a claim to respect; and ought it not to carry as much weight with the law world, as other great men's commentaries? At least, how did the Court and Bar receive it, in *Burdett v. Abbott* [14 East. 1 at p. 85], when Sir V. Gibbs cited the Judge's argument in *Almon*'s case [Wilm. 243], and called it his "admirable argument."

So far, I think, upon principle and authority, there can be no question of the protection of the Judge, for acts done out of Court, as well as done upon the bench; and now, as to the act in question being one, which he might do out of Court, see 2 Hale, Pl. Co., 5, 6. "Any of the Justices of the King's Bench may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county;" and p. 105, as to the power of the King's Bench in cases of breaches of the peace, and before indictment. "The Court of King's Bench has not only a power to issue writs, upon indictments or appeals before them, but has also power by order, to command the Sheriff of the county where they sit, or the Marshall of the Court, to apprehend felons or disturbers of the peace, and bring them before the Court."

With respect to the plea which is here put upon the record, in bar to the present

[46] Mr. Serjeant Spankie, Sir William Follett, Q.C., and Mr. Greenwood, for the Respondent.

The action of trespass brought against the Respon-[47]-dent by the Appellant, was not sustainable in the Supreme Court, for two reasons : first, because the Respondent, acting *bona fide* in the execution of his office as magistrate of the Foujdarry Court,

action, I think there ought not to be a second opinion, as to the necessity and propriety of putting it in by the Lord Chief Justice of the King's Bench. I can easily believe with Mr. Radcliffe, that the Chief Justice wished the decision to be on the abstract question, whether he ought to give other answer to the action, than he has done by this plea. I think that those who surmised, that this plea was prepared against his approbation, as if it was unfit for his candid and honourable justification, took away from him a merit to which he is entitled, and which is a further proof of his just conception of the Judicial character, of his constitutional spirit, and of his fortitude and personal disinterestedness. I have a perfect recollection of the learned and respectable Defendant stating to the Judges (when taking their opinion whether he should sit on the trials of Kirwan and others) that he was resolved to take no steps in this action, nor put in any plea that should compromise the constitutional rights of the Judges, or desert that dignified and constitutional defence which a Judge ought to make. It happened, that my brothers, Fox and Fletcher, were not present at the time, and it may be a fact with which they are unacquainted ; but I thought it infinitely to the honour of the Chief Justice of the King's Bench, to display a temperate, but fixed resolution to sustain the legal rights and privileges of the Judgment Seat, of which he was the trustee.

Mr. Justice Fox.—Two of my brethren having given their opinions upon this record, at considerable length, it will not be necessary for me to occupy much of the public time. My brother Fletcher, in giving his judgment, differed from the opinion pronounced by my brother Mayne, who has just closed his judgment and his argument.

It now, of course, devolves on me to state my opinion, and such reasons as have decided my mind in forming that opinion—not so much at large as either of my brethren have done, for indeed they have, in their respective views which they have taken of the case, stated the principles of law and the authorities, together with the reasons and grounds of their opinion as applicable to the present case, so fully, that in following either of them, I would do injustice to the ability with which they have argued the question.

The questions which arise upon this record, appear to be two : the latter branching out into different modifications as appeared in the course of the argument. The first question which I deem myself bound to decide, is, whether the arrest, as it is stated by the Defendant, is legal or not. The second question is, supposing that the arrest, as it is stated upon the record, is not legal, whether the Plaintiff is barred of his action, by the matter stated by the Defendant in his plea. I feel myself bound to consider, and decide the first question ; because, if I should be of opinion that the plea discloses sufficient matter of justification to show the arrest legal, then the second question could not arise.

It is my opinion, that the matter stated by the Plaintiff does not justify the arrest ; and that the arrest was not lawful in the manner in which it has been pleaded. It is necessary to keep the consideration of these two points separate and distinct, and not to let the subject matter of one question influence the discussion of the other ; indeed, I apprehend that some little difficulty, perhaps I might say confusion, has arisen from drawing an inference too hastily, that the decision of the first question was to close and decide the second question, which possibly was the only one intended by the Defendant to have been proposed to the Court, as the other has not been much relied upon at the bar.

The plea states the Letters Patent appointing the Defendant Chief Justice, that being Chief Justice, and by virtue thereof, and as such he made a warrant, reciting in the warrant that a certain information upon oath had been made before him, and that by virtue of this warrant the arrest was made. It is a principle in law, that the liberty of any subject of this realm is not to be restrained by any Magistrate whatsoever, unless by presentment or due process of law. In this case the arrest is stated to have been made solely as an arrest to bring the party before a Judge of the Court

in a case [48] within the jurisdiction of that Court, is protected by the Statutes 21st Geo. III., c. 70, s. 2 and 24, and 53rd Geo. III., c. 155, s. 105; and secondly, because it did not appear upon the trial, nor was there any [49] ground for the Court to presume, that the Respondent had any notice of the fact, or any reason to suppose that the Appellant was not a native, and as such amenable to the jurisdiction of the

of King's Bench; and the warrant under which arrest is made, is stated in the usual course of such warrants. No principle of authority in the Magistrate is referred to, —nothing more is relied upon by this plea to justify the arrest, save barely a recital in the warrant, that an information was sworn before the Defendant, charging the Plaintiff with a certain offence. I think that the Defendant issuing a warrant of arrest, ought, in order to justify such arrest, to set out and aver in his plea, the informations previously sworn. It would be, in my opinion, carrying the case beyond the bounds of the law, and be dangerous to the liberty of the subject, to say that the Chief Justice, or any other Judge of the King's Bench, or any magistrate, has, in himself, an authority of arresting by warrant, any subject of the realm, upon a bare suggestion in the warrant, that the party did a particular criminal act. In order to constitute the arrest a legal one, the criminal act must be duly evidenced to him by information upon oath. I am perfectly aware, that the highly respectable and much revered Defendant in this case, was in fact authorized to issue his warrant, by a regular information duly taken and sworn before him. But it is not so avowed by this plea. The authorities which have been resorted to on this part of the case, if authorities are here necessary, are 4 Bl. Com. 125; 2 Hale, P.C., 198, 110, and 2 Hawk. 135. In giving this opinion on the first point in the case, I must be understood as not imputing in any way the slightest irregularity to the Defendant in this case. The point is made by the mode of pleading, and does not in any manner arise from any act of his.

I now proceed to the second question in this case; namely, whether on the whole matter disclosed by the Defendant's plea, the Plaintiff can have or maintain his action against him. It has been relied upon, that the Defendant has alleged, as Chief Justice, sufficient matter to show, that he acted in a judicial capacity, and is not answerable in this action, or indeed in any action, for what was done by him as a Judge, in a Court of Justice.

The principle at Law, of exemption from being sued for matters done by Judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely;—it is calculated for the benefit of the people, by ensuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land, and the dispensation of justice in this country; and is founded on the very frame of the constitution; it is to be met with in the earliest books of law; and has been continued down to the present time, without one authority or *dictum* to the contrary, that I have been enabled to find. My brother Mayne, who preceded me, has given a clear and lucid detail of the authorities, as they have arisen from time to time. Most of them were mentioned in the course of the argument at the bar. After the manner in which they have been stated by him, it becomes superfluous now for me to travel minutely through them again; but I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect; not to injure or infringe. It appears to be most necessary that a Judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution;—they are only answerable for their judicial conduct in the high Court of Parliament; and without the existence of this principle, it is utterly impossible that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A Judge must—a Judge ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent

Foujdarry Court. [50] The sections 2 and 24 of the 21st Geo. III., c. 70, must be taken together: the latter provides that no action shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the Country [51] Courts for any judgment, decree, or order, of the said Court; and by the former, and person impleaded in the Supreme Court for any act done by order of the Governor-General

with the constitutional independence of the Judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.

The leading case on which this principle has been stated particularly and at large, has been already amply dilated upon:—I mean the case of *Floyd v. Barker*, 12 Coke, 23, in which the principle was extended to magistrates. The reasons for extending it so far, are stated with such accuracy, that no case has occurred since that time, which has not bottomed itself on that adjudication. Indeed, it has not been controverted that for any act done by a Judge sitting in Court, he is not responsible in an action to the party conceiving himself aggrieved. But this is not the extent of that case. It embraces not only judicial acts done by a Judge sitting in Court, but also acts done by him out of Court. After mentioning that for acts done openly in Court, the Judge is not responsible, it proceeds, “nor for acts done out of Court, such as the due examination of causes out of Court, and inquiring by testimony and other such things; because they are fit to be done by the Judges.” Here expressly extending the principle of protection, beyond the limits of acts done in Court, to acts done out of Court, giving examples of each. The present case comes within the authority of this leading case: it is within the principle of that protection, which the Judges are clothed with, for acts done by them as such. The case goes on, lest there should be any mistake, to show what acts are not within this protection, “as if a Judge hath conspired before, out of Court, this is extra-judicial;—subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, etc., will be an unlawful conspiracy.” These are not judicial acts—they are not within the protection of the principle; and the person who commits them, even though he be a Judge, is left open to an action: because he has done that which was not fit for him to do—which did not appertain to a judicial character, “these are extra-judicial”—making the distinction between judicial and extra-judicial acts, not, as in argument here has been contended, that judicial acts are such only as are done in Court, if they are necessary to the administration of justice.

Let us see, then, whether the act disclosed in this case by the Defendant's plea be such an act as falls within the reason and authority of this case. The act stated by the Defendant is, the issuing of a warrant, as Chief Justice, reciting an information upon oath to have been sworn before him. The warrant is full—regular on the face of it;—it recites an information to have been taken upon oath, in order to show that he was acting in a judicial course of proceeding. This recital is important: though it is not sufficient to bar the Plaintiff as matter of justification. With the view of bringing the case within the principle I have mentioned, it is not necessary to make the averment, that an information was sworn, to ground the warrant, if the act was done in a course of judicial proceeding; because it cannot be traversed. It is immaterial to decide whether or not any error was committed by the Judge, because if he acts judicially, even though he is in error, he is protected. It is absurd to say that the protection is confined to those cases where no protection is required. To say that everything is necessary to protect a Judge from an action, that would be necessary to protect an ordinary magistrate, is unreasonable; when the very object of the protection is, not to say that he is justified, as having acted legally, but that he did the act in the ordinary course of justice; and for such an act is not responsible in an action at law.

Much reliance has been placed, on the part of the Plaintiff, on the analogy between the act of a Judge of the King's Bench, and that of an ordinary Justice of the Peace;—this argument deserves consideration. A Judge of the King's Bench has a jurisdiction over all matters of crime within the realm. They are superior Judges in criminal matters. They are so by virtue of their patents and their offices. This power and jurisdiction is incident to their office, to have a power of issuing a warrant commensurate with this jurisdiction, to bring in the party for inquiry

in Council, may plead the general [52] issue. Now it is admitted that the parties engaged in the riot were natives, and as such amenable to the jurisdiction of the Native Courts. The Appellant was the exception: he, it seems, was an Euro [53]-pean and a British subject; but how was Mr. Halket to know that circumstance! his name would not necessarily import the fact,—he might be half-caste: it is clear that

and trial. It would be vain and idle to say, that the Judges of this high Court have by virtue of their offices jurisdiction over criminal matters, generally, throughout the realm; unless it was, at the same time held, that they had necessarily inherent in their office, and flowing directly from it, a power of issuing process to bring in the party charged with crime; without this their jurisdiction would be impotent,—could never be brought into action at all. All the ancient authorities speak of this power of issuing process as necessarily incident to their office, they are conservators of the peace *virtute officii*. The distinction is recognized by Blackstone, in his 1 Com. 368, between conservators of the peace *virtute officii*, and conservators by prescription. The Judges of the King's Bench are stated to be conservators of the peace *virtute officii*. The Master of the Rolls and others are conservators by prescription; that is, the Judges of the King's Bench have this power, as incident to their jurisdiction, and from their patents, which constitute them Supreme Judges in criminal matters, throughout the realm. It would be strange to say, that a process, which is necessary to give animation to their jurisdiction—to give it operation and effect, to enable it to act at all, and flowing from their very office,—I mean the issuing a warrant to arrest for crime, should not, in itself, be a judicial act. There is, as I conceive, a wide distinction in this respect between a Judge of the Court of King's Bench, and an ordinary justice of the peace. Justices of the peace are not, individually, invested with a power to hear and determine any felony, or other offence. Their authority is to try before themselves and *others*. No individual justice of the peace has that power; but, as an individual, he has merely a ministerial power: to bring the party accused before others as well as himself, for the purpose of trial. This distinction has been noticed by Serjeant Hawkins and by my brother Fletcher. The distinction is this; where process is issued, to bring the party accused before the person issuing the warrant, and *others*, for trial, it is a ministerial act—it is ministerial to the other justices, who are necessarily to sit with the justice issuing the warrant. But in the case of a Judge of the King's Bench, he has power and authority to sit alone, and try the fact, respecting which the process issued. A single Judge is invested with full power to try the criminal in the same manner, as if assisted by all the Judges in full Court. He is not ministerial to others; but has this power, as incident to his office. But this distinction is further strengthened, when we come to consider the power of justices of the peace, as regulated by different Statutes. Justices of the peace were originally conservators of the peace merely, under the 34th Edw. I. Justices of the peace were first appointed by commission from the Crown, by which the justice so commissioned, and others of whom particular persons named were to be always present, were authorized to try felons. See how that power has been abridged by subsequent Statutes. The Statute 1 and 2 of Philip and Mary, c. 13, in England, of which the Statute of the 10th Charles I. c. in Ireland is a transcript, obliges justices of the peace to take examinations of all persons brought before them under charge of felony, and other offences therein specified; they are to certify the examinations, and to take bail for the appearance of the party, at the next assizes or gaol delivery; thereby depriving the justices of all jurisdiction whatsoever, which had been given by their commission, in cases of felony; or at least suspending the exercise of that jurisdiction; for the statute is mandatory upon them, to transmit to the Judges of Assize, the informations, examinations, and recognizances taken before them; and a power is given to the Judges of Oyer and Terminer and Gaol Delivery, if a justice of the peace does not comply with the statute, to fine him, in their discretion, for such default. Here by this statute, the justices of the peace, in the cases therein mentioned, are clearly ministerial. Their duty is confined solely to the office of taking informations, examining the prisoner, and returning those informations and examinations to another jurisdiction for trial of the parties, under the coercion of being fined, in case of neglect. It would be strange to say, that in these respects, the justice of the

he was engaged with others, who were amenable to the jurisdiction of the Four-darry Court, in a common breach of the law ; when, therefore, he was apprehended, if he intended to avail himself of his privilege as a British subject, he should have moved for [55] a warrant to be discharged ; that would have been the course here ; and if he had that remedy, can he lay by, and then bring his action ? But if a magistrate

peace was acting judicially—he is not only ministerial in all these particulars, but he is ministerial to the Judges of Assize and Gaol Delivery, under the responsibility of being fined, in case he does not comply. Where then is the analogy between the process of arrest issued by a justice of peace, and a Judge of the King's Bench ? The justice of the peace is by law limited in his jurisdiction, having no jurisdiction singly and alone over the matter, for which his warrant might issue. No trial had by him alone, could be sustained in law ;—he must have the co-operation of others, specially named for the purpose. It was not an authority flowing out of his office, but appears to have been at all times, as well before the statutes were passed for regulating the office of justice of peace, as since, purely ministerial. This analogy, therefore, which has been relied upon as complete and decisive, with regard to the jurisdiction of a Judge of the King's Bench, appears to me not to apply. A justice of the peace has no authority to try, by himself, any criminal offence ;—a Judge of the King's Bench has, by virtue of his office, a power to try all criminal offences, arising within the realm. He is not restrained as to the number of persons who are to sit in judgment upon the offender ;—the trial may be by a single Judge : and the power of issuing a process to arrest is commensurate with his jurisdiction ;—it arises from his office ; and is not ministerial to any other person whatever. The analogy thus completely fails in all its parts.

But it is said, and it deserves notice, that this act does not appear to have been done in a judicial course ; because it wants the necessary concomitant of an information upon oath, to ground the warrant upon. I have already endeavoured to show, that this is, in fact, confounding matters altogether distinct. It is saying, that the principle of protection should extend only to cases where it is not necessary—where the jurisdiction is acknowledged, and indemnity complete, without the aid of that principle. It is against the authority of all the cases and the principle itself, which is to protect Judges, where they have erred ; and yet, to show that it comes within such a principle, it is contended you must show that no error at all exists. The case of *Hamond v. Howell*, in 2 Mod. 218, which was stated by my brother Mayne very much at large, and with great precision and clearness, was bottomed upon this, that the Judge acted erroneously. The point, as to the illegality of it was decided by all the Judges.—*Bushell's case* [1 Mod. 119 ; Vaugh. 135] was originally before the Common Pleas, and afterwards before all the Judges. They all concurred in opinion, that the act done by the Judge was an illegal act ; yet they all agreed, as the act was done in a course of justice, the Judge was not answerable for it in an action at the suit of the party.

Whatever doubts or difficulties may have occurred to my mind in the progress of the argument, I have none now. I am clearly and decidedly of opinion, that the demurrer in this case ought to be overruled ;—that the matter disclosed by the Defendant in the second plea is sufficient to show that the act done by him was done in a course of justice ;—that it was a judicial act, flowing from his commission. The law on the matter now referred to us has received the sanction of many successive Judges, venerable from their experience, their knowledge, and integrity ; their decisions have not been questioned. There is not to be found an adjudged case nor a *dictum* varying therefrom ;—neither can any reasonable analogy be argued upon, at all trenching upon this principle. I do not think it necessary to follow my much respected and highly talented brother Fletcher, through that very able argument which he has delivered with such eloquence and ability. It does not appear to me, that the arguments adduced by him apply to the proposition which has been contended for on the second point, though they apply to the first point arising on this record ; namely, that the arrest was not legal. In that I concur with my brother Fletcher ; but I differ widely from him on the conclusion which he has drawn ; that therefore, or for any other reason, this action is maintainable. Here again I must repeat, that there is not either principle, authority, reason or analogy to

acts *bona fide*, he is protected against all unintentional [56] errors: that is the principle upon which all the Acts of Parliament for their protection are framed: and the decisions of the Courts are in accordance with that principle, *Weller v. Toke* (9 East, 364), *Beechey v. Sides* (9 Barn. and Cr. 806), *Price* [57] *v. Messenger* (2 Bos. and Pul. 158). The 7th Jac. I., c. 5, made perpetual by 21st Jac. I., c. 12,

warrant such conclusion. If we were to pronounce the Defendant liable to this action, we would decide contrary to the entire current of authorities;—we would unsettle the law; we would expose the Judges to be harassed in their persons, to have their minds disturbed, and their station degraded, for acts done in discharge of their judicial duties. I feel myself therefore bound to pronounce, that in this case I am most clear, that the demurrer here taken by the Plaintiff ought to be overruled.

Lord Norbury.—After the long, elaborate, and able discussion which this case has undergone, during the course of the former and part of the present year, were it not for the singularity as well as the importance of it, I might content myself by merely expressing my assent to the very satisfactory judgment pronounced by my brothers Fox and Mayne for the Defendant; but I owe it as a matter of respect to the Bar, as well as in point of duty to the public, to assign my reasons for concurring in that judgment.

The whole of this case is spread on the pleadings. The declaration is trespass *vi et armis*, against the Defendant, who is therein designated and styled Chief Justice of the King's Bench, who is attached to answer the Plaintiff in the Common Pleas, for an assault and false imprisonment without any probable cause.

There is a further count, for beating and ill-treating the Plaintiff, in the usual language of complaint against unjustifiable force.

To this declaration the Defendant has pleaded, amongst other matters, as his second plea in justification, that which is the subject of the present argument.

By the plea in question, the Defendant sets forth, "that he is Chief Justice of the King's Bench;" sets out the King's Patent, by which he holds his office by the Royal authority; "and that as such Chief Justice he issued his warrant to certain persons therein named, under his hand and seal, reciting, that it appeared to him, by information on oath, that on the 9th of July last, a number of persons assembled in Fishamble-street, Dublin, and resolved to form a Committee, to represent the Roman Catholics of Ireland, for the purpose or under the pretence of preparing a petition to parliament; and that the Plaintiff amongst others, met and acted in the appointment of such representatives, against the statute; and that Defendant issued his warrant to apprehend the Plaintiff, and bring him before him or some other Judge of the King's Bench, to be dealt with according to law. In obedience to such warrant, the constable did arrest and apprehend the Plaintiff, and brought him in custody; and the Defendant did forthwith deliver the Plaintiff to bail for his appearance in the King's Bench, on the first sitting day of the then next term."

To this plea the Plaintiff demurs, as insufficient in law by way of justification, on the following grounds.

1st. That the plea avers no positive offence. 2ndly. That there is no averment of an information on oath, to ground the warrant. 3rdly. That no offence having been charged, Plaintiff could not have been legally arrested, before indictment found. 4thly. That the act of the Defendant cannot be considered as a judicial act, but merely as ministerial or extra-judicial; and that for such ministerial or extra-judicial act the Chief Justice is liable to an action, and responsible in damages to the party complaining.

It must be allowed, that if the act in question, as complained of, can be legally considered as imputable to the Defendant, in a capacity and character distinct from his judicial functions and privileges with which his office is clothed, the question would be conclusively against the plea. But it stands admitted by the demurrer, that the Defendant acted in the matter as a Judge; and it has been given up in argument, that in order to support the Plaintiff's position, the act must appear to be merely ministerial, as contra-distinguished from judicial: as it is conceded that for an act purely judicial, the action cannot be maintained against a Judge. In

first enabled an officer impleaded for the execution of his office, to plead the general issue. By the 42nd Geo. III., c. 85, s. 6, this provi-[58]-sion was extended to all persons having, holding, or exercising public employment in or out of the kingdom, and who by law are empowered to commit persons to safe custody; so that, independent of the [59] statute 21st Geo. III., c. 70, the Respondent, being a person having legal authority to commit, if sued in this Court, might have pleaded the general issue: but it is said, that this arrest of the Appellant was not [60] within the intent or meaning of 21st Geo. III., c. 70. The instrument of arrest is a *Per-*

the progress of this discussion, no definition has been given or legal boundary established, by which the act in question is proved to be excluded, or put out of the sphere of that class of official duties, properly called judicial, as distinguished from ministerial. If it be once established, that the act in question emanated from, and was appropriate to, the legal duties of the office of Chief Justice, it must, on this argument, stand as an act purely judicial, and as such it must be exempted by the law from responsibility to the party by action. Much argument has been expended in attempting to confine judicial acts to such only as are done in open Court. But it has been demonstrated, that whether such acts as that in question be done by the Judge in Chamber, or *sedente curia*, the privileges connected with the duties of the Judge's situation, and which are given for the public safety and advantage, in which the security and independence of the Judge are interwoven, must necessarily await upon such acts, as if they are judicial. The position which I lay down is supported by obvious principles, and the established authority of *Floyd v. Barker*, 12 Co. 24, which has been uniformly recognized. Upon the face of the pleadings it appears, that the act of the Defendant which is complained of, is the judicially issuing a legal process, to compel an appearance in a matter within the jurisdiction of the Judge, and relating to the Court of which he is the Chief Justice.

It further appears by the plea, and it stands an admitted fact, that the Plaintiff who complains here, has been apprehended by the warrant of the Defendant, but been held to bail to appear in the King's Bench, where the cause of the committal, and the investigation of the offence thereby imputed, are vested and attached, and are put in the usual course of legal investigation, as matter which is incident and peculiarly belonging to that Court. The warrant set out is good on the face of it, and is the regular process to bring the party into that Court in cases of similar misdemeanors. The issuing of that process is directly analogous to those orders for writs, from this and other Law Courts, called *fiats*, which are daily and hourly issued in chamber, by every Judge in the Hall, in every civil action, in conformity to the Laws of England and Ireland for centuries. But in matters which relate to breaches of the peace, which belong to the jurisdiction of the King's Bench, and its respective Judges, all their acts in such matters, and in relation to that Court, are considered as judicial acts; that is, they are the acts of a Judge, within the sphere of his judicial duty, which is all that is necessary for the present argument.

Here, then, is the head and front of that offending which the Plaintiff complains of: and to which much elaborate argument has been expended, to show that *Magna Charta* has been violated, and that the palladium of British liberty has been outrageously assailed. But it is, in fact, a complaint moving from a man who, in the case now before you, plunges out of the tribunal where he stands, as a criminal to be tried, and drags the Judge, who rendered him amenable there, into this Court, that has no cognizance of a case to which we must for ever be strangers, so far as relates to the criminal offence, which the King's Bench only is competent to try. The Common and Statute law of these realms has wisely secured the independence of the judicial order in the exercise of their functions, against the vexatious suits and attacks of irritated parties, as well as against the overbearing authority of the Crown; otherwise the Judges, from the ordinary infirmities of man, might become timid administrators of justice, and inadequate guardians of the peace, the rights, and liberties of the subject.

In the particular case, where the statute has given an action to the parties aggrieved against the Judge who refuses the writ of *Habeas Corpus* in vacation—2 Hawk. 147; 1 Burr. 856; and 3 Burr. 1437. In commenting on that subject, the language of the laws is, "*that in all other cases, they are at liberty to exercise their*

wannah, which is something more than a warrant, for it sets forth the report of the *Darogah* on which it is founded, and then [61] proceeds to order the arrest of the parties implicated in the riot, who are to be detained until the arrival of the presence, that is, the Judge, and not brought, as would be the case here, immediately before him for [62] examination. It is an order, and being sealed with the seal of the Court, must be taken to be an order of the Court, and as such is precisely within the 24th sect. of the Act 21st Geo. III., c. 70. Then is Mr. [63] Halket liable to an action of trespass for excess of jurisdiction in a matter over which he had

sound discretion, without being liable to an action of the party; and this, say the books, is most agreeable to the general reason of the law, which regularly will not suffer a Judge to be liable for what he does as Judge, in an action by the party."

'Tis apposite to the present case to observe, that the passages alluded to, as relating to acts in vacation, can only be applicable to the acts of a Judge done in chamber. Such acts of a Judge of the King's Bench in the chamber, if they belong to his office and relate to his Court, are constantly recognised and adopted as the acts of the Court at large, although no cause should be then depending. So in the *King v. White*, Lord Hardwicke's cases, 37, the Court attached the party for disobedience to the Chief Justice's warrant, as a contempt of the Court to which the Judge belonged, when he was acting within the sphere of his office and the jurisdiction of the Court.

Upon this principle, the cases of the *King v. Wilkes* [4 Burr. 2527], and the *King v. Almon* [Wilm. 243], much has been published. In the valuable book, published by the title of "A Compilation of the Opinions and Judgments of Lord Chief Justice Wilmot," p. 97, that great and remarkable man appears to have given his opinion, in 1759, upon the *Habeas Corpus* Bill then depending, pursuant to the order of the Lords. In that opinion, so solemnly delivered to them, and now published in that well-authenticated volume, the acts done by Judges in their chambers, as well as the acts done in Court, "*are said to form that system of practice, by which the benefit of the law is dealt out to the people.*"

In the case of a motion for an attachment against Almon, the printer of a libel (in the same volume) against the Chief Justice, for having rectified, by an order in chamber, a clerical mistake in the record of an information against Mr. Wilkes, it had been argued there, as here, that the act of the Judge, as being in chamber, was not a judicial act, and, of course, that the libeller could not be punished as for a contempt, summarily. The libel was admitted to be a gross one on the individual; but it was contended, that the Court could not take cognisance of it, by attachment. But hear the words of Sir Eardly Wilmot. "This is a gross charge upon a Judge of this Court, of his endeavouring to subvert the constitutional liberty of the subject;" and page 259, "the constitution has provided remedies for the involuntary mistakes of Judges: and for the punishing and removing them for voluntary perversions of justice. Is it possible to stab the authority of a Court more fatally, than by charging the Court, and particularly the Chief Justice, with such an act?" And in p. 269, he proceeds, "I can make no difference between a Judge, acting in Court, judicially, and out of Court, but that he has not the same plenitude of power; but still he acts under the patent which made him a Judge. When he issues the warrant as conservator of the peace, the Court punishes the disobedience;—why? Because it is the act of a Judge, in his judicial capacity. The libel is on his conduct in his official capacity of Judge, for what he does in his chamber, imputing to the King a breach of that oath which he took at his coronation, to administer justice to his people. Striking a Judge in the street would not be a contempt; but 'tis otherwise if he is in the exercise of his duty: '*Tis for the sake of the publick.*'" Such is the powerful reasoning of that upright man, of authoritative wisdom. And you find the doctrine recognised almost as an axiom by Judge Buller, in the well known case of *Sutton v. Johnstone*, 1 Term Rep. 493. "No action," says he, "lies against a Judge, for acts done in that capacity. The law raises a presumption in favour of the Judge, and will not (as in ordinary cases) suffer that presumption to be rebutted. If otherwise, it would deter them from doing their duty." In *Le Caux v. Eden*, Doug. 517: "A negative usage is a strong argument; the universal silence of West-

already, as respected the natives, jurisdiction, without notice of the Appellant's character of a British subject? That [64] is contrary to the principle of all the cases. If a Judge having jurisdiction, exceed it by mistake, no action can be maintained against him. *Gwynn v. Poole* (Lutch, 937), *Truscott v. Carpenter* (Ld. Ray, 229), *Lowther v. Earl of Radnor* (8 East, 113). [65] In *Dicas v. Lord Brougham* [6 C. and P. 249; 3 St. Tr. (N.S.) 569] there was no special plea, the plea of the general issue was held sufficient. If there is a general law, as an Act of Parliament, the Court are bound to take notice of it; it need not be [66] pleaded in abatement;

minster Hall is an authority, that no such action is maintainable;" and p. 535, "there is no Court equal to the trial of a superior Judge."

Yet here the Court of Common Pleas is called upon to try the Chief Justice of the King's Bench, for having acted in preservation of the public peace, over which he has the primary superintendence and jurisdiction; and over which we have no jurisdiction whatsoever. Is that great Court to have its functions paralysed in the cause now vested and in progress there; and to wait until the Common Pleas examines the conduct of the Chief Justice, and the nature of the offence, which he has presumed to bring within his cognizance by means of that very process which is the subject-matter of our present investigation, and which has held the present Plaintiff to be amenable *in alieno foro*?

As to the arguments that have been adduced by Plaintiff's Counsel, from the case of *Bridgeman v. Holt*, Show. P.C. 122, they are founded on the statute of Westminster, which gives the remedy to the party aggrieved, when the Judge shall refuse to put his seal to a bill of exceptions; and gives an action against the Judge for a false return, 2 Inst. "that particular right of action flows from the statute; and so it is in all statutes commanding a thing to be done, as a ministerial act; and so says Lord Keeper North." Suppose no such statute existed as that which I have just mentioned, the reasoning in *Bridgeman v. Holt* demonstrates that the right of action in that particular case is founded on the statute only; and it was strongly contended by the Plaintiff in that case that the proper mode of redress was by appeal to Parliament; and no record exists of any such action having been brought; and no opinion was given by the Lords in *Bridgeman v. Holt* [Show. P.C. 122]—at all events, there is nothing in that case that bears upon the present. The question here comes to this, whether this Court can erect itself into a Court of Control over the Chief Justice, and his brethren of the Court of King's Bench, in matters of their peculiar jurisdiction.

But let us pause for a moment, to consider the character, station, and public responsibility of the Lord Chief Justice of the King's Bench. The law has imposed upon him the high duties incident to his judicial office, of being a principal conservator of the peace. He is the trustworthy guardian of that portion of the King's prerogative which affords the protection of the law to his people. "He should be ready," say the books, 4 Inst. 71, and 11 Co. 98, "to act with promptitude and vigour, *pro salute reipublicae*. He is entrusted with the highest jurisdiction, not only in capital cases, but also in all misdemeanors whatsoever of a criminal nature, tending to a breach of the peace, or oppression of the subject, or of the raising of faction, or any manner of misgovernment; and 'tis not necessary to show a precedent, of the like crime of being acted against: wherever it is against principles of justice, or dangerous in its consequences, it should be restrained by the *Custos Morum* and principal conservator of the peace of the realm."

Of such description is the Defendant, against whom the Plaintiff brings his suit, to be reprised in damages by a jury, for having exercised his bounden duty as a Judge. I have mentioned the privileges with which the Common Law has clothed the Judge, as emanating from the King, as the fountain of Justice and the general conservator of the peace of the kingdom. The 27 Hen. VIII., c. 2, after reciting many of the prerogatives of the Crown, touching the administration of Justice, declares the sole power of the King to make Judges. To that King in his parliament the Judges have an awful responsibility. By the 12th and 13th of William III., c. 2, s. 3, at the era of renovating liberties of England, the Judges' commissions were made "*Quam diu se bene gesserit*." By the uniform usage of many ages, our Kings have delegated their whole judicial power to the Judges of the several Courts.

that was settled in *Parker v. Elding* (1 East, 352), and has been followed by *West v. Turner* (6 Add. and Ell. 614). The effect of reversing the judgment of the Supreme Court would be to allow actions to be brought against [67] individual Judges for the acts of the Court; that is plainly contrary to every dictum and decision to be found. The judgment, therefore, of the Court below must be affirmed, and the Appeal dismissed with costs.

[68] Mr. Hill, in reply.—The construction put upon the 21st Geo. III., c. 70, is inconsistent with the provisions of the Act itself. It [69] is contended that by

In the first year of the auspicious reign of his present Majesty, 1 Geo. III., c. 23, the statute recites the monarch's declaration from the throne; "that the Judges' independence and uprightness are essential to the administration of Justice;" and it continues their commissions beyond the demise of the Crown, with a proviso, that they may be removed by address of both Houses of Parliament. By the 21st and 22nd of Geo. III., c. 50, (Irish Stat.) these great privileges are confirmed to the Judges of Ireland; the power of removing them for misconduct is recognised; and the right to impeach them before the King in Parliament, according to ancient law and usage, is matter of right to those who may suffer from their corruptions or oppressions: and as Judge Buller says, in *Mostyn v. Fabrigas* [Cowp. 122]—"For error of judgment or mistake, a Judge is not answerable to the King or the party; for that this would expose the Justice of the nation, and no man would undertake the office at peril of action or indictment for his judicial acts." And such is the language of *Bushell's Case*, Vaugh. 134.—"If Judges have given corrupt judgments, they have in all ages been complained of to the King, in the Star Chamber or Parliament; and so says Andrew Horner, in his *Mirror of Justice*; and so in the case of *Ship-money*."

As to the objection that there is no averment in this plea, of an information on oath to ground the warrant. Were the Plaintiff brought up on Habeas Corpus to be enlarged without bail, upon a return of the warrant and commitment, this Court would remand him. The warrant is good on the face of it.

In *Wilkes's Case*, 2 Will. 150, on a similar motion, and objections, Lord Chief Justice Pratt said, that "the setting out the evidence was not essential to the validity of the warrant;" and he takes the distinction as to *Rudyard's Case*, 2 Vent., which was a commitment in execution on a conviction of an inferior Court, which conviction must set out the evidence, that the superior Court may judge of it; but that *Coke*, *Hale*, and *Hawkins* had not considered that essential in a warrant to arrest: and he goes on: "I rely on the silence of the case of the seven bishops, when the similar warrant was not objected to by Defendant's counsel, the greatest lawyers of that day, and all lovers of liberty." But the argument, as put here, would be to disarm the conservator of his most salutary powers. If all the formalities contended for are to be observed by the Chief Justice and his brethren, what will become of the public safety, in the variety of instances mentioned in *Hale*, P.C. and 2 Rolle, Ab. 134, where the Judge may order his tipstaff to arrest, *ore tenus*, and without warrant? If there was not such a power justifiable and ready in acting, on the pressing occasions of imminent danger, the sudden bursts of outrage would scoff at the impotence of the first magistrate in the law.

I come now to a part of the Plaintiff's argument, which would endeavour to obviate the glaring consequence of clashing jurisdictions. Upon this plea, thus demurred to, it appears, that in consequence of the warrant and arrest, the party Plaintiff, and the cause in which he is held to bail, are, in contemplation of law, *sub judice*, in a cause in the King's Bench. The present action is sought to be converted into a species of *certiorari*, to remove that original cause into this Court. In the case of *Burdett v. Abbott*, as fully reported in 14 East, 64, *Holroyd*, for the Plaintiff, in arguing the demurrer to the Defendant's plea, which set forth the order of the Commons, and relied on it, there admitted, that, if the matter had come before the Court on a return to a Habeas Corpus, the Court would have remanded the Plaintiff; "because," said he, "he is, as it were, in custody, in the committing Court"—(so situate exactly, is the Plaintiff here); and *Holroyd* goes on to argue, that "if the Court were to discharge the Plaintiff, it would be assuming a jurisdiction over proceedings of another Court." But he proceeds to argue, "that the party

the 24th section, judicial officers are indemnified from any proceedings in respect of acts done by them as such; but the two succeeding sections provide for the case of informations being brought [70] against them for corrupt acts. The argument puts them too high: they may be indicted; is that inconsistent with their being Judges of Record, and as such protected? The Judges of the Court of Record here [71] can only be proceeded against by impeachment; they are amenable to Parliament alone for their acts; are the Judges of the Foujdarry Court in India on the same footing? In the 53rd Geo. III., c. 155, s. 105, [72] the local courts are described

may have his action, if aggrieved;" disputing the privilege to commit. Lord Ellenborough immediately observed, "then you give up *Bushell's case* [1 Mod. 119, Vaugh. 135], which was a similar interference." Holroyd then makes the distinction, that "*Bushell's case* was a committal by a Court of Oyer and Terminer." Lord Ellenborough then questions the position in *Bushell's case*, "that the committal and the cause of it ought to be made appear to the Court, where the *Habeas Corpus* is returned, as it appeared to the Court committing." Holroyd then starts another distinction, between a committal as in *Burdett's case*, being a sentence of punishment, and a committal for trial, which must take place in a reasonable time, or the prisoner be discharged; in which case Holroyd's argument necessarily infers, that in such case of an arrest (as here) by way of process, to hold to bail in another jurisdiction, (and that, too, the first Criminal Court,) it cannot be questioned. In p. 123 of the volume last cited, during Mr. Holroyd's very ingenious argument, Mr. Justice Bayley observes to him, that he had not answered the question that was put to him, viz. "Whether an action would lie in the Common Pleas against an officer of the King's Bench for executing its warrant for a contempt, to question the validity of the commitment; or whether an action would lie against the Judge or Judges who signed such warrant?" Holroyd answers, "Certainly no action will lie against the Judges, they are answerable in another way, and no action will lie against them."

Here, then, the Counsel for Mr. Taaffe in Ireland have got a full answer and refutation from Sir Francis *Burdett's* Counsel in Westminster Hall. Holroyd there supposed a case where the Judges might issue a warrant, in a matter of which they had no jurisdiction; and which appeared so on the face of the warrant, on return to the *Habeas Corpus*.

Lord Ellenborough asks, "Is there any case where, when such discharge had been refused on an *Habeas Corpus*, that the Court has held out the consolation, that though they could not discharge, yet that the party had his remedy by action?" Lord Ellenborough then adverts to cases of *Crosbie* [2 Black. W. 754] and *Oliver* [cit. 14 East, 69], and says, "that Serjeant Glynn never advised an action of Trespass, after they were remanded, and none was ever brought, to leave the matter of law to the jury."

Demonstrably, that is the struggle by the Plaintiff here; and that too, without advertent to the principle in *Morgan v. Hughes*, 2 Term Rep. 23, where it was incumbent on the party, in an action for malicious arrest, to show the cause at an end; but here the pleadings, as they now stand in this case, lay a foundation to presume that the present Plaintiff may be at present a convicted criminal in the Court of King's Bench, seeking from a jury in the Common Pleas, to make the Chief Justice reprove the Plaintiff the full amount of the fine, which he may have been sentenced by the King's Bench to pay to the Crown.

When *Magna Charta* is said to be infringed by the issuing of the process, or warrant in question, we should recollect that the Plaintiff complains of an unauthorized force of the Defendant, in issuing the judicial process spread in the plea, which is demurred to.

The arguments in *Bushell's case* have been resorted to, where much encouragement was given to bring an action against the Recorder of London, and others of his Court, in a case which savoured strongly of oppression—yet, when this action was brought before Lord Chief Justice Hale and his brethren in the King's Bench, on a motion in that Court on the part of the Defendant for time to plead, that just and constitutional Judge expresses himself, without doubt or hesitation, as follows: "That the action would not lie; and that although the judgment of committal

as established by the East India Company; they are not King's Courts in the sense of the Superior Courts here; and if not King's Courts, then they have only a local and limited [73] jurisdiction, and their Judges must be accountable for any excess in the exercise of it. If a Judge acts in a matter or subject in which he has no jurisdiction, he is liable to an action; but if he has jurisdiction, though he proceed erroneously, no action will lie,—that was the distinction taken in the *Marshalsea Case* (10 Co. Rep. 69, 76, 2nd Res.), and by Holt, C. J., in *Greenett v. Barnell* [1 Ld. Raym. 454; 1 Salk. 200]; by Powell, B., in *Gwyn v. Poole* [Lutw. 935, 1560];

had stood reversed, by the proceeding on the *Habeas Corpus* in the Common Pleas, yet no action could be maintained against the Judge, for such judicial act." That indeed "was a case of actual imprisonment; but this is a complaint of one, who disdains to be rendered amenable to that Court, where in contemplation of law he is in custody."

From the 21st James I. to the 43rd Geo. III., a great code of statutes exist in England and Ireland, defining the powers of justices of peace, and officers of the law and revenue. The same laws afford them great advantages, of defence, of notice, and of pleading the general issue, without the embarrassments of pleading special justifications; and the law remunerated them with double costs, if sued without foundation. But where are the similar protections, in the Statute Books, for the Judges of the land? There are none such; and the necessary inference is, that the immemorial sense of the Legislature is, that *that* privileged order is protected, by peculiar, inherent, and unquestioned privileges; otherwise they never could have remained unprotected against vexatious litigation, upon every frivolous occasion. Some difficulty arose in the case of general warrants reported 19 State Trials, 1154; and *Key v. Earbury*, 1 Ha. Pl., c. 562, as to the privileges to which a Secretary of State was entitled, in issuing his warrant for minor offences. It is not for me to animadvert upon the judgment of the great man who pronounced a judgment in that case, with popular applause; but I find Lord Kenyon, in *Despard's case* [7 T.R. 736], of modern authority, questioning that decision.

But was it ever doubted, in that or any other case, until the present, that the privileges of the office of the Lord Chief Justice attend upon him, as incident to his office, in every department of his official duty, and in every part of the realm, within which he is Chief Justice? The power of a Judge, sitting in Court during the term, does not amount to one-fourth part of each revolving year. Is it for that short period only, that the Chief Justices are to be considered as judicial; and on all other occasions as merely ministerial, and liable to action? There is no question, that the Justice of Peace, in his ministerial capacity, is liable; but could the King's Bench entertain complaint or information against one of its own Judges, in his own Court, for having issued the process of their Court? The King's Bench could not, would not, ought not. But it is argued that the Common Pleas would, could, and ought; and in the language of the law, that great law officer, the Chief Justice, is now attached to answer, and awaiting our decision, whether we shall retain him as a Defendant, to answer for the exercise of his judicial discretion, in matters within his special jurisdiction, and of high importance to the public peace, and most properly submitted to his judicial wisdom.

The transaction in question arises out of an Act of Parliament, creating offences spread on the face of the warrant as set forth in the plea, which act is made to guard against a prevalent mischief, that the history of our own times have evinced to be productive of danger to the State. It was a matter of no inconsiderable moment, to have the highest judicial sanction to the process and warrant, framed upon a modern statute, and giving operation to the law. The offence described in the warrant is founded on the Convention Act of 1793. We all know the history of that law, the preamble of which was soon followed by the Legislature of England in her enactments, to meet the prevalent mischiefs of self-elected societies, and the tumultuous assemblies who filled the audiences of such enlightened revolutionists as orator Thelwall. When Lord Grenville, in the House of Lords, enforced the necessity of those laws, he wisely observed, "that those clubs and societies, in imitation of the similar societies in France, were founded on what was called 'The Rights of Man;' they were rights however, (as they explained them) such as were incom-

and by De Grey, C. J., in *Miller v. Seare* (2 W. Bla. 1145); and was the foundation of the more modern case of *Ackerley v. Parkinson* (3 Maule and Sel. 411). The argument that the Respondent had jurisdiction over natives, cannot be carried to give him any over British subjects, who are expressly exempted from the operation of the native courts. The arrest of the Appellant was not a judicial act, or founded on any judicial proceeding. The Respondent had no right to do more than issue a summons; and immediately he found that the Appellant was a British subject, he must have been discharged. He began by exceeding his authority as a magistrate, acting judicially when he ought only to have acted ministerially, and proceeding

patible with law, religion, order, and morality." These societies had eloquent partizans; petitions crowded the table of the House of Commons; and Magna Charta and the Bill of Rights were sounded forth with popular confidence. "*Lex denique lata.*" This law of Irish Legislation was, in principle, adopted in England; and the political fame of Sir William Grant, in the course of the debates on that subject, raised him to conspicuous eminence by his luminous argument, which settled the vibrating opinion. The laws in each country, in *pari materia*, were the same in principle.

The licentious spirit in England was put down by the vigour of the law, and the returning good sense of the people. When it was of late unfortunately become imperatively necessary to bring that Convention Act into operation here, I cannot subscribe to the confident assertion of its having been unbecoming the high office of the Chief Justice, to grant a warrant which might have been issued by a common magistrate. As this argument has been obtruded upon the case, I think it right to say, that in my opinion it was a well advised measure to resort to the highest judicial authority, who was competent to give his sanction to the warrant, which delineates and defines the offence, with legal and technical accuracy. The present action is a bold effort to render the law inoperative in Ireland. If the Defendant had been an inferior magistrate, slanderous publications and liability to action might create terror in the humble mind of an ordinary justice of peace, to deter him from issuing his warrant, in the first instance of acting upon the Statute: but the law officers of the Crown would have been culpable in the extreme, where the peace of the country was at stake, if they had not taken the most effectual means to prevent the inchoate mischief, with the aid of the first criminal Judge,—to make the party amenable to the highest criminal tribunal, to be dealt with according to law. If matters had not been so conducted, the law might have been condemned as a dead letter, and become rusty as old armoury in the Tower: the factious might then exult, that they had worked a virtual repeal of the law.

In the case of *The King v. Despard*, 7 Term Rep. 736, when Ferguson moved for the prisoner's discharge, who was committed for treasonable practices, as the warrant had not delineated his offence with certainty; and it was argued there, as here, that there was no adjudged case upon the point; but it was well answered, that if no point is to be considered as law, unless it has been judicially decided, then farewell the law of the land, and it is sufficient, if it has been considered law at all times. It has been observed also, that no such plea as the present, ever was judicially sanctioned; that is probably true, for no such action was ever brought before; and as Lord Kenyon observed, in the case I have cited, "Though experiments of this kind are frequently made, they seldom succeed. I will not," said he, "overturn the law of the land, as it has been handed down to me. It is not for Judges, who are to watch over the law, to overset it. I am clearly of opinion, that if we are to yield to this argument, we should forget the duty we owe to the public." Before I conclude, let me compose the hitherto undisturbed ashes of Lord Chief Justice Wilmot, of whose character and opinions much has been misconceived. On the present occasion I cannot humiliate that great man's memory, by entering into a laboured vindication of one of the purest judicial characters that ever adorned Westminster Hall. There Wilmot has ever been considered "*Clarum et venerabile nomen*," his opinions and judgments are *there*, as I hope they will be *here*, of high authority; and are treated with respect, whenever they are cited; as in the late case of *Burdett v. Abbott* [11 East, 1, 85], when the Attorney-General resorts to his *admirable argument*, as he calls it, in *The King v. Almon* [Wilm. 243].

summarily when he ought first, at least, to have inquired and ascertained that he had jurisdiction to act at all; he is, therefore, not entitled to any privilege, and ought not to be screened from the consequences of his own deliberate act.

Mr. Baron Parke (Dec. 17, 1840).—The material question in this case is, whether the Defendant, being a judge of the Foujdarry Court of the Zillah of Nuddeah, was, in that character, entitled to [74] the protection of the 21st Geo. III. c. 70, s. 24, for issuing his order, or Perwannah, and for what was done in obedience to it.

This section is as follows:—"And whereas it is reasonable to render the Provincial Magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the Country Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

Three meanings may be attributed to this clause.

First. It may mean that no action should lie against one exercising a judicial office, in the Country Courts, for any judgment, decree, or order of the Court, whether in a matter in which the Court had a jurisdiction or not, or whether the Judge wilfully and knowingly gave judgment or made an order in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order, should preclude all inquiry.

Secondly. It may mean to protect the Judge only where he gives judgment, or makes an order, in the *bona fide* exercise of his office, and under the belief of his having jurisdiction, though he may not have any.

Thirdly. The object may have been to put the Judges of the Native Courts on the footing of Judges of the Superior Courts of Record, or Courts having similar jurisdiction to the Native Courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, [75] but leaving them liable for things done wholly without jurisdiction.

It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the Judges of the Native Courts, and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true meaning of the section in question was to put the Judges of Native Courts of Justice on the same footing as those of English Courts of similar jurisdiction. There seems no reason why they should be more or less protected than English Judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bona fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English Judges or Magistrates, and to leave the injured individual wholly without civil remedy; for English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

This construction is that contended for by the Appellant, and to that extent we think that the Appellant is right. But in applying that rule to the facts in [76] evidence in the present case, we think that enough does not appear to make the Defendant a trespasser.

We must consider the Defendant as being in the same situation as a Criminal Judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown; and the question is, whether he is liable to an action of trespass, for causing the Plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the Plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the Defendant would have been protected; for it is not merely in respect of acts in Court, acts *sedente curia*, that an English Judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Traff v. Downes* [1812,

1813, 3 Moo. P.C. 36 *u.*, 3 St. Tr. N.S. 1318]: and an order under the seal of the Foujdarry Court, to bring a native into that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it or not, would be dispunishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court; and the special jurisdiction given by the 53rd Geo. III., c. 155, s. 105, did not warrant the mode of proceeding in this case, there being no information or complaint by a native; nor did that section of the Statute authorise imprisonment in the first instance.

But the answer to the objection to the Defendant's [77] jurisdiction, founded on the European character of the Plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the Defendant knew, or had such information, as that he ought to have known of that fact; and it is well settled that a Judge of a Court of Record in England, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron Powell, in *Gwynn v. Poole* (Lutw. App. 1566), it is laid down, that a Judge of a Court of Record in a Borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron Powell illustrates by a reference to the case of the *Marshalsea Court* [10 Co. Rep. 69], which had jurisdiction only in certain cases where the King's servants were parties, who being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron Powell, (speaking of the case of a Borough Court,) that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the Judge cannot know that, except by the Plaintiff or Defendant, until he knows it, the rule shall be in this case, as in others, "*ignorantia facti excusatur*." Mr. Baron Powell lays down the same rule as to a party: but his opinion in that respect is disapproved of by Lord Chief Justice Willes, in *Moravia* [78] *v. Sloper* (Willes, 35), but not so far as it relates to a Judge or officer.

The like rule has been followed, in the case of Magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike v. Carter* (3 Binghams, 78), *Louther v. Earl of Radnor* (8 East, 113). It is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the Plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case, that the Defendant was at any time informed of the European character of the Plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the Plaintiff, does not arise; and it is unnecessary to determine, whether, if distinct notice had been given by the Plaintiff to the Defendant, or proof brought forward that the Defendant was well acquainted with the fact of his being British-born, the Defendant would have been protected in this case, as being in the nature of a Judge of Record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the Statute, which was not complied with, and therefore altogether without jurisdiction.

The only doubt their Lordships have had in the consideration of this case is, whether the evidence was sufficient to show that the Defendant knew or ought [79] to have known that the Plaintiff was a British-born subject. They have had none, that it was competent for the Defendant to give his defence in evidence, under

the general issue, by force of the Statute 42nd Geo. III., c. 85, s. 6, if not at common law.

See also the case of *Miller v. Hope*, 2 Shaw. App. Cas. 125, where it was held by the House of Lords (affirming the judgment of the Court of Session in Scotland) that an action of damages is not competent against a Supreme Judge, for a censure passed by him, while acting in his judicial capacity, on a Counsel practising at the Bar, and engaged in the Cause then before the Court, although it was alleged that the censure had been made injuriously, and from motives of private malice.

[Mews' Dig. tit. INDIA, 2. JURISDICTION AND COURTS; also tit. JUSTICE OF THE PEACE. G. LIABILITY OF TO ACTION, 1; also tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. b. *Liability to Action*. S.C. 2 Moo. Ind. App. 293; 4 St. Tr. (N.S.), 481; and, below, in Supreme Court of Calcutta, Morton, 179. On point as to scope of 21 Geo. III. c. 70, s. 24 (see now The Judicial Officers Protection Act 1850, Act xviii. of 1850), see *Sinclair v. Broughton*, 1882, L.R. 9 Ind. App. 163, 172; and cf. *Haggard v. Pelicier Frères* (1892), A.C. 61. On the general question of judicial responsibility, see *Gahan v. Lafitte*, 1842, 3 Moo. P.C. 382; *Spooner v. Juddow*, 1848, 1850, 4 Moo. Ind. App. 353; *Houlden v. Smith*, 1850, 14 Q.B. 841; *Kemp v. Neville*, 1861, 10 C.B. (N.S.), 523; *Fray v. Blackburn*, 1863, 3 B. and S. 576; *Reg. v. Williams*, 1866, 15 L.T. (N.S.), 290; *Anderson v. Gorrie* (1895), 1 Q.B. 668; Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61); and s. 77 of Indian Penal Code (Act xlv. of 1860).]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

JOHN GORE and Others,—*Appellants*: JAMES GARDINER and ALEXANDER URQUHART,—*Respondents* * [Feb., 6, 1840].

THE HERSEY. GRIMWOOD.

Bottomry Bond given by the Master upon a threat of arrest, for supplies previously furnished on his personal credit, held void.

This was originally a cause of Bottomry, civil and maritime, promoted by the Appellants as the Attornies of Thomas Hewitt against the ship *Hersey*, her tackle, etc., whereof Joseph Grimwood was Master, and also against the freight due for transportation of the cargo on board the same.

[80] The circumstances of the case were as follows:—

The brig *Hersey*, being a new-built vessel, sailed on her first voyage from the port of Leith in the month of March 1834, on a general trading voyage, under the command of Joseph Grimwood. In the month of April 1835, she arrived at Hobart Town, from the Cape of Good Hope, where the Master employed William Morgan Orr, a merchant of that town, with whom he was previously acquainted, as his agent or broker for the purpose of receiving the freight of part of the cargo there landed, and disposing of the other parts. The ship afterwards left Hobart Town for Sydney, and returned in August 1835, when the Master again employed Orr as agent or broker. Having taken in a cargo of oil and other goods as freight, with passengers for London, the vessel was, as it appeared from the affidavits in the cause, ready to sail on the 27th of October following.

No accounts had been delivered by Orr to the Master up to this time, though the sum of £28 15s. 7d., the balance, as it afterwards appeared, on the account current between them, was paid by Orr to the Master. The vessel was detained by reason, as it was alleged, of Orr's neglect to furnish his accounts. These accounts

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

were delivered on the 3rd of November, when, notwithstanding the above balance in favour of the Master, a list or schedule of debts owing by him was produced, amounting in the whole to £451 11s. 11d., and said to be for supplies and necessities for the brig. Among these was an item of £83 2s. 10d. for sundries furnished by Orr; £46 2s. 10d. and £16 16s. 6d. sundries furnished by G. and A. Sutherland; £4 15s. ditto by George Watson, and £8 2s. 3d. for government, pilotage, and harbour dues.

[81] To provide for the payment of this balance, the Master, under the threat of arrest by Orr, hypothecated the ship, and executed a Bottomry bond on the day following to Thomas Hewitt, merchant, resident in Hobart Town, for the sum of £564 principal, together with premium, to become due within six days after the arrival of the vessel in England.

The owners having refused to discharge the bond, on the ground that it was not given for necessary disbursements, and obtained by collusion between Orr and Hewitt, proceedings were commenced in the High Court of Admiralty to recover the amount.

On the 27th of November 1837, the Judge pronounced against the validity of the bond, on the ground that the credit given to the Master was a personal credit, and did not constitute a lien on the vessel, and that there was an absence of all necessity for the hypothecation (reported 3 Hagg. Adm. Rep. 404).

From this judgment the Appellant appealed, insisting on the following reason:—

I. That the bond was proved to have been given for necessary disbursements on account of the ship, in a port where the owners had no personal credit; and that there was no proof whatever of the fraud or other misconduct imputed to the obligee of the bond, in order to impeach its validity.

The Respondents, however, relied upon the judgment of the Court below, for the following reasons:—

I. That at the time the bond was entered into, the *Hersey* was not in a state of unprovided necessity. That Orr, for whose benefit it was entered into, was at such time, and had for some time previously [82] been, the agent for the owners in respect of the said ship. That he had in his hands sufficient funds belonging to the owners, and that money, if required, might have been obtained on account of the homeward freight, or on the personal credit of the owners.

II. That the bond was not contemplated, still less conditioned for, previous to the payment by Orr of the great mass of the sums for which it purported to have been given, and that all payments on account of the ship were made out of monies belonging to the owners previously in the hands of Orr.

III. That the bond was not entered into *bona fide* for the benefit of Hewitt, to whom it purported to have been given, but was obtained by duress on the Master, in liquidation of a debt due to Orr for goods supplied and monies advanced to the Master on his own private account and personal credit.

Sir Frederick Pollock, Q.C., and Dr. Addams, for the Appellants, cited the *Augusta* (1 Dodson, 283).

Sir William Follett, Q.C., and Dr. Nicholl, for the Respondents, were not called upon.

Mr. Baron Parke.—This is as hopeless a case as was ever presented to a Court of Appeal. From the accounts, it is clear that the supplies were furnished on the personal credit of the Master. There is too great a proneness on the part of Masters of vessels to resort to Bottomry bonds; it is only for necessary supplies or repairs that resort to a Bottomry bond can be upheld, but even then it [83] must be such a necessity as requires the hypothecation, viz., no personal credit being to be obtained. Here the supplies, in the first place, are not necessary supplies: there are several items in the accounts which are clearly not for necessary supplies or repairs. Then at the time the goods are supplied, no agreement is made that their amount shall be secured by hypothecation, that is essential: but the day after the accounts are delivered, the Master, as he alleges, upon a threat of arrest, and without any previous agreement or existing necessity, executes a Bottomry bond. Now although he might have been arrested, yet the ship could not have been detained: there is no pretence that there was any attempt or threat to arrest the vessel. Here both Orr

and Hewitt must have known, or at least they must be taken to have known, that there was no necessity to hypothecate the ship, and they must take the consequence of their own act. All their Lordships are of opinion that there never was a clearer case. Judgment affirmed with costs.

[Mews' Dig. tit. SHIPPING, A. X. BOTTOMRY, 2 VALIDITY, b. S.C. below, 3 Hagg. Adm. 404. Considered in *The Karnak*, 1868, L.R. 2 Ad. and E. 289; L.R. 2 P.C. 505; and cf. *The Empire of Peace*, 1869, 39 L.J. P. M. and A. 12. By s. 18 of the Judicature Act 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act 1891 (54 and 55 Vict. c. 55), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

84] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

JAMES MOORE,—*Appellant*: ANN MOORE,—*Respondent* * [Feb. 6, 1840].

To a suit for Restitution of conjugal rights brought by the wife, the husband pleaded in a responsive allegation the adultery of the wife. The acts pleaded were in substance and form the same as had been previously alleged by the husband in a suit for divorce, in which the libel was rejected.

Held by the Judicial Committee, (reversing the judgment of the Court below,) that the defence being one which the husband had a right to set up in bar to the wife's suit, and the acts charged being sufficiently specific to entitle him, if not condoned or concealed, to allege them as grounds for a charge of divorce in such a suit, he was entitled to plead them by way of responsive allegation.

Semble. If the acts of adultery charged are sufficiently circumstantial to admit of proof, it is not necessary to specify time and place.

This was a question as to the admissibility of a responsive allegation, in a cause of restitution of conjugal rights, originally promoted and brought in the Arches Court of Canterbury by Ann Moore, the Respondent, against James Moore, the Appellant, her husband.

The parties were married in the year 1806, and separated, by mutual consent, in consequence of differences arising between them, in the year 1818. In the year 1836 the Appellant instituted proceedings against the Respondent in a cause of divorce by reason of adultery, in the Court of the Dean and Chapter of St. Paul's. The libel given in on behalf of the Ap-[85]-pellant, pleading the adultery, was rejected by the Judge of that Court, and his decision was affirmed on Appeal by the Arches Court, upon which the suit abated, and an arrangement was made between the parties for continuing an allowance previously made to the Respondent. The terms of this arrangement not having been complied with on the part of the Appellant, the present suit for restitution of conjugal rights was instituted by the Respondent.

In reply to this suit, the Appellant brought a charge of adultery against his wife, and offered a responsive allegation consisting of nine articles, pleading the same acts, and in the same form as were alleged in his original libel. The first three articles pleaded the marriage and cohabitation of the parties. The fourth that the Respondent had given birth to a child before her separation from the Appellant, which he alleged was the offspring of an adulterous intercourse with some person unknown to him. The fifth, sixth and seventh articles charged the wife with the commission of the acts of adultery charged in the former suit.

The Judges of the Court of Arches refused to admit this allegation, on the ground,

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

as it was alleged, of its being in substance the same as the libel originally given in and rejected by the Court.

From the rejection of this allegation the present Appeal to Her Majesty in Council was interposed by the Appellant.

The Queen's Advocate (Sir John Dodson) for the Appellant.

Dr. Addams for the Respondent.

[86] The Right Hon. Dr. Lushington.—The question for their Lordships to decide is, whether the Court below was right in refusing to admit the Appellant's responsive allegation. The suit was originally brought by the Respondent, the wife, for the restitution of conjugal rights. To this suit the husband pleaded in bar, as by the practice of the Ecclesiastical Court it was competent for him to do the adultery of the wife, in order to ground a decree of divorce from bed, board, and mutual cohabitation. The fourth article charges the commission of acts of adultery, but does not so allege it, as to be capable of proof: their Lordships think, therefore, that this article must be rejected. But the acts charged in the fifth, sixth, and seventh articles are capable of proof: the seventh article especially pleads habitual and continued acts of adultery, and it is not necessary, therefore, to specify time and place. Their Lordships also think, that if this allegation can be admitted, these articles ought to be admitted. Then was the Court below right in rejecting the allegation altogether? Unless the husband has condoned or been a party to the concealment of acts of adultery, it is undoubtedly competent for him to allege them as grounds for a decree in a suit for restitution of conjugal rights, even though they should not be sufficiently specific to support an allegation in a suit for divorce; but there is a great difference between a suit for restitution and a suit for a divorce; which this case has in fact now become. Their Lordships, being of opinion that the acts of adultery are sufficiently pleaded, are of opinion that unless the Appellant is precluded by reason of the rejection of the libel in the former suit, the responsive allegation [87] in this suit ought to be admitted. They give no opinion respecting that rejection; but on the grounds of the difference of the two suits, and the admissibility of the articles before mentioned, they think this allegation, subject to the reformation of the fourth article, ought to be admitted, and they will, therefore, advise Her Majesty accordingly, and retain the cause.

[Mews' Dig. tit. HUSBAND AND WIFE, I. MARRIAGE, 11 b.; II. DIVORCE, 9 a. Followed in *Stace v. Stace*, 1868, 37 L.J. P. M. and A. 52; and cf. *Woodey v. Woodey*, 1875, 31 L.T. 647.]

ON APPEAL FROM THE EQUITY SIDE OF THE SUPREME COURT OF JUDICATURE AT BOMBAY.

NATHOOBHOY RAMDASS,—*Appellant*: MOOLJEE MADOWDASS, GOPALDASS MADOWDASS, and MUNMOHUNDASS DAVIDASS,—*Respondents* * [Feb. 7, 1840].

The right of appeal given by the charters of Bengal [Morley's Dig. ii. 550], Madras [*ib.* 588], and Bombay [*ib.* 638], is not confined to cases where a right or duty is finally decided, but includes interlocutory judgments, decrees, or decretal orders; such appeal does not, however, extend to the finding of a jury upon issues directed from the Equity side of the Court; no motion for a new trial having been made, nor exceptions taken to the Master's report founded on the verdicts in such issues [3 Moo. P.C. 95, 96, 97].

Semble.—The word "determination," in the charter of Madras and Bombay, is equivalent to the "decree or decretal order" of the Bengal charter [3 Moo. P.C. 95].

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington. Privy Councillor,—Assessor, Sir Edward Hyde East, Bart.

This was a motion for the dismissal of an appeal lodged on the 19th of November 1838, under the following circumstances:—

On the 29th of June 1832, the Appellant and Ram-[88]-cooverboye his mother, filed their bill of complaint on the Equity side of the Supreme Court of Judicature at Bombay, against Madowdass Kunsordass and Davidass Hurjuvandass, stating (amongst other things) that Ramdass Manordass, formerly a merchant and Hindoo inhabitant of Bombay, on or about the 17th of February 1808, departed this life, having duly made his Will, whereof he appointed the Defendants Madowdass Kunsordass and Davidass Hurjuvandass, executors; to whom Probate was granted by the Recorder's Court on the 29th of March 1813; and thereby after other bequests, he gave and bequeathed the residue of his property, estate, and effects, to his widow Ramcooverboye, and his two sons, the Appellant Nathoobhoy Ramdass and Wittuldass; and after stating that a certain partnership had formerly existed between the testator and the Defendant Davidass, but that the same had been finally closed and determined, and mutual releases executed by both parties in 1808, previous to the testator's decease, the bill prayed that the Will might be duly established, and that the usual account of the real and personal estate might be taken, and the same applied in due course of administration.

The Defendants severally put in their answers; the Defendant, Davidass Hurjuvandass, insisted on the partnership between the testator and himself subsisting at the time of his decease, and denied the execution of any release, as stated by the Plaintiffs; but insisted that the accounts had never been wound up, and he claimed to retain such part of the residue as remained in his hands for the liquidation of the balance due to him on account of such partnership.

Upon the hearing of the cause, on the 1st of March 1834, two issues were directed by the Court, with a [89] view of determining the existence of the partnership, and the alleged release. These issues were afterwards tried before the Supreme Court, on the plea side, and verdicts found for the Defendants: viz., on the first issue, that a partnership did exist between him and the testator, and, on the second, that such partnership was determined on the 29th of January 1808.

On the 19th of November 1835, the Appellant, Nathoobhoy Ramdass, applied by motion, on the plea side of the Court, for leave to appeal to the King in Council from the above verdicts; but the Court having taken time to consider his application, on the 29th of February 1836 refused the motion.

No application was made for a new trial by the Appellant; but the suit having abated by the death of the Defendant Davidass Hurjuvandass, and been duly revived against his widow Mooleevalhoo and the Respondent Mummohundass, his personal representatives, the Appellant, on the 29th of August 1836, moved the Court on the plea side for leave to appeal against the above-mentioned verdicts or judgments given upon the issues, and on the 2nd of September following, an order was made, that the petition of appeal be filed, on its being amended, by striking out such part as related to proceedings not on record on the plea side of the Court, as forming a part of the proceedings on the trial of the issues, and on payment of the costs of opposition of the motion; and it was ordered, that the Appellant should give good and sufficient security for the payment of all such costs as might be incurred by the appeal, in the event of his failing therein; and for the performance of such judgment or order as His Majesty might think fit to give or make thereon; and upon such security being given, the Court allowed the [90] appeal, and directed true copies of the issues, evidence, verdicts, or judgments, and orders, should be certified under the seal of the Court.

On the 26th of October 1836, the petition of the Appellants for liberty to appeal against the above verdicts or judgments was filed; but no security was at that time given, in conformity with the liberty to appeal.

On the 11th of November following, a motion was made to dismiss the above order for allowing the appeal, which was refused, though without costs.

On the 19th of November 1836, the original cause came on to be heard, on the Equity side of the Court, on the finding, upon the aforesaid issues, and for further directions; and by the decree then made, certain accounts respecting the partnership formerly existing between the testator and Davidass were directed to be taken, and further directions reserved.

On the 8th of February 1837, the Appellant applied, on the Equity side of the Court, for liberty to appeal to His Majesty in Council against the above decree of the 19th of November 1836, which was on the 28th of the same month allowed, on the petition of appeal being amended, by mention being made therein of the allowance by the Court, on the plea side thereof, of an appeal to His Majesty in Council, from the verdicts or judgments given by the Court on the trials of the issues.

On the 22nd of November 1837, the Appellant filed his security bond, on the plea side of the Court, and on the 8th of December he filed his general petition of appeal against the decree of the 19th of November 1836.

On the 12th of February 1838, the Respondent, [91] Mummohundass Davidass applied, by motion, and obtained an order *nisi* on the plea side of the Court, that the order of the 2nd of September 1836, and the petition for leave to appeal from the verdicts or judgments, filed on the 26th of October 1836, and the subsequent petition of appeal, of the 8th of December 1837, should stand dismissed.

The motion was supported by a certificate of the proceedings had in the cause, given by the Prothonotary of the Court, by which the various steps above set forth were detailed, and from which it appeared that no proceedings had taken place in the cause subsequent to the filing of the security bond and the general petition of appeal, nor any copies of the evidence given on the trial of the issues transmitted, under the seal of the Court, to His Majesty in Council.

On the 23rd of February cause was shown against the above order *nisi*, when the same was made absolute.

On the 19th of November 1838, the Appellant lodged his petition of appeal in the office of the Privy Council, which was entitled in these causes on the Equity side of the Supreme Court; and after stating the leave given to him, on the 2nd of September 1836, to appeal from the judgments or verdicts, and also the order of the 28th of February 1837, giving him leave to appeal from the decree of the 19th of November 1836, the petition prayed that His Majesty in Council would review and re-hear the cause, and thereupon reverse, vary, or alter the judgments of the Supreme Court on the issues and the decree of the 19th of November 1836.

The Respondent Mummohundass Davidass appeared to this appeal, but no proceedings having been taken under it, he, on the 8th of November 1839, presented a petition to Her Majesty in Council, in which, after [92] stating the circumstances above detailed, and insisting that the appeal and petition of the 19th of November 1838, was irregular, and that the orders of the 2nd of September 1836, and the petitions of the 26th of October 1836, and 8th of December 1837, were severally discharged by the order of the 23rd of February 1838, he prayed that the petition of appeal of 19th November 1838 might be taken off the file, or dismissed with costs, or that so much of the petition and appeal as prayed to reverse, vary, or alter the judgments of the Supreme Court on the issues, might be dismissed or discharged with costs.

Mr. Wigram, Q.C., and Mr. E. J. Lloyd, moved to dismiss the appeal, as having been improperly presented, after the order allowing the same had been dismissed by the Court. They insisted, also, that the order of the 23rd of February 1838 applied to the proceedings both on the plea side and on the equity side of the Court;—that the Appellant ought, if he disputed that order, to have made a special application of the Court below, and that he was, in fact, now endeavouring to prosecute an appeal against a judgment obtained on the plea side by means of proceedings taken on the equity side of the Supreme Court. They contended, also, that the Appellant had miscarried in his mode of proceeding,—that no appeal could be made from the finding of the Court on the issues in question but by means of a new trial, or exceptions taken to the Master's Report,—that the case was not one within the meaning of the Charter of Justice, and that he was utterly precluded, by the order of the 23rd of February, from prosecuting an appeal either against the verdicts or the decree in question.

[93] Mr. Pemberton, Q.C., and Mr. A. Lewis, contended that the trial of issues by the Judges of the Supreme Court, instead of a jury, brought the findings or judgments of the verdicts within the intent and meaning of the Charter of Justice:—that the filing the petition of appeal, and executing security for the due prosecution thereof, were matters subsequent to the allowance of such appeal, not required by

the Charter, as a condition precedent to the granting of the appeal; and that the Court, having once made the order allowing such appeal, had no further jurisdiction in the matter; they insisted that the issues in question were *coram non judge* at the period the order *nisi*, of the 12th of February 1838, was made absolute, and could not be held binding on the Appellant, who having perfected his security, and presented his petition in the Court below, before lodging his case here, had substantially complied with the conditions imposed on him by the Supreme Court, and could not be precluded from prosecuting the appeal so presented. They cited *Chowdry v. Mullick* (1 Moore's Ind. Appeals, 358).

Mr. Baron Parke (February 11).—In this case a motion was made on the part of the Respondent to dismiss the appeal, so far as it was an appeal from the decision of the Supreme Court of Bombay on its common-law side, in the nature of a verdict on an issue directed on the equity side of that Court in this suit, it being admitted that the appeal was competent so far as it related to the equity suit.

The suit was instituted by the Appellants to recover [94] their shares, as the residuary legatees of the estate of a Hindoo testator, whose executors are represented by the Respondents. The answer of one of the executors set up a case of partnership between the testator and himself, and a right to retain the amount of the balance due from the testator. The Court ultimately directed two issues to be tried on the common-law side of the Courts, one whether there was such a partnership, and the other whether it had been put an end to. The Court on the common-law side, on the trial of the first issue, decided that there was a partnership.

There was no motion for a new trial, but the Court on the common-law side gave leave to appeal on the 2nd of September 1836, on giving security, without mentioning the time for it. The petition for leave to appeal was filed on the 22nd of October 1836, but the security was not given until the 22nd of November 1837.

On the 19th of November 1836, the cause came on for further directions founded on the issues, and a decree was made referring it to the Master to take the usual accounts.

On the 28th of February 1837, leave was given to appeal from this decree, on condition of the amending of the petition of appeal, and stating that leave had been given on the common-law side to appeal against the finding on the issues.

On the 12th of February 1838, an order *nisi* was obtained to discharge the order for leave to appeal against the finding on the issues, and on the 23rd of the same month, the Court made that order absolute, and the leave to appeal was rescinded, but on what grounds does not appear.

Notwithstanding the order for leave to appeal, of the [95] 2nd of September 1836, was so rescinded, the appeal was lodged in the Privy Council against the finding on the issues, as well as the decree on the equity side, of the 19th of November 1838, and it is contended that so far as relates to the findings, it is not competent for the Appellant to prosecute his appeal; under these circumstances, several objections were taken and argued, which the Court will now dispose of, having taken time for consideration on account of the practical importance of some of them.

One objection was, that, under the Charter of Justice of Bombay, it is not competent to appeal against any determination which is not of a final character, which does not settle some right or impose some duty. The Charter of Justice of Bombay is, as near as may be, a transcript of that of Madras, of the 33rd Geo. III. The Charter of Madras follows that of Bengal, of the 13th Geo. III., with this difference, that liberty is given to appeal against any *Judgment* or *Determination* of the Supreme Court of Madras, whereas the liberty to appeal is given, in the Calcutta Charter, against any "Judgment, Decree, Order, or Rule," afterwards varying the terms to "Judgment," "Decree," or "Decretal Order." In other respects the provisions in each are substantially the same, and we are all of opinion that the word "determination" is an expression at least equivalent to the terms used in the Bengal Charter; and as an appeal undoubtedly lies from all Decrees or Decretal Orders in the equity side of the Supreme Court at Calcutta, it does equally from every Decree or Decretal Order on the equity side of the Supreme Court of Bombay and Madras.

The context of all the three Charters shows that the appeal is not confined to cases in which some right or [96] duty is finally decided; and the clause limiting

the value in dispute to ten thousand Pagodas does not apply to the value of the matter in dispute involved in the order, but to the subject of the suit itself.

But then it is said that this finding of the Court on its common-law side, in the nature of a verdict, is a "*determination*" which may be directly appealed from. Undoubtedly such a verdict, in a common-law suit, might be indirectly appealed from, in an appeal against the judgment in that suit, which is founded on that verdict, the evidence, as well as the finding, being brought up as part of the proceedings, and included in the transcript. But the verdict only, prior to judgment being given, could not be appealed from in a common-law suit; nor can this verdict on an issue directed from the equity side, as a *determination* in a common-law suit.

There is, indeed, no common-law suit. In trying the issue, the Court of law is merely ancillary to the Equity Court: it investigates facts, and pronounces its opinion on them, merely in order to ground some further proceedings in the equity suit: the verdict itself is no proceeding in the equity suit, it only becomes so when it is adopted and acted upon in that suit. It stands on the same footing as the finding of a jury in a distinct common-law Court, analogous to the case of a reference to the Master, which when confirmed by the Court, and not before, is the subject of appeal. If a party objects to such a report, he must except to it, and the overruling that objection and confirming the report, opens the whole question of the propriety of the finding of the facts contained in it, to the review of the Court above; but if there be no exception, the report is not open to such revision. In the present [97] case, the Appellant meaning to object to the finding of the Court on the facts, should have applied to the equity side for a new trial, as a verdict against evidence; and having brought all the evidence before the Court, the refusal of a new trial and consequent adoption of the finding, as one of the grounds for a decree, would then have been the subject of appeal; and the propriety of the decision on the facts would be considered and decided in a Court of Appeal. But as the Appellant did not pursue that course, he must be taken to have made no objection to the finding, and the verdict on the issue of which the *postea* is the only evidence, is to be treated as one proof of the truth of the facts in the cause involved in it, and may be acted upon accordingly. I say as *one* proof—not a conclusive proof, because it might happen that in opinion of the Court of Appeal, the evidence in the cause was so strong that no finding of a jury, or the finding of the Court below itself, ought to weigh against it.

As there has been no application for a new trial in this case, the facts proved on the issues, and the propriety of the finding upon it, cannot now be brought under our review—and the appeal must be confined to the propriety of the decree on further directions, founded on the *postea*, and the evidence in the cause.

In the case of *Chowdry v. Mullick* [1 Moo. Ind. App. 358], the question was disposed of, upon a different point.

Another objection taken by Mr. Wigram would also in our opinion be fatal: viz., that the leave to appeal granted at the common-law side has been vacated, by order on the common-law side of the Court—and if an appeal could be against an order on the common-law side, it ought to have been made against the last order, which stands good until vacated. At all events, [98] therefore, there is *now* no liberty to appeal against the finding on the issues, and so much of this appeal therefore as seeks to vary or alter the judgments of the Supreme Court on the issues must be dismissed.

[S.C. 2 Moo. Ind. App. 169, cf. *Tronson v. Dent*, 1853, 8 Moo. P.C. 419. The original Charters establishing the Supreme Courts of Judicature in India will be found in Morley's *Dig.* ii., 549, 588, 638. For the existing conditions of appeal from the High Courts of Calcutta, North-Western Provinces, Madras, and Bombay, see *Code Civ. Proc.* (Act. XIV. of 1882), ss. 595 *et seq.*; and charters establishing the High Courts (i.) of Calcutta, Dec. 28th, 1865 (Stat. R. and O. Rev. iv. 82); (ii.) of North-Western Provinces, March 17th, 1866 (*ib.* 121); (iii.) of Madras, 28th Dec., 1865 (*ib.* 96); (iv.) of Bombay, 28th Dec., 1865 (*ib.* 108). See also O. in C. of April 10, 1838, *ib.* p. 330, and Indian High Courts Act, 1861 (24 and 25 Vict. c. 104).]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

RICHARD HOWE COCKERELL, DWARKANANTH TAGORE, and ANSHOOTOSH
DAY,—*Appellants*; THEODORE DICKENS,—*Respondent** [Feb. 11 and
24, 1840].

The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply, where that creditor obtains by his diligence something which did not, and could not, form a part of that fund [3 Moo. P.C. 132].

The Orphan Chamber of Batavia, being the executors of a foreign creditor in the island of Java, by their agent in Calcutta, proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act, 9 Geo. IV., c. 73, and after making such proof, and receiving the dividends upon the whole debt, instituted a suit in the island of Java, to recover a plantation or estate there, held by one of the insolvents as trustee for the firm of A. B., and C. D., in equal shares; to which suit the assignees of the insolvent appeared as Defendants, but judgment was given in favour of the creditor, and for the sale of the estate for his benefit; the proceeds of which amounted to three-fifths of his whole debt. The assignees of A. B. filed a bill on the equity side of the Supreme Court at Calcutta, against the agent of the foreign creditor, resident within the jurisdiction, praying that the dividends might be refunded, and that the Defendants might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at Java: the Defendant demurred, and obtained judgment against the assignees. Held, on Appeal, by the Judicial Committee, that the estate in Java, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was therefore not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20s. in the pound upon his whole debt [3 Moo. P.C. 133].

But the bill having stated that the creditor had also instituted proceedings against certain debtors of the insolvents at Bencoolen; held, that the assignees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends until the proceedings at Bencoolen were abandoned [3 Moo. P.C. 134-136].

Under the prayer for general relief, specific relief may be granted of a different description from the specific relief prayed for by the bill: provided the bill contains charges, putting material facts in issue, which will sustain such relief [3 Moo. P.C. 135].

This was an Appeal from a judgment on the equity side of the Supreme Court of Judicature at Fort [99] William in Bengal, in a suit in which the Appellants were Plaintiffs, and the Respondent the Defendant. The Appellants were the surviving assignees of the joint estate and effects of John Palmer, George Alexander Prinsep, William Prinsep, and Charles Barber Palmer, formerly of Calcutta, merchants and agents, trading under the firm of Palmer and Co., who in the year 1830 were declared insolvent, under the Indian Insolvent Act, 9 Geo. IV., c. 73.

The bill, which was filed on the 11th January 1837, stated, that the insolvents, on the 4th January 1830, duly filed their petition of insolvency in the Court established at Calcutta for relief of insolvents, and assigned and conveyed the whole of their estate and effects to the common assignee of the said Court, who by order of

* Present:—Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington. Privy Councillor.—Assessor.—Sir Edward Hyde East, Bart.

the Court afterwards duly assigned over the same to certain persons as special assignees, of whom some had since died, and others had been removed by order of the Court, leaving the Appellants, [100] Dwarkananth Tagmore, and Anshootosh Day, the only surviving and continuing assignees, and that the Appellant, Richard Howe Cockerell, had been subsequently appointed an assignee by order of the Court; whereby the whole of the estate and effects of the insolvent firm had become vested in the Appellants: that on the 22nd January 1836, John Palmer died; and that the surviving insolvents were afterwards, by two several orders of the Court, duly discharged from their debts. That the insolvents in due course filed the schedule of their debts and assets, and that amongst other claims set forth, was a debt or sum of 2,52,160 sicca rupees, being the balance due from the insolvent firm to the estate of one Gavorke Manuk (formerly an Armenian merchant, and inhabitant of Batavia, within the territories of the King of the Netherlands), who died at Batavia in the island of Java, on the 2nd October 1827, having made his Will according to the laws of that island, and constituted a certain public body or institution there (out of, and not subject to, the jurisdiction of the Court), called the Orphan Chamber of Batavia, executors and trustees of his Will. That the testator bequeathed the residue of his real and personal estate to his brother, Malmuc Manuk, formerly of Calcutta, and since deceased, and in case of his death in the lifetime of the testator, to the heirs of the next of kin of the said Malmuc Manuk.

The bill then proceeded to state, that Gavorke Manuk died possessed of very large property, sufficient to pay all his debts and legacies: that shortly after his death, and before the arrival of any authority or power from his executors, the Orphan Chamber, James Wier Hogg, the then registrar of the Supreme Court, on the 29th January 1829, obtained adminis-[101]tration, with the Will annexed, to the goods of Gavorke Manuk, and got in effects of the testator within the jurisdiction of the Court, to the amount of 4,84,000 rupees: that the Orphan Chamber being dissatisfied thereat, transmitted powers of attorney to the firm of Palmer and Co., empowering them jointly or severally to apply for administration of the goods of the testator. That William Prinsep, on the 28th April 1829, obtained accordingly such administration, with the Will annexed, and received from Hogg, the registrar, 1,85,147 rupees, 14 annas, 10 pice, part of the testator's estate, leaving in the hands of the registrar 2,98,202 rupees, being the amount of several legacies directed in the Will to be paid into the hands of the ecclesiastical registrar for the time being. That William Prinsep entered into the administration of the estate, got in assets, and paid them into the hands of the firm of Palmer and Co. That at the date of filing the petition of insolvency, there was due to the estate of Gavorke Manuk from the firm of Palmer and Co., as such constituted agents, the said sum of 2,52,466 sicca rupees.

That Malmuc Manuk, the sole residuary legatee, died on the 20th of February 1826, in the lifetime of the testator, leaving four sons and three daughters, infants under the age of twenty-one, who were Defendants in the suit.

The bill then stated, that after the insolvency of Palmer and Co., the letters of administration to Prinsep were cancelled; and that on the 23rd of August 1831, fresh letters of administration were granted to Hogg, with the Will annexed; and that afterwards the Defendant Dickens became, and then was, the sole personal representative of Gavorke [102] Manuk, deceased, within the jurisdiction of the Supreme Court, and was in possession of assets amounting to 75,000 rupees.

That Hogg, on the 29th of August 1831, received from the Plaintiffs, and their then co-assignees, a dividend of 5 per cent. on 2,52,166 sicca rupees, appearing in the schedule to be due from Palmer and Co. to Gavorke Manuk, amounting to 12,623 rupees; and that Smoult and Dickens, his successors in office, had received other dividends, which, inclusive of the dividend paid to Hogg, amounted to 71,793 rupees.

That the insolvent firm, at the time of its insolvency, was possessed, jointly with the firm of Sir Charles Cockerell and Co., of London, of the beneficial interest in a large plantation in the island of Java, purchased and carried on for account, and with the joint funds of the two firms of Palmer and Co., and Cockerell and Co., but in the sole name of John Palmer, for the joint benefit of the two firms, in equal shares.

That the Plaintiffs directed their agents at Batavia (after the insolvency of Palmer and Co.) to take possession of the plantation, and dispose of it for the benefit of the creditors of the insolvent firm, and remit the proceeds to the assignees for distribution. That although the administrator at Calcutta had received dividends on a debt due from the insolvent there, the Orphan Chamber of Batavia, though apprised of the receipt of such dividends, on the 20th March 1833, caused a suit to be commenced in one of the Courts in the island of Java, against John Palmer, and caused the whole of the plantation and estate in Java to be sequestered for the debt of 2,52,462 rupees. That although the assignees appeared and defended [103] the suit so instituted, the Court at Batavia, on the 25th June 1835, condemned John Palmer to pay the said debt of 2,52,460 rupees, with interest, and declared the plantation so sequestered to be liable to execution. That on appeal to the Supreme Court at Batavia, the Decree was affirmed, and on the 10th March 1836, the plantation was publicly sold, and the proceeds of sale, after expenses paid, amounting to about 1,50,134 rupees, were paid over to the Orphan Chamber, as executors of Gavorke Manuk. That this sum greatly exceeded the rateable dividend on the 2,52,460 rupees, and of all dividends which were likely to be declared.

That process had been served also by the resident of Bencoolen, in the island of Sumatra, upon certain debtors to the estate of Palmer and Co., endeavouring thereby to enforce execution of the Decree of the Court of Batavia upon such debtors; whereby the Plaintiffs were unable to realize large sums due from such debtors.

That in consequence of the sale of the plantation in Java, towards satisfying the claim of the Orphan Chamber upon the insolvent firm, notwithstanding Cockerell and Co. were entitled to an equal share, and interest in the plantation, the firm of Cockerell and Co. had since claimed to prove against the insolvent estate 76,500 rupees, being the moiety of the value of the plantation.

That the Plaintiffs gave notice to Dickens of all these proceedings in Batavia, and requested him to refund the amount of dividends paid in Calcutta, being dividends on the debt for which the plantation had been sold, and the produce of which sale greatly exceeded the amount of such dividends. That Dickens and the [104] representatives of Malcolm Manuk were subject to the jurisdiction of the Court; but that the Orphan Chamber was not.

The bill prayed that the administrator might refund to the assignees the sums received by his predecessor and himself, and that the sum so refunded might be decreed applicable for the rateable benefit of the other creditors of the insolvents; that he might be restrained from receiving future dividends, until the other creditors of the firm had received dividends on their respective debts, proportionate to, and in like rate to the sum realized on the debt of 2,52,460 rupees by the sale in Java; and for such further and other relief as the nature of the case should require.

To this bill the Defendant, Dickens, demurred, first stating generally that the complainants had not made a case entitling them either to discovery or relief, then setting out special grounds of demurrer, as follows:—

1st. That it appeared by the bill that the public body called the Orphan Chamber of Batavia were the executors of Gavorke Manuk, and, therefore, as far as assets belonging to his estate within the jurisdiction of the Supreme Court were concerned, the Orphan Chamber were bound by the laws applicable to the case within such jurisdiction, and also by the laws relating to insolvent debtors, which were in force in the city of Calcutta, as also by the acts of the late insolvent firm of Palmer and Co.; and who were shown by the bill to have been the duly-constituted agents of the Orphan Chamber, and by which laws, and also by the acts of the late firm of Palmer and Co., as appearing by the bill, the Plaintiffs were not entitled to the relief prayed.

[105] 2nd. That it appeared by the bill that the Court of Justice at Batavia was a foreign Court of Law, beyond the jurisdiction of the Supreme Court, and not recognizing nor bound by the law which such Court administers; yet that the said bill sought relief by reason of the decision of the Court of Batavia, over which decision the Supreme Court had no control.

3rd. That the Plaintiffs, by their bill, sought to make the estate of Gavorke Manuk, then in the hands of the Defendant, liable to pay a debt or claim of the firm of Sir Charles Cockerell and Co. against the Plaintiff; which, by the Plaintiff's own showing, appeared to be a claim disputed by themselves.

4th. That it appeared by the bill, that the Orphan Chamber, through their

attornies, obtained from the Court at Calcutta, administration of the goods of Gavorke Manuk, deceased, and thereby submitted to the laws and jurisdiction of such Court in regard to such goods; yet that the Plaintiffs, as the assignees of Palmer and Co., sought by their bill to call in question such submission on the part of the Orphan Chamber.

5th. That it appeared by the bill, that the Orphan Chamber refused to recognize the validity of the law and practice of the Court at Calcutta, applicable to the administration of the effects of Gavorke Manuk, which were within the jurisdiction of such Court, and thereby prevented any equitable adjustment of accounts with the Orphan Chamber.

The demurrer was argued on the 13th November 1837, and the Supreme Court, having taken time to deliberate, pronounced judgment on the 2nd March 1838, allowing the demurrer, and dismissing the bill.

From this judgment the Plaintiffs appealed to Her [106] Majesty in Council, submitting that the judgment ought to be reversed, and the demurrer overruled, for the following reasons:—

I. Because it is contrary to the rules and principles which regulate the distribution of the property of bankrupts and insolvent debtors amongst their creditors, to permit any such creditor, having no special security or lien for his debt, to enforce payment thereof out of property from which the other creditors are excluded, and also in respect of the same debt to participate in competition with such other creditors in the general assets, and, therefore, inasmuch as the Orphan Chamber, as the personal representative of the testator, Gavorke Manuk, had received in Java, by virtue of their judgment in the Court there, a greater sum, towards satisfaction of the debt due to the testator's estate, than they could have obtained by dividends under the insolvency, the Respondent, Theodore Dickens, as the like personal representative of the testator, ought not to have received in respect of the same debt the dividends which have erroneously been paid to him, and ought to refund the same.

II. Because, even if the personal representatives of Gavorke Manuk were entitled to receive any dividends out of the insolvent estate, in respect of the debt due to the estate of Gavorke Manuk, such dividends ought to have been computed and paid upon the balance of such debt only, after deducting what was recovered by virtue of the judgment in the Court of Batavia; and inasmuch as such dividends have been paid upon the whole debt, the Respondent, Theodore Dickens, ought, in any event, to refund the difference or excess beyond what he ought to have received, and ought to be restrained by injunction from receiving any further [107] dividends until the other creditors shall have received dividends in proportion to those which have been received by or on account of the testator's estate.

The Respondent, on the contrary, contended that the judgment ought to be affirmed, and the appeal dismissed, for the following reasons:—

I. Because the Appellants have not, in and by their said bill, stated or made such a case as entitles them in equity to any discovery or relief, as is thereby sought and prayed from or against the Respondent.

II. Because, in particular, it appears by the bill, that the dividends, which have been paid on the debt due from the insolvents to the estate of Gavorke Manuk, and which dividends the bill seeks to have refunded, were at the time rightly due and properly paid to the Respondent, and the claim now set up by the Appellants to have those dividends refunded, appears by the bill to be founded on the fact, that the Orphan Chamber of Batavia, being a foreign creditor of the insolvent subsequently to the payment and receipt of those dividends, recovered certain immoveable or real property belonging to the insolvent in a foreign country, that is to say, in the island of Java, within the territories of the kingdom of the Netherlands, which property, according to the decisions of Courts of competent jurisdiction in that foreign country, did not pass to the Appellants by the assignment made on the insolvency of Palmer and Co., and to which property the Appellants, after a contest in those Courts, were unable to establish any claim.

III. Because it is not alleged, nor does it appear in or by the said bill, that any further dividends will be paid on the said insolvent's estate, under the said insolvency, nor have the Appellants, in and by their said [108] bill, stated or made such a case as entitles them to restrain the Respondent from participating in further dividends on the said estate, if any such shall be declared; and because, at all events, the case made

by the Appellants did not entitle them to any relief by bill on the equity side of the said Supreme Court.

Mr. Wigram, Q.C., Mr. Deacon, and Mr. Cockerell, for the Appellants.—The first question for the consideration of the Court is, whether the plantation in Java, which we shall treat as real estate, did not pass to the assignees of Palmer and Co., under the provisions of the Indian Insolvent Act.

2ndly. Whether, supposing such real estate did not pass to them, the Orphan Chamber were justified in taking it in execution, after their agents in Calcutta had proved against the estate of Palmer and Co. for the whole amount of the debt due from that firm, and had received dividends on the amount so proved.

3rdly. Whether the Respondent, Dickens, as the administrator of Gavorke Manuk, and the agent of the Orphan Chamber, is not bound to refund such dividends, and whether a bill in equity is not the proper proceeding for that purpose.

4thly. Whether the Appellants are not entitled to an injunction, restraining the Respondents from receiving any future dividends from the estate of Palmer and Co. until all the other creditors of that firm are put upon an equal footing with the Orphan Chamber, in respect of the proceeds received by them from the sale of the estate at Java, or by their proceedings at Bencoolen.

[109] I. We submit, that the estate at Java passed to the assignees under the insolvency of Palmer and Co. The assignees, under the Indian Insolvent Act, 9 Geo. IV., c. 73,* take all the property of the insolvent, both real and personal, to the same extent as the assignees under an English fiat in bankruptcy. For by the 26th section of that Act, it is declared, that every such assignment shall have the effect of conveying or transferring to, and of vesting in the assignee or assignees, who shall have been appointed by the Court, and named in the assignment, the whole estate and effects, real and personal, and all rights, duties, claims, choses in action, interests and property whatsoever, which, at the time of executing the assignment, shall belong to the insolvent or insolvents, either solely or jointly, with any other person or persons, or which shall come to or be required by him, her or them, or to which he shall be or become entitled in reversion, remainder, or expectancy, before the Court shall have made an order for the discharge of such insolvent or insolvents, etc. By section 23, also, the insolvent is required forthwith to put the assignees in possession of his estate and effects. There is no question, therefore, but that the property in Bencoolen, consisting of outstanding debts due to the estate of Palmer and Co., would pass to the assignees, not only under the statute law of England, but also according to the principles of universal jurisprudence, and the comity of nations. This doctrine is clearly laid down by Dr. Story in his [110] Conflict of Laws (336-351), where all the authorities are collected. And we submit it is equally clear, that the estate in Java might have been reached by the assignees, if the Orphan Chamber at Batavia had not interposed and seized it in execution for their own debt. [Sir Edward Hyde East.—The right to the estate might pass, but not the possession, to the assignees.] It is laid down by Mr. Burge, in the third volume of his Commentaries on Colonial and Foreign Laws (3 Burge's Com. 904), that under the Bankrupt Law of England, the debtor is not only deprived of the possession, administration and disposition of his effects, but the absolute property in them is transferred to the assignees. Lord Eldon, also, in the case of *Benfield v. Solomons* (9 Ves. 83), says that the Bankrupt Laws vest in the assignees all the property of the bankrupt, without exception. And in the important case of *The Royal Bank of Scotland v. Cuthbert* (1 Rose, Bkcy. Cases, 462), it was decided by the Court of Session in Scotland, that a Commission of Bankrupt vests in the assignees under it, all the property of the bankrupt, wherever situate, precluding creditors in a foreign country from attaching, by sequestration, their debtors' property remaining or situate in that country; and that although the Commission may not in itself operate upon the heritable property of the bankrupt in such foreign country, yet it imposes on him a legal obligation to execute the proper conveyances, and do all necessary acts for transferring it to the assignees.

* This Act was continued by 2 and 3 Will. IV., c. 43, to March 1836, and after being amended by 5 Will. IV., c. 79, was further continued by 6 and 7 Will. IV., c. 47, to 1st March 1839, and from thence to the end of the next session of Parliament. [See now Indian Insolvent Act, 1848 (11 and 12 Vict. c. 21).]

The second point we have to contend for is, that, notwithstanding the real estate in Java might not pass to the assignees by the assignment, yet that the [111] Orphan Chamber were not justified in taking it in execution after their agents at Calcutta had proved against the estate of Palmer and Co. for the whole amount of their debt, and had received dividends on the amount so proved.

The aim of the legislature in all the Statutes relating to bankruptcy and insolvency is, that the creditors should have an equal proportion of the effects of the bankrupt or insolvent, and that creditors of every degree should come in upon equal terms. If a creditor, having a security, seeks to prove the whole amount of his debt under a fiat of bankruptcy, he must deliver up the security for the benefit of the general creditors: if he insists upon retaining the security, he can only prove for the balance after deducting the value of his security. In the present case, the Orphan Chamber at Batavia, having a security (that is, a lien or right of process) against the estate of Palmer in the island of Java, according to the laws of that country, come in, under the Indian Insolvent Act, and prove for the whole amount of their debt, without deducting the amount of their security—namely, the value of that estate, which they intended to sequester, and to appropriate the proceeds for their own exclusive benefit. Now we contend, that the Orphan Chamber, when they proved their debt, ought to have deducted the value of the estate, on which they had a lien by the laws of Java. It was contrary to all principles of justice in the administration of assets, whether in equity or in bankruptcy, that they should be allowed, first to prove and receive dividends on their own debt, and then proceed on their security. The obligation of the creditor to deduct the value of his security is clearly laid down in the case of [112] *Greenwood v. Taylor* ([1] Russ. and M. 185), where a mortgagee petitioned for the sale of his security, and to be admitted to prove the full amount of his debt in a suit for the administration of assets; but the Master of the Rolls (Sir John Leach) held that this could not be done, saying, "The rule in bankruptcy must be applied here. The mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as his mortgaged estate will not extend to pay. This rule is not founded upon the peculiar jurisdiction in bankruptcy, but rests upon the general principle of a Court of Equity in the administration of assets." It has been thought by some that this decision of Sir John Leach has been impugned by the present Chancellor, in *Mason v. Bogg* (2 Myl. and C. 443), which was a motion to discharge an order of the Vice-Chancellor; but his Lordship's judgment, which was against the motion, proceeded on the ground, that the order merely asserted that about which there could be no doubt, namely, that the vendor had a lien, and that he was a specialty creditor, leaving the question quite open as to how his rights were to be dealt with. And his Lordship expressly said, that he thought the matter was not in such a state as to call for an opinion upon the question which arose in *Greenwood v. Taylor* [1 Russ. and M. 185]. But whether the principle was or was not correctly laid down by Sir John Leach, in regard to the right of proof in a creditor's suit for the administration of assets, is perfectly immaterial; for in bankruptcy there can be no doubt that it is an invariable rule that a creditor, having a security upon any portion of the bankrupt's property for his debt, must give up the security, if he [113] prove for his whole debt,—or can only prove for the balance if he chooses to retain his security. There is a great distinction between a case of this kind, and where another person is security for the debt. There it is admitted that the creditor may prove and recover what he can from the surety; but if he has any security or lien on the bankrupt's property, he must deduct the amount from his proof.

There is another mode of considering this question—namely, that the creditor having proved for the amount of his debt against the estate of Palmer and Co., made his election to come in *pari passu* with the other creditors, and to abandon any right of action he might have against Palmer and Co., or their estate: upon the same principle as where a creditor proves his debt under a fiat in bankruptcy, he is deemed by law to have made his election, to take the benefit of such fiat, with respect to the debt so proved (see 6 Geo. IV., c. 16, s. 59). And even where a creditor has two distinct demands against a bankrupt, and proves only for one of them, it has been held, that he thereby relinquishes a pending action against the bankrupt for the other. *Ex parte Dickson* (1 Rose, Bkey. Cases, 98). But in the present case, the creditor, after proving the whole amount of his debt, and receiving dividends on the whole,

brings an action against the insolvent in Java, and recovers there no less than three-fifths of the amount of his debt.

The principle we are now contending for has been recognized and acted upon in several cases by Lord Eldon. In the case of *Drewry v. Thacker* (3 Swanst. 544), his Lordship says, "It is fully settled, that if this Court once [114] takes on itself the administration of the assets of a testator or intestate, a creditor seeking, and not having yet obtained, satisfaction at law, shall not be suffered to proceed there: it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere." So in the case of *Perry v. Barker* (8 Ves. 527), where a mortgagee had foreclosed and sold the mortgaged estate, Lord Eldon granted an injunction to restrain him from recovering the difference at law, which decision was afterwards confirmed on re-hearing before Lord Erskine (13 Ves. 198). According to these decisions, it is clear, therefore, that a creditor, after taking the benefit of a decree for a foreclosure, or for the administration of assets, is not permitted to sue his debtor at law.

If the property in Java had been personal property, and the Orphan Chamber had been within the jurisdiction of the Supreme Court, it is clear, from the doctrine laid down in *Sill v. Worswick* (1 H. Bla. 665), *Hunter v. Potts* (4 T. R. 182), and *Philips v. Hunter* (2 H. Bla. 402), that they could have been compelled to refund the proceeds arising from the sale of that property. In the present case, however, it is admitted that the property being real property, must be governed by the *lex loci rei sitae*; and that if the creditor has duly obtained possession of that property in an adverse suit, according to the law of the foreign country, he cannot be called upon to refund the proceeds, which he has by his diligence acquired. But what we contend for is, that he shall not be permitted, after thus helping himself to the greatest portion of [115] his debt, to take the benefit of his proof against the estate of Palmer and Co., and receive dividends upon his whole debt. The learned Chief Justice of the Supreme Court appears in his judgment to have been strongly influenced by a dictum of Lord Loughborough in *Sill v. Worswick* (1 H. Bla. 693), where his Lordship said, "It by no means follows, that a Commission of Bankruptcy has an operation in another country against the laws of that country. I do not wish it to be understood that it follows, as a consequence from the opinion I am now giving, (I rather think the contrary would be the consequence of the reasoning I am now using,) that a creditor in that country, not subject to the Bankrupt Laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable." In the present case, however, the bill was filed by the Appellant, not to compel the creditor to refund any portion of his debt, but the dividends upon that debt, which, after receiving the greatest portion of his debt, he ought not, in conscience and equity, to be permitted to retain. There is a much stronger dictum of Lord Chief Justice Eyre, in *Philips v. Hunter* (2 H. Bla. 413), that makes in favour of the claim of the Appellants; and it is of the greater weight, because that eminent Judge differed with the other Judges upon the main question in that case. His Lordship there said, "If a man use legal diligence in a foreign country, and obtains a preference, it cannot be helped, but if he afterwards comes here for a dividend, he shall first refund what he has so acquired [116] by his lawful diligence, and come in equally with the rest of the creditors, or not come in at all. This is the only fair and practicable coercion that can be used towards creditors abroad." The consequence of this reasoning is plain, as applied to the present case: if the Orphan Chamber choose to come in under the insolvency of Palmer and Co., and insist upon retaining the dividends they have received, they ought to refund what they have acquired by their legal diligence in Java: if they refuse to do this, they ought to be compelled to refund the dividends, because they ought not to have been permitted to come in at all under Palmer and Co.'s insolvency. The judgment of Lord Eldon, also, in the case of *Selkraig v. Davis* (2 Rose, Bkcy. Cases, 318; 2 Dow. 231), is in entire accordance with the principle thus laid down by Lord Chief Justice Eyre. His Lordship says, "It has been decided that a person cannot come in under an English Commission, without bringing into the common fund what he has received abroad. The reason of that cannot be merely that all the creditors under the Commission are to be put

on an equal footing. If he has got property (which did not pass under the Commission) before he came in, whatever Chancellors may have said on the subject, they had no more right to call into the common fund that which he *had got* by law, and which was kept out of the common fund, than any other part of his property. It could only be, therefore, because the law did not pass the property of the individual coming within your jurisdiction, that you say to him, if you claim anything under this Commission you shall not hold in your hands the property which you have got by force of the law [117] of another country. If a man choose to say, I will not bring into the common fund that sum which I have received, then let him retire." If the Orphan Chamber, therefore, had got the property at Java before they came in under Palmer and Co.'s insolvency, they could not of course be compelled to refund what they had so got by law; but as they got it after they had so come in, it would seem to follow, from this reasoning of Lord Eldon, that if they claim anything under Palmer and Co.'s insolvency, they ought not to hold in their hands the property which they have got by force of the law of another country.

But the bill, in the present case, does not pray that the Respondents may refund the proceeds of the property at Java, but merely the dividends which they have received on proof of their own debt; and this brings us to the third proposition, namely, that the Respondent is bound, as the executor of Gavorke Manuk, and the agent of the Orphan Chamber, to refund the dividends which he had so received, and that a bill in equity is the proper proceeding for that purpose. It is quite clear, from the authorities already cited, that if the Orphan Chamber insist on the retention of the property which they have acquired by their legal diligence in Java, they are bound to retire from any claim to a distributive share under Palmer and Co.'s insolvency; and if they are bound to retire from any such distributive share, it follows, that they ought to refund any dividends which they have received on account of such distributive share. That they are not entitled to these dividends is plain, from what Lord Hardwicke said in a case in Wilson's Bankruptcy (see *Waring v. Knight*, 1 Cooke's B. L. 300), [118] where an application was made to stay proceedings against the bankrupt's property in Scotland, which, although Lord Hardwicke said could not be done, yet he added, that if the effects there were not sufficient to satisfy the party's debt, and he applied for a dividend under a Commission here, in that case he would postpone him till the rest of the creditors were paid in the same proportions as he had received. If it is contrary to equity, that the Orphan Chamber should retain the dividends upon their whole debt, after paying themselves the greatest portion of that debt, by their seizure of the insolvent's property in Java, it seems to be a necessary consequence of that proposition, that a Court of Equity will compel them to refund such dividends, upon the same principle as it compels one of several legatees, who has been paid his legacy in full, and the assets prove afterwards deficient, to refund what he has so received, and to come in *pari passu* with the other legatees (Anon. 1 P. Wms. 495; *Edwards v. Freeman*, 2 P. Wms. 447; *Orr v. Kaines*, 2 Ves. Sen. 194). So if there be a deficiency to pay the debts of a testator, a legatee, who has received his legacy, is, in all cases, liable to refund to creditors (*Noel v. Robinson*, 1 Vern. 94; *Hodges v. Waddington*, 2 Vent. 360; *Davis v. Davis*, Dick. Rep. 32; *Hardwick v. Mynd*, Anstr. 113; *Newman v. Barton*, 2 Vern. 205). In bankruptcy, also, the same principle applies: for where a creditor, proving his debt under a commission, had been paid a dividend upon the amount of his proof, under an order of the Lord Chancellor obtained by him for that purpose and it turned out afterwards that he was not entitled to retain the dividends upon the whole amount of his proof, Lord Eldon said,—upon a [119] petition of the assignees, praying that the creditors might be ordered to refund,—that there could be no doubt of the authority of the Court to recal the dividends, and that the practice had been long established. *Ex parte Burn* (2 Rose, Bkey. Cases, 55). So, where a proof was ordered to be expunged, but, before the order was made, the creditor had received dividends upon the proof, an order was made by Lord Eldon, that he should refund the dividends to the assignees, upon a petition presented by them for that purpose. *Ex parte Dewdney* (2 Rose, Bkey. Cases, 59, note).

The *fourth* proposition we contend for is, that the Appellants were entitled to an injunction, restraining the Respondents from receiving any future dividends from

the estate of Palmer and Co. until all the other creditors of that firm were put upon an equal footing with the Orphan Chamber, in respect of the proceeds received by them from the sale of the estate at Java, or by their proceedings at Bencoolen. The learned Chief Justice of the Supreme Court at Calcutta, in deciding against the species of relief prayed by the bill, observed, that no mention was made in the bill for any further dividends being likely to arise, but that the relief, which the complainants asked by injunction, was founded entirely on the assumption, that the dividends were improperly paid, and ought to be refunded. But we submit, that the very statement in the bill, that there were outstanding debts owing to the estate of Palmer and Co. at Bencoolen, sufficiently shows that there is a fund out of which further dividends might be likely to arise. At any rate, the Appellants were entitled to an injunction to restrain the proceedings against the Bencoolen debtors, or to restrain the Re-[120]-spondents from receiving any further dividends until those proceedings were abandoned, and this, under the prayer of the bill for general relief. It has been already shown, that when a creditor has come in under a Commission of Bankrupt, he cannot afterwards sue the bankrupt at law; for having deliberately made his election to take the benefit of the Commission, he will be restrained from prosecuting an action against the bankrupt for recovery of the same debt. Upon the same principle, it has been determined, that after a Plaintiff has obtained a Decree for an account against a party in a Court of Equity, he will be restrained from proceeding at law against the Defendant, pending the suit in Equity. *Mocher v. Reed* (1 Ball and B. 318), *Wilson v. Weatherhead* (2 Meriv. 406), So in the case of *Booth v. Leicester* (1 Keen. 579), where a Plaintiff had instituted a suit in the Court of Chancery in England, in which that Court had pronounced a Decree refusing the relief sought by the Plaintiff, and he afterwards commenced a suit in the Court of Chancery in Ireland, in which the subject matter was the same, the English Court of Chancery granted an injunction to restrain the Plaintiff from proceeding further in the Irish Court. It appears from these cases, therefore, that a party will be restrained from proceeding against another in a foreign country, for the same cause of suit for which it has instituted proceedings against him in this country; and the same principle applies to a party who has proved his debt, and has taken the benefit of the English Bankrupt or Insolvent Law.

The Respondent alleges that the Appellants have not shown, by the statements in their bill, that they [121] are entitled to any equitable relief. Now, what the bill shows is this, that the Orphan Chamber, after proving their debt against Palmer and Co.'s estate, and receiving dividends on the whole amount rateably with the other creditors of the insolvents, got possession of the estate in Java, by which alone they realize three-fifths of their whole debt, and obtain more than three times as much as any of the other creditors. Whether such proceedings are accordant with principles of equity, is now for the Court to determine. Lord Coke, in his definition of equity, says, "*Aequitas est quasi Aequalitas*;" but the Respondent, in this case, would contend that the greatest equity is the grossest inequality. The learned Chief Justice of the Supreme Court, in the course of his judgment on the hearing of the demurrer, acknowledges more than once, "that the case was attended with great doubt and difficulty," and we submit, that when a Court of Equity entertains any doubt in regard to the law applicable to a case, it should lean to that decision which is most consonant to principles of Justice and Equity. There can be no doubt, as the Chief Justice himself admits, that the great principle of the Bankrupt Laws, which is justice founded on equality, would be grossly violated in this particular instance, if a creditor, after coming in *pari passu* with the other creditors of the insolvents, were permitted to retain the dividends on his whole debt, besides recovering three-fifths of the debt by proceeding against the property of the insolvents in a foreign country. The dictum of Lord Loughborough in *Sill v. Forswick* (1 H. Bl. 693), which weighed so much on the mind of the Chief Justice in deciding this question, merely applies to the liability of a foreign creditor to refund [122] what he has acquired by his legal diligence in the foreign country, and is no way applicable to the present case. The Plaintiffs here do not require the creditor to refund the fruits of his judgment in the island of Java; but they say, that it is contrary to equity, and inconsistent with every notion of justice, that he should be permitted to retain the dividends received by him on the whole amount of

his debt, which he was only allowed to prove, on the faith of an implied agreement to come in equally with the other creditors of the insolvents. It is true that this point does not altogether escape the attention of the learned Chief Justice, for he says, "Can the recovery of this judgment by the foreign creditor give to the assignees equitable grounds for applying to a Court of Equity to oblige the creditor to refund dividends, to which, at the time he received them, he was clearly entitled?" Now, supposing that the foreign creditor had, instead of three-fifths, received the whole of his debt by his proceedings in the Courts at Java, can it be doubted for a moment that he would in that case be compelled to refund the dividends which he had previously received, notwithstanding, at the time he received them, he might have been fairly attached to them? In the case already cited, of *Ex parte Burn* (2 Rose, Bkey. Cases, 55), the creditor, at the time he received the dividends, was fairly entitled to them, under an order of the Lord Chancellor, but it was no reason, because he was at the time entitled to receive them, that he was afterwards entitled to retain them, when subsequent events, in which the creditor was an acting party, rendered the retention of them inequitable and unjust.

On the various grounds we have mentioned, there-[123]-fore, and more especially on the ground of proof being considered an election to come in equally with the other creditors under a Commission, and an abandonment of all right to sue the bankrupt at law for the same debt, we submit that the Appellants, the Plaintiffs in the Court below, were clearly entitled to an order on the Respondent to refund the dividends which he had received as the representative of the Orphan Chamber, and to restrain him from receiving any further dividends until all the creditors of Palmer and Co. should have received dividends sufficient to put them on an equal footing with the Orphan Chamber.

Mr. Pemberton, Q. C., Mr. G. Richards, Q. C., and Mr. Coleridge, for the Respondents. -The Appellants are not entitled to any relief by bill on the equity side of the Supreme Court, but ought to have proceeded, by petition, in the matter of Palmer and Co.'s insolvency. There is no case to be found in the books where dividends have ever been ordered to be refunded to assignees in a proceeding by bill. It has been contended on the other side that the Appellants were entitled to an order of the Supreme Court to restrain the Respondent, or the Orphan Chamber, from proceeding against the debtors to the estate of Palmer and Co. at Bencoolen, and that this order could have been made under the prayer for general relief. But as no part of the prayer of the bill is to restrain proceedings against the debtors at Bencoolen, no specific relief of this description could be obtained under the prayer for general relief, unless the particular relief sought was applicable to the allegations in the bill. Now there is no allegation in the bill which would justify an order for an injunction to [124] restrain the Orphan Chamber from proceeding against the debtors in Bencoolen, and, moreover, such an order could not be made, because the Orphan Chamber was not a party to the suit, nor subject to the jurisdiction of the Supreme Court.

But as to the main question, whether the Orphan Chamber were justified in proceeding against the estate of Palmer in the island of Java, to recover a portion of their debt, it is clear that the estate there did not pass by the assignment to the assignees of Palmer and Co., for on that question a Court of competent jurisdiction has decided in the negative. Neither the Bankrupt Law of England, nor the Insolvent Law as administered at Calcutta, can control the law of an independent foreign state. In *Sill v. Worswick* (1 H. Bl. 693), Lord Loughborough expressly says, "It by no means follows, that a Commission of Bankrupt has an operation in another country against the law of that country," or "that a creditor in that country, not subject to the Bankrupt Laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable." Now, in the present case, the property was recovered in an adverse suit with the assignees, for they contested the right of the Orphan Chamber in the Courts at Java, and were unable to defeat their claim. But in no case where a party has recovered a debt in a Court of competent jurisdiction, by due process of law, can he be compelled to refund the money so recovered, because another party might have successfully resisted his [125] claim. For suppose a man, after becoming bankrupt and obtain-

ing his certificate, is sued by a creditor for the amount of his debt, and neglects to plead his certificate, could the creditor be compelled to refund the money he had thus recovered in the action? The observations of Lord Eldon in *Selkirk v. Davis* (2 Rose, Bkey. Cases, 318), which has been so strongly relied on by the other side, make much more in favour of our case than theirs. His Lordship there says, "If the creditor of a bankrupt has got property (which did not pass under the Commission) before he came in, whatever Chancellors might have said on the subject, they had no more right to call into the common fund that which is got by law, and which was kept out of the common fund, than any other part of his property." [Mr. Justice Bosanquet: In the case put by Lord Eldon, the creditor had received the proceeds of the estate in the foreign country, before he came in under the Commission.] In the present case it is clear, that by the law of Java, the real estate of the insolvents did not pass to the assignees, and in *Selkirk v. Davis* (2 Rose, Bkey. Cases, 98), Lord Eldon expressly says, "That according to the English law, there is no authority to compel a bankrupt to convey the real estate" belonging to him in a foreign country, and that the only mode of getting at the real property of a bankrupt in Scotland "was, for the creditors to assign their debts to some individuals who proceeded against the heritable property, according to the Scotch law, or to withhold the certificate till the bankrupt consented to convey." Now here we have obtained, by our legal diligence, what the assignees could never have obtained by the law of Java, which, it must be [126] taken for granted, prevented the bankrupt's property in that island from passing to them by the assignment. [Mr. Baron Parke: The Appellants ought certainly to have stated in their bill, that by the law of Java they could not have recovered the property belonging to the insolvents in that country, if the Orphan Chamber had not adopted proceedings for that purpose.] In *Hunter v. Potts* (4 T.R. 192), it is admitted by Lord Kenyon, in delivering his judgment in that case, that the property of a bankrupt, in a foreign country, does not pass to his assignees, if there is some positive law of that country to prevent it; and he also adds, that if there be a law of that country directing a particular mode of conveyance, that mode must be adopted. It is well known that the American Courts permit a creditor to take the property of his debtor in that country, notwithstanding our Bankrupt Law. And even if the property is situate in our own colonies, it was decided in *Brickwood v. Miller* (3 Meri. 279), that where a creditor of two persons in the West Indies had attached joint property there, the assignees of one partner resident and become bankrupt in England, were entitled only to the surplus in his hands, after satisfaction of his joint debts.

It has been urged, on the part of the Appellants, that the Respondent is bound, in equity and conscience, to refund the dividends he has received, after the Orphan Chamber has recovered a portion of their debt by their proceedings in Java. But is there any thing inequitable or contrary to conscience, that a creditor should, by legal process, be able to recover the whole of his debt? If the assignees have any equity in [127] this case against the Respondent, it must have existed at the time the proof was tendered by him under the insolvency of Palmer and Co. The equity ought to be contemporaneous with the proof, or the receipt of the dividends. Now, what equity had the assignees in this case on either of those periods? The Orphan Chamber had not, either at the time of the proof or the receipt of the dividends, received one farthing from any other source, in reduction of their debt, and it was quite uncertain whether they ever would. But even granting that their right of any future proceeding against the estate in Java was to be considered in the nature of a present security then held by them, we say that the security would only amount to a separate security of one partner for a joint debt, for the estate in Java did not belong to the firm of Palmer and Co., but to John Palmer alone. Cannot a joint creditor, therefore, holding the separate security of an individual partner of a firm, prove the whole amount of his joint debt, and proceed afterwards against the separate partner? The decision in *Ex parte Peacock* (2 G. and J. 27), clearly shows that the creditor is entitled to do so. It is quite clear in this case, that the property in Java did not form part of the general property belonging to Palmer and Co.: for the allegation in the bill is, that the property was held by John Palmer in his sole name, for the joint benefit of the two firms of Palmer and Co. and Cockerell and Co., in equal shares. Then with respect to that portion of the

proceeds arising from the sale of this property, which would have belonged to Cockerell and Co., how could that have formed part of the estate of Palmer and Co.? Taking [128] it either way, whether as the joint property of Palmer and Co. and Cockerell and Co., or as the separate property of John Palmer, it would in neither case be the property of the assignees. And if the allegation in the bill is correct, that this plantation or estate was purchased and carried on for account, and with the joint funds, of the two several firms of Palmer and Co. and Cockerell and Co., the assignees could not claim any portion of this property until an account was taken of the dealings of these two firms, and it was ascertained what balance was due from one to the other.

For these reasons we submit that the judgment of the Supreme Court was right, and ought to be affirmed.

Mr. Wigram, in reply.—With respect to the objection that has been now, for the first time, raised by the Respondent, that the Appellants ought to have proceeded by petition, and not by bill, the answer is, that the proceeding in Java was not a proceeding in the Insolvent Court, and therefore the proper remedy was by bill, and not by petition. But this objection was not included in one of the causes of demurrer to the Plaintiff's bill, nor was the point ever raised in argument in the Court below. As it was not taken then, it is therefore clear that it was not the practice of the Court to proceed by petition. In regard to the observation of one of their Lordships, that the bill is defective in not stating that the assignees could have recovered the property in Java if the Orphan Chamber had not interposed, it is expressly alleged in the bill, that the assignees, after the insolvency of Palmer and Co., duly instructed [129] the firm of Maclaire and Co., as their agents at Batavia, to take possession of the plantation and estate in Java, and of the the interest of Palmer and Co. therein, and to dispose of and realize the same for the benefit of the creditors of the insolvent firm, and to remit the proceeds thereof to the assignees, for distribution amongst the creditors at large in due course, and that they were prevented from doing this by the proceedings of the Orphan Chamber. This, it is submitted, amounts to an allegation that the property could have been recovered by the assignees for the benefit of the general creditors, if the Orphan Chamber had not interfered. If this property, therefore, might have been recovered by the assignees, but for the proceedings of the Orphan Chamber, who had, by their previous proof against Palmer and Co.'s estate, for their whole debt, agreed to come in *pari passu* with the other creditors, the assignees are entitled to have the dividends returned to them, which were only paid to the Orphan Chamber on the faith of that agreement. As to the objection to the stay of any further dividends, that no mention is made in the bill of any further dividends being likely to arise, it is perfectly clear that there are assets in Bencoolen to which the assignees are entitled, and which therefore remain to be divided amongst the creditors. And there is as little doubt, that the assignees might impound any further dividends, payable to the Orphan Chamber on their proof, until they abandoned their proceedings against the Bencoolen debtors. But it is submitted, that the assignees are, under all the circumstances, fully entitled to an order on the Respondent, to refund the former dividends, as well as an injunction to restrain him from [130] receiving any further dividends, and that the judgment of the Supreme Court must be reversed.

Mr. Baron Parke (Feb. 24, 1840).—This is an appeal from an order of the Supreme Court at Calcutta, on the Equity side of that Court, allowing a demurrer and dismissing a bill.

The facts stated in the bill, and admitted by the demurrer, are shortly these:

The Appellants, the Plaintiffs below, are the assignees, under the Indian Insolvent Act [9 Geo. IV. c. 73], of Palmer and Co., who were indebted, at the time of their insolvency, to the estate of a deceased Armenian merchant, Gavorke Manuk, domiciled at Batavia, in the sum of 2,52,460 rupees. The Respondents were, at the time of the filing of the bill, the representatives of the deceased in Bengal: other representatives had been appointed before, and been removed. In Batavia his representatives were the Orphan Chamber, who, after the insolvency, proceeded in the Court at Batavia to recover satisfaction from a real estate in Java, the joint

property of Palmer and Co. and Cockerell and Co., but held in the individual name of Palmer. The assignees of Palmer and Co. in vain interposed: their claim was disallowed by the Colonial Court and the Court of Appeal in Europe, and the Orphan Chamber ultimately recovered 1,50,134 rupees, a sum greatly exceeding the amount of all the dividends declared at the time the bill was filed on the debt of 2,52,460 rupees, or likely to be declared thereon. In the meantime, and before the process against the real estate in Java, the Bengal representatives of the deceased received at different times from the assignees [131] of the insolvent estate, dividends amounting to 71,793 rupees on the whole debt. The Orphan Chamber had also caused process to be served on debtors of the firm domiciled at Bencoolen in the island of Sumatra, and were endeavouring to enforce the sentence which they had obtained at the Court at Batavia against those debtors. And the prayer of the bill was, that the Defendant, the now Respondent, might be decreed to refund to the Plaintiffs all the dividends received by him, or the preceding representatives of the deceased creditor in Bengal, with interest, and that the Defendant might be restrained by injunction from suing for, demanding, or recovering any future dividends, from the estate of Palmer and Co., in respect of the debt due to the deceased's estate, until all the other creditors of the insolvent firm should have received dividends on their respective debts, proportionate to, and in the like ratio, as the sums realized by the process in the island of Java, or which had or might be realized by the proceedings at Bencoolen, or elsewhere, within the kingdom of the Netherlands; and for such further and other relief as the nature of the case should require.

The learned Chief Justice of the Supreme Court, Sir Edward Ryan, with the notes of whose judgment we have been furnished, had his attention directed solely to the question, whether the Defendant was bound to refund the past dividends, and ought to be restrained from receiving any in future, in consequence of the satisfaction received by the Orphan Chamber, (representing the same deceased creditor as the Defendant,) out of the real estates of the insolvent in Java. Upon a review of the authorities upon this subject, and acting on the distinction between personal and [132] real estate, the former of which is, generally speaking, governed by the law of the domicile of the owner, and transferred by an assignment according to that law, the latter by the *lex loci rei sitae*, and not so transferred—the Chief Justice gave his opinion, though with some little doubt, that the assignees had no right to the real estate in Java, and consequently allowed the demurrer and dismissed the bill.

If this had been the sole question in this case, their Lordships have no difficulty in saying that they should have concurred entirely in opinion with Sir Edward Ryan. If the real estate in Java did not pass by the assignment under 9 Geo. IV., c. 73, s. 9, nor could in any way be got hold of, and made available by the assignees, for the payment of the general creditors, any individual creditor who could obtain it by due course of law would have a right to hold it, and if he duly proved the debt due to him, before he had been paid any part of the debt so proved, by means of that estate, he would be entitled to receive the dividends under the insolvent estate, until he had been paid altogether twenty shillings in the pound, exactly in the same way as if the creditor had had a security on the real estate or personal credit of a third person. In this case he could neither be compelled to refund the money obtained by means of the real estate, or the dividends received on the debt, or be restrained from receiving those hereafter to become due.

The principle is, that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund: and this principle does not apply where [133] that creditor obtains by his diligence something which did not and could not form a part of that fund.

Was the real estate in Java therefore a part, or capable of being made part, of the general fund distributable under the Bengal Insolvent Act [9 Geo. IV., c. 73]? Upon the statements contained in the bill, it does not appear that it was. Under the general assignment made by Palmer and Co., of all their property which would operate wherever, but not elsewhere, the Imperial Parliament could give the law,

it certainly would not pass, unless the law of Java made such conveyance, being in the English form, operative. There is no statement that it did; and on the contrary, as the intervention of the assignees was held to be ineffectual by the Court at Batavia and by the Court of Appeal in the Netherlands, it must be assumed that by the *lex loci rei sitae* the assignees were not at the time of the suit by the creditors entitled to the property.

But it is said that they might by some mode of proceeding have obtained this property, and brought it into the common fund, if the creditors had not interfered. We are not, however, able to see in what way that could have been accomplished by the law of England in force at Calcutta: there is no statement that it could have been done by the law in force at Java; as to the law of England, assuming that it did not pass, we have the authority of Lord Eldon in *Selkirk v. Davis*, (2 Dow. 245,) in the analogous case of an English Commission of Bankruptcy, that a bankrupt could not be compelled directly to assign his foreign real estate to his assignees, and though there are indirect methods, as withholding their certificate, or by creditors assigning their debts to others in order to obtain execution against the real estates, neither [134] of these are in the power of the assignees, as such, nor would the first of them seem to be in any case properly applied; at all events no such steps, as far as appears by the bill, were taken by any persons at the time the right of the Orphan Chamber accrued. They were then, by law, fully entitled to have satisfaction out of the real property, and that property was at that time no part of the fund available for the benefit of the general creditors. And we are of opinion, on these grounds, that the personal representatives of the deceased were entitled to all the benefit they had then obtained by their diligence, as much as if it had been the estate of a stranger.

But it is insisted on the behalf of the Appellants, that the bill states that there was personal estate at Bencoolen, viz., the debts due from persons domiciled there, and which did pass under the assignment, and that they were entitled to some species of relief, under the general prayer of relief in respect of that part of their claim. Such relief, it was contended, ought to be given either by injunction to restrain proceedings against the Bencoolen debtors, or to restrain the Defendants from receiving further dividends unless those proceedings were declared to be abandoned. It was not disputed that the debts at Bencoolen did pass by the general law of nations under the assignment; but it was contended that in this case the Plaintiffs could not have any part of that relief which they now ask.

First; that no injunction could be granted to restrain the proceedings against the Bencoolen debtors, because the Orphan Chamber was not a party to the suit, nor subject to the jurisdiction of the Court. And this we think is a satisfactory answer to the argument that this species of relief could be granted.

[135] Secondly; that an injunction to stay the receipt of dividends was not the proper remedy, but that the jurisdiction was in the Insolvent Court on petition. We do not find that any jurisdiction is given to the Insolvent Court by the 9th Geo. IV., c. 73, to determine such matters on petition, and we cannot assume that they have any such power; still less that they have such power exclusively. This objection therefore cannot prevail.

Lastly; it was said that the Plaintiffs were not entitled to such relief, under the general prayer. There is no dispute about the rule on this subject, which is laid down by Lord Eldon, in *Hiern v. Mill* (13 Ves. 119), in very distinct terms: "The rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief." If we apply this rule to the present case, we find that the specific relief which is now contended may be asked for at the bar under the general prayer,—namely, an injunction to restrain the receipt of dividends until the proceedings at Bencoolen should be abandoned,—is supported and warranted by the general case made by the bill as to the personalty, and is, in truth, a relief of the same description as that specifically prayed for, namely, an injunction to stay the receipt of dividends until all the

creditors were on an equal footing. It is only a different qualification or modification of the specific relief prayed.

[136] We are of opinion, therefore, that as the Plaintiff had an equity to obtain some relief under the bill, the demurrer ought not to have been allowed, and the order of the Court below must be reversed.

[Mews' Dig. tit. BANKRUPTCY, B. V. PROOF OF DEBTS, 28, iv; VIII. DIVIDENDS, 1; also tit. EXECUTOR AND ADMINISTRATOR; X. ADMINISTRATION, d.; also tit. PAYMENT, A. I.; also tit. PRACTICE, XXV. PLEADING, b. S.C. 2 Moo. Ind. App. 353; 1 Mont. D. and D. 45; Morton, 407. See Indian Insolvent Act, 1848 (11 and 12 Vict. c. 21), s. 7; *Ex parte Rogers*, 1881, 16 Ch.D. 665; *Callender v. Colonial Secretary of Lagos* (1891), A.C. 460; *Cooke v. Charles A. Vogeler Co.* (1901), A.C. 102; Dicey, *Conf. of Laws*, 334, 336; Westlake, *Priv. Int. Law*, 3rd ed. 153, 155, 156, 157.]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

FREDERICK DUFAUR,—*Appellant*; WILLIAM CROFT, WILLIAM UNDERWOOD, PINDER SIMPSON, and REBECCA DAY, —*Respondents** Feb. 13, 14, 1840].

A Codicil prepared by a Solicitor, appointing him a joint executor, with a legacy of £500, which was read over to the Testator, who was blind, and, at the time of execution, of fluctuating capacity, in the presence of the attesting witnesses, pronounced against; there being no direct evidence that it was prepared in consequence of instructions from the Testator, or satisfactory proof that at the time of the execution he was cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing.

Charles Day, the deceased in the cause, died on the 26th of October 1836, possessed of real estates of the value of £140,000, and of personal property of the value of about £200,000.

On the 1st of May 1834, he duly executed his Will and a Codicil thereto, and appointed William Croft, William Underwood, and Peter Simpson, executors. He subsequently executed four other Codicils, bearing date respectively the 2nd, 3rd, 10th, and 22nd of September 1836.

[137] The fifth Codicil, the validity of which formed the subject of the present Appeal, was as follows:

"This is a Codicil to the last Will and Testament of me, Charles Day, of Edgeware, in the County of Middlesex, Esquire, which I desire may be annexed to and taken as part thereof. I hereby nominate, constitute, and appoint Mr. Frederick Dufaur, of 23, Queen Ann Street, Cavendish Square, one of my executors jointly with the executors appointed by my said Will, and I give and bequeath unto the said Frederick Dufaur, the sum of five hundred pounds, free and clear of legacy duty, for the trouble he may have attending the execution of the trusts thereof; and it is my will and desire that the said Frederick Dufaur should continue after my decease to receive the rents of my houses in London, and also the annuities and mortgage interest which he now receives for me, upon the same terms as he now receives the same. Dated this 22nd of September 1836. "CHARLES DAY.

"Signed in the presence of, etc.,

"Thomas Ansaldo Hewson, Surgeon, 6, Woburn Place, Russell Square.

"Horatio Clagett, Edgeware.

"Frances Barton, Edgeware."

The Executors propounded the Will and first Codicil for proof in solemn form

* Present: The Lord President [Lord Wharncliffe], Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine.

of law, and prayed probate of those papers only, but did not oppose the probate of the Codicils of the 2nd, 3rd, and 10th of September, which were propounded by the parties respectively interested under them.

The above Codicil of the 22nd of September was [138] propounded by Mr. Dufaur: and opposed by the Executors.

On the 28th of June 1838, the Judge of the Prerogative Court (Sir Herbert Jenner) decreed probate of the Will and first four Codicils to the Executors, and pronounced against the validity of the fifth Codicil on the ground of failure of proof (reported 1 Curteis, 783, *nom. Croft v. Day and Others*).

From this sentence Mr. Dufaur appealed to Her Majesty in Council.

Mr. F. Kelly, Q.C., Mr. C. Cooper, Q.C., Dr. Addams, and Mr. Wollaston, for the Appellant.

Sir William Follett, Q.C., and Dr. Nicholl, for the Respondents, the Executors.

The authorities relied upon and referred to in the course of the arguments were *Constable v. Tuffnell* (4 Hagg. Ecc. Rep. 465; 3 Knapp, P.C. Cases, 122), *Billinghurst v. Vickers* (1 Phill. 193), *Brogden v. Brown* (2 Add. 441, 449), *Blewitt v. Blewitt* (4 Hagg. Ecc. Rep. 450), *Attorney-General v. Parnter* (3 Bro. C.C. 441), *Willan v. Willan* (2 Dow. 282), Godolphin's Orphan Leg. (p. 24, 2nd ed.), Swinburne on Wills (p. 79, 5th ed.), Domat's Civil Law (Book 9, sec. 3, § 6, 12).

Mr. Justice Bosanquet (Feb. 24).—Their Lordships being of opinion that the Judge of the Prerogative Court has come to a right conclusion in this case, and that his sentence ought to be affirmed, [139] it will not be necessary to enter at much length into the evidence which appears upon the proceedings.

This is a case in which a Codicil has been prepared by an attorney in his own favour without any communication with the confidential solicitor of the testator, who had prepared the Will and all the other Codicils except one, which Codicil has been made by the Testator's apothecary, at his particular request, to provide for some natural children, when he believed himself in danger of dying before his solicitor could come to him, and was delivered to the Solicitor without delay.

The Testator was totally blind; his speech was to a certain extent affected; his lower extremities were completely paralyzed, and his mental faculties so much weakened, according to the account of his physician, as to render him incapable of conversing rationally for more than a quarter of an hour together. Except at such intervals, he displayed the most extravagant inconsistencies, confusion, and childishness; and even during those short intervals, though he conversed freely and rationally, he is stated to have shown feverish excitement, and after a little time his thoughts became confused. Upon a *post mortem* examination it appeared that a disease of the brain had affected the nerves of both of his eyes and ears.

He was naturally of a strong, vigorous mind; and possessed a memory remarkably retentive. On the 26th of August, he had three epileptic fits, after which he grew gradually worse; but he executed three Codicils, pursuant to his own undoubted instructions, on the 2nd, the 3rd, and the 10th of September. On the 12th of September he had a fit of silence, and refused food; and on the 16th another of the same [140] kind, each of which lasted about twenty hours, indicating, in the opinion of his medical attendants, a failure of mental capacity. On the 22nd of September the Codicil in question was executed. No direct evidence has been given to prove that it was prepared in consequence of any instructions from the Testator.

Of the three Executors named in the Will, one was the confidential solicitor of the Testator, and another had been inserted on the advice of that solicitor.

The Codicil in question purports to constitute the Appellant a co-executor with a legacy of £500, free from legacy duty (a legacy similar to those left to the Executors in the Will), and also to appoint the Appellant collector of the Testator's rents (amounting to £3000 or £4000 a-year), with a commission of two-and-a-half per cent.

The reason which the Appellant assigns for his appointment as an Executor is, that the other Executors were getting in years, and that it was therefore advisable to add a younger man. Assuming this to be the truth, the Testator must have contemplated the Appellant becoming, by survivorship, the sole Executor of his very

large property, as well as his introduction to the joint control over that property during the life of his confidential solicitor without his previous consent.

Independently of these considerations there does not appear to be any thing unreasonable in the contents of the Codicil. The Appellant's family had been long known to the Testator, and the Testator had employed him in lending money upon annuities and in the discount of bills, and had also employed him in the collection of the rents mentioned in the Codicil.

[141] The facts attending the preparation and execution of the Codicil are as follows:—Mr. Dufaur, the Appellant, in consequence of a note written by the Testator's son-in-law, expressing a wish to see Mr. Dufaur, at Edgeware, went to the Testator's house there, on the 21st of September. On the evening of that day he produced a draft in pencil, written by himself, of the Codicil in question, to a surgeon (Mr. Hewson), who was in the habit of attending the Testator, and requested him to copy it, which he consented to do. On the next morning, at breakfast, in the presence of the Testator's wife and daughters and of his son-in-law, as well as of Mr. Hewson, the Appellant mentioned the Testator's intention to make him an Executor; to which no objection was made; and as soon as the Codicil was copied by Mr. Hewson, those persons, with the Appellant, Mr. Dufaur, went together to the Testator's room, between nine and ten in the forenoon, where the Testator was sitting on a sofa, supported by pillows. Mr. Hewson, having the Codicil in his hand, said to the Testator, "I have prepared a statement, in compliance of the wish of Mr. Dufaur, and shall I read it to you, Sir?" To which the Testator assented by nodding his head. Mr. Hewson proceeded to read the Codicil, as he says, as distinctly and audibly as he could, and the Testator appeared to pay great attention to it. The reading being completed, Mr. Hewson asked the Testator, if that was his wish? to which the Testator answered, "Yes," firmly and distinctly. Mr. Dufaur then said, "Now, Mr. Day, you can make your mark to this;" upon which the deceased, in an irritable tone and manner, said, "Why make my mark? why cannot I sign it?"

The Testator, Mr. Hewson says, then called Mrs. Day to bring his desk, which was brought, and the [142] Testator signed his name, his hand being guided by Mrs. Day, as seems to have been done on other occasions when he signed his name.

The three other Codicils, executed in September, had been signed with his mark only. Mr. Dufaur asked the witnesses to sign their names, which they did. They were Mr. Hewson, Mr. Clagett, and Frances Barton, the maid servant. The two former of these witnesses, though they witnessed the act of execution, state that, in their opinion, the Testator, at the time of executing, was not capable of executing a Codicil to his Will, or of doing any serious act requiring thought, judgment, and reflection. On the other hand, the last witness deposes that he perfectly well knew what he was about, and all that was said in his presence; that he was of perfect mind, memory, and understanding; and that being in constant attendance upon him, she had, according to her own idea, an accurate knowledge of his state of mind; and that during the time the business of the paper was going on, he was quite himself, and fully capable of making and executing a Codicil to his Will, or of doing any other serious or important act. This is her opinion; but in weighing that opinion, what follows must be taken into consideration.

The same witness states that immediately after the execution of the Codicil, and before the other two witnesses had left the room, the Testator conducted himself in such a manner that she should say, at such time, he was not of sound mind, memory, and understanding: which induced her to remark, "See how soon he goes off again." Her description of the Testator's state on the 12th September (the day of the first silent fit) is as follows:—"I did observe many [143] instances of incoherent, irrational, and childish behaviour in the deceased. He would go on talking nonsense for an hour or two, then he would go off to sleep as if from exhaustion, and wake up again in an hour perfectly refreshed, and his mind and memory perfectly collected, and so he would remain for three or four hours, then he went off with his nonsense, and so he kept sometimes foolish and at other times quite rational till his death."

The apothecary (Mr. Foote), who attended him daily, says, that after the 13th

of September, he is decidedly of opinion that Mr. Day was never capable of doing any act requiring thought, judgment, and reflection.

What the state of the Testator's mind was on the morning of the 22nd September, before the witnesses came into the room, or what sort of night he had passed, does not appear. The Appellant was in his room with him before breakfast, but no evidence has been adduced with respect to the Testator's condition at that time: though both the man-servant Hunt, and the maid-servant Barton, were in constant attendance upon him.

There is a difference in the testimony of Mr. Hewson and Frances Barton respecting anything having been said about the execution by the Testator. Hewson says, nothing whatever was said by the deceased as to declaring the paper to be a Codicil to his Will, or as to his publishing it as such; on the other hand, Barton says that either Dufaur or Hewson said some words to the deceased which he was to repeat, and he did repeat the said words perfectly and correctly: but she cannot say what they were, they were something about signing, sealing, and declaring.

[144] Mr. Clagett does not recollect any thing being said on the subject. Hewson's account is, that Mr. Dufaur said, "Now, Mr. Day, you can make your mark to this." Upon which the Testator asked the question, why he could not sign it, in an irritable tone and manner. Clagett says the question was asked in a hasty way, and that either Dufaur or Hewson asked the Testator to make his mark.

Barton thinks that Hewson said he should have to trouble the Testator to sign it, and the deceased seemed to give his assent by nodding his head, and she went of her own accord and fetched a little desk which the deceased was in the habit of using latterly when he signed papers. She neither speaks of the Testator saying, "Why cannot I sign it?" or of his calling for the desk. But she was not in the room at the time.

That the Testator did use the expression about signing is most probable, because the Codicil is signed, while the others were not.

The only other word which the Testator is stated to have used is, "Yes," unless Barton's evidence can be relied on of his having correctly repeated, after some other person, words of signing, sealing and declaring, which are the words of the attestation clause—which may have been read by Mr. Hewson as well as the body of the Codicil.

Now the question is, whether the evidence of what passed upon that occasion is sufficient to satisfy a Court of Probate that the contents of the Codicil originated with the Testator, or were adopted by him at a time when he was in a condition to exercise, and did exercise, thought, judgment and reflection respect-[145]-ing the act which he was doing and the contents of the paper which he signed.

If this were the case of a Testator possessed of undoubted and unimpaired capacity, the reading of the instrument in the presence of his family, pursuant to his desire, expressed by gesture, his approval of it by an affirmative expression, and the signature of his name, might be sufficient to show that the act was his own, though the instrument had been prepared by the person to be benefited by it. But in a case circumstanced like this, where the capacity is fluctuating and the intervals of reason very short, it is incumbent upon the party propounding the instrument, to show, by more than ordinary proof, that at the precise time when the act was done the Testator was in the possession and exercise of his mental faculties.

In the present case there is a total defect of evidence as to any subsequent recognition by the Testator of what he had done. Though he lived from the 22nd of September to the 26th of October, and though he is said, by Barton, to have been rational, at times, till his death, he does not appear to have ever spoken of the Appellant as his Executor, of having given him any legacy, or intending to confer any benefit upon him, or having appointed him to collect the rents after his death.

It has been suggested that the instructions must have emanated from the Testator, because the Appellant had no means of learning from any other source the amount of the legacies given to the other Executors, or that they were given free from legacy duty. With respect to the latter point, the Codicil of the 3rd of September, which was witnessed by Dufaur himself, and read over in his presence, expresses that [146] the legacies given by the Will were free from legacy duty: and as he had free access to the Testator's strong room at Harley House, where the

draft of the Will was kept, and which was also brought down to Edgeware, by John Simpson, in company with Mr. Dufaur, when the Codicil of the 3rd of September was executed, it is not impossible, or even improbable, that Mr. Dufaur may have seen the contents of the Will; but assuming that he never did see them, the mere correspondence in amount of a legacy of £500 given by the Codicil, and those given to the other Executors by the Will, affords very slight, if any, ground for inferring that Mr. Dufaur learned that amount from the information of the Testator.

It has been asked, if the instructions were really given to Mr. Dufaur at an interview between himself and the Testator, how was he to prove it? The answer is very simple: he might have suggested to the Testator the propriety of some other person in the Testator's confidence, rather than himself, being allowed to take the instructions for a Codicil to be made in his favour, and having no relation to any other legatee but himself. Or he might have requested Mr. Hewson to take the draft of the Codicil as prepared, to the Testator, and ascertain by sufficient inquiry whether he was capable of understanding and did understand it, and wished it to be carried into effect.

Their Lordships cannot approve the conduct of Mr. Hewson and Mr. Clagett in witnessing an instrument which, according to their own evidence, they thought the Testator unfit to execute. Nevertheless, their evidence must be attended to and weighed, though it is to be received with caution. Both of them appear to have entertained doubts of the propriety of their at-[147]-testing the act of execution: but of Mr. Hewson it ought in justice to be observed, that upon his communicating to the family the intention that Mr. Dufaur should be made an Executor, no objection was made on the ground of the Testator's incapacity, but the Testator's wife and daughter said that if it was the Testator's wish they had nothing to say to it; after which the Codicil was taken to the Testator's room and read, executed and witnessed, in the presence of Mrs. Day, as well as Mr. Clagett.

Mr. Clagett says, that from the delicacy of his situation he was unwilling to oppose what might be the wish of the Testator, who was his father-in-law. And the doubts of both these gentlemen might be, and probably were, considerably quieted by the promise of Mr. Dufaur that he would take or send the Codicil to Mr. Simpson.

On two occasions previous to the execution of this Codicil, Mr. Dufaur had been informed that the Testator was not in a state to transact business. This was calculated to apprise him of the necessity of being prepared to establish by competent proof the validity of any serious act of the Testator, and of the propriety of communicating without delay anything which might be done, to the confidential solicitor of the Testator: but no such communication was made until the 10th of November, the day after the funeral, when all possibility of testing the intentions of the Testator by any personal communications had ceased.

Their Lordships however do not mean to intimate that the Codicil was obtained from the Testator by fraud. The absence of concealment from the family of the Testator militates against suspicion on this head. But still the burthen of proof lies upon the Appellant, [148] and if he is not able to supply sufficient proof to satisfy the Court of Probate that the Testator, at the critical time when the instrument was executed, did execute it in the exercise of his mental faculties, alive to, and fully apprehending its tenor and effect, it may be his misfortune, though not his fault.

The ground upon which their Lordships think that the sentence of the Court below ought to be affirmed is, that the proof to be expected and required in such a case as this, is defective. *Deficit probatio.*

They will, therefore, report their opinion to Her Majesty, that the sentence ought to be affirmed, but without costs of the Appeal. The cause to be remitted. The widow to have her costs out of the estate.

[Mews' Dig. tit. WILL, I. TESTAMENTARY CAPACITY. g. *Soundness of Mind.* S.C. below, *sub nom. Croft v. Day*, 1 Curt. 783. See *Huguenin v. Baseley*, 1807, 14 Ves. 273; 1 Wh. and T.L.C. 7th ed. 247; *Bainbrigge v. Browne*, 1881, 18 Ch.D. 188; *Morley v. Loughnan* (1893), 1 Ch. 736.]

ON PETITION FROM JAMAICA.

In re CHARLES HARVEY * (heard *ex parte*) [May 23, 1840].

Leave to appeal from a sentence of the Supreme Court of Jamaica, affirming the decision of local magistrates, against penalties inflicted for the harbouring of apprenticed labourers, refused. The amount of the penalties being within the sum specified in the 47 and 48 Instructions of 1709, providing for appeals.

This was an application for the admission of an appeal from a sentence of the Supreme Court of Jamaica. By a decision of the magistracy of the island, the Petitioner was convicted, under clause 20 of the local "Act in Aid," passed A.D. 1834, of the offence of [149] harbouring certain apprenticed labourers, and sentenced to penalties amounting to £199 10s. currency.

From the sentence the Petitioner appealed to the Supreme Court, where the sentence was affirmed.

The Petitioner then applied to the Governor of the Island, in his character of Chancellor, for a Writ of Error, to bring the proceedings of the Local Justices and of the Supreme Court before his Excellency in Council. The Governor refused this application, because not within the instructions Nos. 47 and 48, of 1709, by which appeals to the King in Council are restricted, in civil suits, if below the value of £300, and in fines upon criminal proceedings if below the sum of £200. Whereupon, the Petitioner applied for and obtained an order of his Excellency, allowing an appeal from his rejection of the Writ of Error to Her Majesty.

Mr. W. Wood now moved to reverse the order of the Governor refusing a Writ of Error, and for an order to the Judges of the Supreme Court and Local Justices to return the proceedings to the Governor in Council, and that he might be directed to hear the appeal, or that the same might be heard before the Judicial Committee of Her Majesty's Privy Council: he relied upon the general jurisdiction of Her Majesty in Council to admit Appeals, although not strictly within the terms of the Royal Instructions, and upon the authority reserved under 3 and 4 Will. IV., c. 41, s. 21.

Mr. Baron Parke.—Their Lordships are of opinion that they cannot entertain this question. By the Royal Instruction, No. 47, which gives jurisdiction to the Governor to [150] entertain Appeals from any of the Common Law Courts of the Island, it is expressly stipulated that the sum or value appealed from shall amount to £300 sterling. The subject of the present Appeal is only £199 10s. currency; and, therefore, cannot come within the terms of the Instructions; neither does it come within the provisions of the 48 Instruction, allowing the Governor to admit Appeals to the Queen in Council, in cases for fines imposed for misdemeanors, if the sum so imposed amount to £200; the question then is, whether this is a case in which we ought to advise Her Majesty under the general jurisdiction to let in the appeal; it is true, that an appeal has been allowed in some cases, where a party has been otherwise precluded from appealing; but that has only been granted in cases of great importance; here the question is under £200: we are, therefore, of opinion that the Appeal cannot be allowed, and that the application must be refused.

[*Mews' Dig.* tit. COLONY, III. APPEALS TO PRIVY COUNCIL 3. *Leave to Appeal.* See *In re Levien*, 1855, 10 Moo. P.C. 31, 35. On point as to appeal by special leave, see cases enumerated in note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125. Appeals from Jamaica are regulated by O. in C. of April 14th, 1851 (Stat. R. and O. iv. p. 334); see also *Judicature Law*, 1879 (No. 24 of 1879).]

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir Herbert Jenner.

ON PETITION FROM THE ISLAND OF TOBAGO.

In re JOHN MUIR * [Dec. 5, 1839].

The Judicial Committee of the Privy Council have no power under their general jurisdiction, as a Court of Error, to issue an order in the nature of a mandamus to the Judges of the Common Pleas of Tobago, to enter up judgment after verdict obtained on behalf of the plaintiff in an action of assault; though such judgment ought to have been entered up as of course.

The Petitioner, John Muir, in the month of July 1838, brought an action for assault and false imprisonment—[151]—in the Court of Common Pleas, in the Island of Tobago, against James Henry Keens and others, and obtained a verdict with £115 sterling damages. The Defendants in the action shortly afterwards moved to set aside the verdict, but the Court being divided in opinion, no judgment was given.

By one of the rules of the Court of Common Pleas, it is required that “when a verdict is obtained against any party in a cause, judgment shall be moved for at the subsequent Court, and until such judgment shall be moved for and entered, no execution shall issue thereon.”

In accordance with the above rule, the Petitioner moved for judgment, when the Court, being divided in opinion, the following minute was entered: “The Court divided, so that there was no order made.”

No motion was made by the Defendants in arrest of judgment.

On the 12th of June 1839, pursuant to notice to that effect, the Defendant moved in the Court of Common Pleas, under the 92nd clause of the Court Act of Tobago, for an attachment to issue for costs, on the ground that the Plaintiff had discontinued his suit. The Court were of opinion that the motion could not be granted; and they further expressed their opinion that they would not grant judgment in the case, or interfere with it any further.

Under these circumstances, the Petitioner presented a Petition to Her Majesty in Council, praying that Her Majesty would be pleased to order and direct that an authentic copy of the record in the said action, verdict, and all orders and proceedings in any way relating thereto, might be transmitted to Her Majesty in Council, and such orders and directions given by [152] Her Majesty, that judgment might forthwith be granted and entered upon the said verdict, and execution issued thereon.

Mr. Burge, Q.C., now moved in the terms of the prayer of the Petition, contending that, inasmuch as the Instructions on which a Writ of Error lies in the Colonies proceed entirely from the Crown, and are with a view of regulating the particular occasions on which the Governor is to permit an Appeal, it remains with the Crown to bring before the Privy Council, in some form or other, any grievance of which the subject complains, in the administration of justice; and referred to *Christian v. Corren* (1 P. Will. 329); *Re Justices of Antigua* (1 Knapp, P.C. Cases, 267); *Re Monckton* (1 Moore, P.C. Cases, 455).

Mr. Baron Parke (Feb. 5, 1840).—Upon the facts of the case there is no doubt the Judges have done wrong. The Petitioner brought an action of assault in the Court of Common Pleas below, and recovered large damages—£115: the Defendant applied for a new trial. The Court consisted of two Judges; the Judges were equally divided, and no rule could be granted for a new trial. It appears to be the practice of the Court of Common Pleas, in Tobago, that (instead of moving a sidebar rule for judgment, as here,) it is a motion in open Court, by the party applying to the Court; but one would suppose that such a motion would be granted as of course, unless there was a motion in arrest of judgment—[153]—and we have no difficulty in saying the Judges ought to have granted that motion. They had no right to consider the propriety of the verdict. After verdict, the motion to enter up judgment is a motion of course, and that motion ought to have been granted unless there was

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Dr. Lushington.

some reason for it. Unfortunately the Petitioner did not take that course on this occasion. If the Petitioner had applied for judgment at another time, in all probability justice would have been done: but upon a motion being made for an attachment against the Plaintiff, (the Petitioner,) for costs, under the 92nd clause of the Tobago Court Act, the Court refused the motion, but at the same time, very improperly, refused to give judgment for the Plaintiff in the action. Then there was an application to the Governor, who refused to interfere, and now there is an application to the Privy Council.

The application to us is as a Court of Error to grant an order in the nature of a mandamus to the Judges of the Court of Common Pleas of Tobago, to enter up judgment in this cause. Search has been made, and no precedent has been found for exercising such authority by Her Majesty's Privy Council.

If there had been any precedent for this Court giving instructions to the Judges of the Court below what to do, their Lordships would, probably, in such a case as this, have been disposed to act upon it, and would direct the Judges to give judgment for the Plaintiff upon the Writ of Error; but unfortunately there is no precedent for this Court giving any direction in the case of an act of the Court below upon a Writ of Error; and, therefore, all we can do is to recommend the Petitioner again to apply to the Judges of the Common Pleas, and to intimate to them that [154] it is the opinion of their Lordships sitting here, as Her Majesty's Judicial Committee of Privy Council, that there being no motion in arrest of judgment, it is the bounden duty of the Court to give judgment for the Plaintiff. Perhaps after that intimation they will do so; but if not, unfortunately you are without remedy, except in the event of this suit being abated, as judgment must be pronounced within a certain time, and in that case you would have another action, as there would be no bar on the ground of this action depending, or a judgment recovered. Petition dismissed.

See next Case.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 4. *Jurisdiction of Privy Council*. See *In re Whitfield*, 1845, 5 Moo. P.C. 157, *In re Butts*, 1842, 4 Moo. P.C. 95. Trinidad and Tobago are united into one colony (see Trinidad and Tobago Act 1887, 50 and 51 Vict. c. 44); O. in C. of 17th Nov. 1888 (Stat. R. and O. Rev. Vol. viii. p. 80; 6th April, 1889 (*ib.*) and 20th Oct. 1898 (Stat. R. and O., 1898, p. 1295). Appeals are regulated by O. in C. of June 20, 1831.]

ON PETITION FROM THE COURT OF ERROR IN THE ISLAND OF ANTIGUA.

IN THE MATTER OF THE PETITION OF THE ASSIGNEES OF MANNING AND CO.* [June 30, 1840]

The Court of Error in Antigua having refused to enter upon a Writ of Error issued from the Court of Common Pleas, on the supposition that they were not a properly constituted Court: no appeal lies against such refusal to the Queen in Council.

By the constitution of the Courts in Antigua, no appeal lies from the Court of Common Pleas except to the Court of Error in the Island, and a judgment must be obtained from that Court to give the Judicial Committee jurisdiction in the matter.

This was an application for leave to appeal against an alleged refusal of the Court of Error in Antigua to [155] decide upon an appeal brought before them, from the Court of Common Pleas in that Island, under the following circumstances:—

In July 1836, the Petitioners, as Assignees of the estate and effects of the firm

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

of Manning and Anderdon, who had been bankrupts, commenced an action of ejectment in the Court of Common Pleas, in Antigua, against William Lee, to recover possession of a sugar plantation in that Island, part of the estate of the above firm. The Defendant who was in possession claimed as purchaser for valuable consideration.

The action was tried in April 1837, and evidence given of the title of Messrs. Manning and Anderdon, their Bankruptcy, the appointment of the Petitioners as Assignees, and of the demand of possession. An objection was taken by the Defendant to the sufficiency of the notice to quit, and the want of due form in the demand of possession: and the Court being of opinion that the demand was not sufficient, directed the Plaintiff to be nonsuited: to which the Plaintiff objected, and tendered a bill of exceptions.

The Defendant then tendered evidence of an execution issued upon a judgment obtained by him against Messrs. Manning and Co., and of a purchase made by him of the Plantation under the execution sale. The Plaintiffs objected that the Judgment, Execution and Sale, having taken place after the bankruptcy, they were no answer to the action of the Plaintiffs, as such Assignees, and requested the Judges so to state to the Jury.

The Judges declined giving any opinion or direction on the subject, leaving the case altogether to the Jury, who found a verdict for the Defendant.

From this verdict the Petitioners caused a Writ of [156] Error to be brought in the Court of Error of the Island. Judgment not having been entered up upon the Record, application was made by the Petitioners to the Court of Common Pleas to order the Defendant to enter up Judgment, which being refused, the Petitioners further moved the Court to order its own officer to enter up the Judgment; however, the Court refused to order the Judgment to be entered up. The Writ of Error was proceeded with in due form, errors assigned, and the record, notwithstanding no judgment had been entered up, was, with the Bill of Exceptions annexed, certified by the Judges of the Court of Common Pleas with the Court of Error.

Pending these proceedings, a motion was made by the Defendant in error, to quash the Writ of Error; while this application was before the Court, a question arose whether the Court of Error was legally constituted, and the Judges being equally divided on the question, the Court dissolved itself.

The Petitioners then presented a Petition to His Excellency the Governor of the Island, to convene another Court, which he accordingly did, when the Defendant renewed his application to quash the Writ of Error and Bill of Exceptions; the Court, however, postponed giving judgment until the question as to the constitution of the Court, as originally summoned, was disposed of: and being ultimately of opinion that that question could not be reheard, they refused to proceed further with the case.

The Governor, however, caused to be annexed to the proceedings in the Court of Error an expression of his opinion in the following terms: "That he was of opinion, as before, that the Court was legally constituted, and that the case ought to be heard."

[157] From the above decision of the Common Pleas, and the refusal of the Court of Error to hear the case and decide upon it, the Petitioners presented a Petition of Appeal to Her Majesty in Council, praying Her Majesty to direct such Judgment to be given in the premises as the case might require, or that the Court of Error might be directed to hear the Exceptions and give Judgment therein.

Sir William Follett, Q.C., and Mr. W. H. Watson, for the Petitioners, the Plaintiffs in Error.—The Court of Common Pleas and the Court of Error have both grossly miscarried: and we are entitled to appeal, first, against the refusal of the Judges of the Common Pleas to compel the Defendant to enter up judgment: secondly, against their refusal to order their own officer to enter up judgment: and thirdly, we are entitled to appeal here against the proceeding in the Court of Error, by which we have been deprived of our right to a hearing and decision upon the Writ of Error and Bill of Exception tendered. We do not now seek your Lordships' opinion on the merits of the case; all we ask is, for liberty to appeal against these several proceedings, or such of them as the justice of the case may seem to your Lordships to require. Now we complain of the decision both in the Common Pleas and in the Court of Error. We say in the former Court the Judges were wrong in ruling that

demand of possession should be made in the action, it being clearly proved that such demand had been made prior to a previous action; that they ought to have directed the jury upon the law, and that they were bound to enter up judgment, or to allow it to be entered up, when [158] applied to—there are also serious injuries of which we complain. We protest moreover against the proceedings of the Court of Error. That Court is constituted by virtue and under the authority of two Local Acts of Antigua, Nos. 475 and 623. By the 155th clause of the former Act, by which the Courts of Common Pleas, Error, King's Bench and Grand Session were first established, the Court of Error is to consist, in the absence of any royal instruction, of the Commander-in-Chief of the Leeward Islands, or, in his absence, of the Commander-in-Chief of Antigua, and five Councillors; and in case any members of the Council shall be parties interested in the matters to be determined, any three of the Council shall be a sufficient number of Councillors to make a Court. By the Act No. 623 the constitution of the Court of Error is varied: any three members of Council, the President being one—or in case of the President's indisposition, any other three, not being Judges of the Common Pleas, or Barons of Exchequer—are declared competent to constitute a Court of Error, and to hear and determine suits of Error for judgment, etc. This latter Act does not apply to the case of the President being a party interested in the suit: the provisions therefore of the former Act in that respect are left untouched. Now we are in a condition to show, if your Lordships allow this appeal, that the Court of Error entirely misconceived, if they did not wilfully violate, their duty.

The case came before the Court of Error no less than three times: on the first occasion the President and three of the Council were present, so that the Court was legally constituted, but they refused to proceed, on the ground, as it would seem, that the President, who was the attorney of the Plaintiffs, was therefore [159] an interested party, and the Court was adjourned. The next time the case came on, the President was absent, and though the Act No. 623 expressly provides that three members of the Council shall form a Court in case of the President's indisposition, and the previous Act No. 475 dispenses with the attendance of the fourth member of the Council in case of his being interested, yet they refused to proceed with the case, upon the ground that the Court was not legally constituted. It was stated at the time, as the fact was, that the President was absent from indisposition, but the Court refused to listen to that statement unless made upon affidavit, and accompanied with a certificate from a medical man. An application was then made to the Governor, and by his direction another Court was summoned, when upon the case coming on they decided that though the first Court was legally constituted and might have heard the case, yet that having decided themselves that they were incompetent, the Court could not vary their decision, and consequently they refused to enter upon the merits. All these circumstances we are in a condition to prove if permitted to appeal. We complain, therefore, of the proceedings of the Court of Common Pleas in the first instance, and of those in the Court of Error subsequently. The question then is, what authority your Lordships have, and how you will exercise it under the circumstances of this case.

By the 3 and 4 Will. IV., c. 41, Judicial Committee Act, sec. 8, it is enacted, "That in any matter which shall come before the said Judicial Committee, it shall be lawful for the said Committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said Committee shall seem fit, not-[160]withstanding any such witnesses may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter: and it shall be lawful for Her Majesty in Council, on the recommendation of the said Committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the Court from the decision of which such appeal shall have been made, and at the same time to direct that such Court shall re-hear such matter, in such form, and either generally or upon certain points only, and upon such re-hearing take such additional evidence, though before rejected, or reject such evidence before admitted, as Her Majesty in Council shall direct." Now the provisions of this clause, we submit, enable your Lordships to admit this appeal both from the Court of Common Pleas and the Court of Error. There is no judgment, properly speaking, in the Common Pleas: they refused to allow judgment to be entered up,

and the Record is sent up to the Court of Error in a defective and imperfect state. The refusal to enter up such judgment, with the defective state of the Record, certified to your Lordships, is a grievance to which the eighth section of the Act points, and your Lordships, under the powers of that section, can give such directions to the Court below, as would enable us to bring the judgment of the Common Pleas to the final decision of this Court. We are also further entitled to appeal against the proceedings of the Court of Error. The effect of the decision of that Court is the rejection of the Writ of Error, and that upon grounds admitted by the Court itself to be insufficient, viz. the misapprehension, on the part of the Judges of whom the first Court was composed, of their power. They imagined they were [161] not a legally formed Court, when in fact they were; and having declined to enter upon the merits of the case; that is treated as tantamount to a dismissal of the Writ of Error, and the Appellant is thereby deprived of all redress.

Mr. Burge, Q.C., for Lee, the Defendant in Error.—This application must, I submit, be governed by the same rule as was recently laid down in the case, *Re Muir* (*ante* [3 Moo. P.C.], 150). There an action had been brought to recover damages for an assault, and a verdict obtained for the Plaintiff, with £115 damages; upon motion before the Common Pleas to enter up this judgment, the Judges were equally divided in opinion, and no judgment was entered up. Your Lordships held that no appeal could be brought from the Common Law Courts here, and that the Plaintiff must be left to bring a fresh action. The right to appeal from the Court of Error in Antigua, to the Queen in Council, is derived from the 47th and 48th Instructions to the Governor of Jamaica. They are of a very old date, but are continued to each successive Governor of those Colonies which are not subject to any special orders of Council. The 47th declares, "That the Governor or the Commander-in-Chief of the Island for the time being, in all civil causes, on application being made to him for that purpose, shall permit and allow appeals from any of the Courts of Common Law in the Island, unto him and the Council of the Island; and for that purpose the Governor or Commander-in-Chief is to issue a writ returnable before himself and the Council, who [162] are to proceed to hear and determine such appeal, wherein such of the Council as shall be at that time Judges of the Court, from whence the appeal shall be made, are not to be permitted to vote, though they may be present at the hearing, to give the reasons of the judgment given by them in the causes wherein such appeal shall have been made; it is provided, however, that in all appeals the sum or value appealed for shall exceed the sum of £300 sterling, and that security shall be given by the Appellant to answer such charges as shall be awarded, in case the first sentence be affirmed. And it further provides, that if either party shall not rest satisfied with the judgment of the Governor and Council, they may then appeal to the Privy Council, provided the sum or value appealed exceed £500 sterling, and that such appeal be made within fourteen days after sentence, and security given by the Appellant, for the effectual prosecution of the same, and for costs and damages, in case the sentence appealed against be affirmed."

The 48th Instruction provides for appeals from fines imposed in cases of misdemeanours. This is the sole authority under which appeals are allowed to Her Majesty in Council, and they are expressly limited to appeals from the Court of Error. The appeal from the Court of Common Law is to the Court of Error in the first instance, and as in this country no appeal could be brought from a judgment in the Court of Queen's Bench or Common Pleas, but by means of a Writ of Error, so, in the Island of Antigua, no appeal lies except from a decision of the Court of Error. There is therefore no judgment which can be appealed from; the non-entry of the judgment by the Court of Error cannot be made [163] the subject of appeal, for there is no subject matter upon which the Court of Error below, or this Court, could act: the Record is defective, but there is no authority to rectify it, and the defect appearing merely on the face of it, is not such an error as will give this Court, or any Court of Appeal, jurisdiction. There must be some positive judgment of the Court below from which an appeal is interposed in due course. The Appellant must be left to try his action again.

Mr. Justice Bosanquet (July 11).—In this case an application has been made for

leave to appeal against certain proceedings which have taken place in the Courts of the Island of Antigua. It appears that an action was brought in the Court of Common Pleas, and in that Court a verdict was found for the Plaintiff. An application was made by the Plaintiff to the Court of Common Pleas, to enter up judgment, that Court refused to give any judgment, and that refusal to give that judgment is entered upon the proceedings, it coming up here upon the transcript as a part of the Record. From that a Writ of Error was brought to the Court of Error in the Island, and in the Court of Error in the Island upon two or three occasions there was a meeting of some of the members of the Court; that Court thought itself not duly constituted, and, therefore, refused to proceed. Afterwards a number of members appear to have been summoned, and that number would have been sufficient to hold a Court; however, that Court considering what had been done before as a decision that the Court was not duly constituted, refused upon that occasion to proceed.

Now if this case had rested entirely upon that which [164] had been done in the Court of Common Pleas, and this had been a Writ of Error from that Court, supposing this was the next superior Court of Appeal, a question might have arisen, and which might have deserved consideration, namely, whether that which was done in the Court of Common Pleas, though not in form, such a judgment, as in the Courts of this country would be given, where the Court arrests the judgment, by declaring that they give no judgment, and the parties may go without a day—it might be questioned whether this was not a mere informal mode of giving that sort of judgment, and if that were so, and this Court being the next immediate Court of Appeal, there would have been a fair ground to argue that this Court might have reversed that judgment, and have given such a judgment as ought to have been given, and for that purpose therefore it would have been proper that leave should have been given to appeal. But the present state of the case is this—that this Record has been carried to the next proper Court of Appeal—the Court of Error; there the Judges have done nothing, and the question now is, whether a Writ of Error will lie from that judgment in which they have done nothing, in which they have pronounced nothing, that can be appealed from. In that respect it appears to us, therefore, that the application would be in the nature of a mandamus, calling upon them to proceed and to give judgment, for which we find no precedent. The case which occurred before this Court not a great while ago, on the petition of John Muir [3 Moo. P.C. 150], was very much of this kind. That was a case in which the Court in the Island of Tobago refused to proceed. There the Court refused to proceed, and they did nothing; there was not that which [165] amounted to anything like the informal judgment in the Court of Common Pleas here, for they did nothing, and therefore that case does not affect the proceeding as far as the Court of Common Pleas is concerned: but inasmuch as no Writ of Error lies from the Court of Common Pleas here, the question is, whether that case does not stand upon the same footing with regard to this proceeding in the Court of Error, as this case. It appears to us, therefore, that this case is really in principle the same as Muir's case [3 Moo. P.C. 150].

Now it is said, and it is true, that as far as regards an appeal to Her Majesty in Council, these parties are without remedy, which is a very great evil. But all we can say upon that subject is, that if the Judges below have misconducted themselves, if they refuse to do what they ought to do, and refuse to proceed as they ought to proceed, a representation may be made to the proper quarter upon the subject, and then they may be given to understand that it is their bounden duty to proceed with the case, and if they do refuse to proceed, they must take the consequences. That is all we can say upon the subject, and, therefore, this application must be dismissed.

[See *In re Whitfield*, 1845, 5 Moo. P.C. 157; *In re Butts*, 1842, 4 Moo. P.C. 95. Appeals to Privy Council from Leeward Islands are regulated by Orders in Council of June 8, 1854 (Stat. R. and O. Rev. iv. p. 339; Privy Council Blue Book, 1862), and March 24, 1880 (Stat. R. and O. 1899, p. 1592).]

[166] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Rev. WILFRED SPEER, *Appellant*; JOHN BURDER, *Respondent* *
[July 2, 1840].

In a suit against a clergyman, for drunkenness and indecent conduct in his church, articles charging him with being addicted to the immoderate use of spirituous liquors, frequenting a public-house, drinking to excess, and thereby becoming intoxicated: followed by charges of drunkenness at different times, one of which was particularly specified, admitted.

This was a cause of Appeal and complaint of nullity from the Arches Court of Canterbury, in a cause of the office of Judge, promoted by John Burder against the Appellant, the Reverend Wilfred Speer, clerk, as curate of the perpetual curacy of Thames Ditton, in the county of Surrey.

On the 13th of June 1839, a citation issued, calling upon the Appellant to "answer to certain articles touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for his being an habitual drunkard, and for having been repeatedly guilty of the crime of drunkenness, and also for his having been repeatedly guilty of indecent conduct, demeanour, and language in the church of Thames Ditton, as well in and during the time of Divine services and offices in the church, as before and after the performance of such Divine services and offices."

An appearance was given for the Appellant, and articles were exhibited: they were fourteen in number. [167] The first and second pleaded the date of the appointment of the Appellant, and his licence by the Lord Bishop of Winchester to the curacy. The third article, that ever since his entrance on the spiritual duties of the said perpetual curacy, he had addicted himself to the immoderate use of wine and spirituous liquors; that he had been in the habit of frequenting a public-house in the parish, and of there drinking to excess, thereby becoming intoxicated, to the great scandal and offence of his parishioners and others. The fourth article charged, that ever since his, the Appellant's, entrance on the spiritual duties of the perpetual curacy of Thames Ditton, he had been in the habit of performing Divine service in the church of the said perpetual curacy in an indecent and irreverent manner; and had thereby, and otherwise, by his indecent demeanour and conduct in the said church, during the time of the performance of Divine service, caused great offence and scandal to his parishioners and other persons assembled on such occasions for the purpose of Divine worship; and that he had by such conduct and demeanour driven many of his parishioners away from attending the said church: that during the time of Divine service on Sunday mornings, he had been constantly furnished, from the aforesaid public-house, with a bottle of Port wine, or with some brandy, which he had invariably drank in the vestry-room of the said church, during the time of such service; that on many such occasions he had thereby become, and evinced by his conduct and demeanour that he was, intoxicated, and had been scarcely able, by reason of such intoxication, to get through the services or preach his sermon, to the great scandal and offence of the congregation then and there assembled for the purpose of Divine [168] worship. The six following articles charged various acts of intoxication committed in the church, and during Divine service, by some of which the Appellant was wholly disabled from performing the services, and by others in such a state as to render his performance indecent and irreverent. And in the four concluding articles, the complaints made to the Bishop, and the proceedings thereon, were fully set forth.

The rejection of these articles was prayed by the Appellant, in the Arches Court: but after argument, the same was admitted by the Judge of that Court.

From this decision the Appellant appealed to Her Majesty in Council.

Sir William Follett, Q.C., and Dr. Addams, for the Appellant, insisted that the

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

articles ought not to be admitted, the charges contained in them being too general, and not sufficiently specific. They especially objected to the third article, as containing a general charge, not shown or so specified as to amount to an ecclesiastical offence: and though in a cause of adultery, if the offence was laid generally, proof of one act might be sufficient to sustain the suit, yet this being in its nature a criminal proceeding, and the offence charged a penal one, it was not sufficient to lay it generally, but that each act charged, ought to be stated specifically, and proved. They cited and relied on *Oliver v. Hobart* (1 Hagg. Ecc. Rep. 43).

Mr. Cresswell, Q.C., and Dr. Haggard, for the Respondent. The offence charged being an Ecclesiastical offence, [169] it is sufficient that the articles should be so framed, as to give the party a general knowledge of the nature of the charge. The article objected to (the third) imputes habits of drunkenness and intoxication, the subsequent articles allege instances of such habits: the general charge is sufficiently supported by the subsequent specific acts. The case cited only decides, that, in criminal suits, articles must be sufficiently specific to afford a fair opportunity of defence.

The Right Hon. Dr. Lushington.—The sole question their Lordships have had to consider in this case is, as to the admissibility of the articles: whether they are sufficient, and ought to be admitted in their present form, or whether they ought to be rejected altogether; or reformed. There is no doubt that the charges are in conformity with the Ecclesiastical Law, and that habits of drunkenness and acts of intoxication in a beneficed Clerk are ecclesiastical offences. So far, therefore, as these articles charge or impute any specific act, their Lordships are of opinion they ought to be admitted. From the fifth to the tenth article, various offences of this kind are imputed, and one particularly specified in the sixth. It was proper also to plead the complaints made to the Bishop as in the concluding articles; these articles, therefore, must be admitted. The question then comes with respect to the third and fourth articles, in which a general habit of drunkenness accompanied with some particularity of statement is alleged. In a charge of this nature, it is very difficult to state with precision the habits of a party, though such habits form an ecclesiastical offence: the frequenting a public-house, drinking therein to excess, and becoming [170] intoxicated, is in a Clerk an ecclesiastical offence; but it is contended, that the charge is too general in its effect, and ought to have been laid specifically and in particular acts. That, in fact, the third article ought to be split into individual instances. It is very difficult to lay down any specific rule as to particular or general pleas: all, therefore, that their Lordships decide here is, that in this case the offence is sufficiently laid, and the articles ought to be admitted. If these articles shall ultimately turn out to be unsupported in evidence, the Court may expunge or reject them; but to call on the party now to split them into specific charges, would be to put the promovent to an expense not warranted in the circumstances of the case, and to exact proofs which the nature of the charge does not require. The case of *Oliver v. Hobart* [1 Hagg. E.R. 430] is not applicable: there, the charge was entirely general, running over a period of fifteen years acquiesced in by the parishioners, and no individual or specific act as to time and place pleaded. Their Lordships are, therefore, of opinion, that these articles must be admitted, and the cause remitted to the Arches Court, with costs.

[A list of cases of prosecution of clergymen for similar offences is given in Phillimore, *Eccl. Law*, 2nd ed. p. 841.]

[171] RE WOODCROFT'S PATENT * [Feb. 11, 1841].

Prolongation of Patent refused on the ground of want of merits.

Practice respecting hearing of Counsel where several parties enter Caveats [3 Moo. P.C. 172 n].

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

The Petition in this case was for the prolongation of a Patent obtained in 1827, by John Woodcroft, the son of Bennet Woodcroft, "for certain processes and apparatus for printing and preparing for manufacture yarns of linen, cotton, silk, woollen, or any other fibrous material."

The Petition set forth that considerable expense had been incurred by Bennet Woodcroft, in perfecting his invention by experiments, and in obtaining the Letters Patent; that a partnership having been formed between the Petitioner, Bennet Woodcroft, the Patentee, and one John Gould, it was agreed, as one of the conditions of the partnership, that the Letters Patent should be the property of the partnership; but no formal assignment of them was made by the Patentee; that a mill and extensive premises were taken for the purpose of carrying on the printing and preparing yarns, which were used for that purpose until the year 1835, when the demand for printed yarns having greatly diminished, the mill and premises were converted to other purposes;—that the partnership with Gould was subsequently dissolved, his share thereof being purchased by the Petitioner and Bennet Woodcroft, for the sum of £12,000;—that between the years 1827 and 1831, monies to the amount £4250 and upwards were expended in machinery apparatus and implements [172] for the purposes of the Patent; but that such machinery, in and from 1834, had become almost useless and unemployed, and if now sold would not produce more than £1300. That a dissolution of partnership between the Petitioner and Bennet Woodcroft took place in 1835, Bennet Woodcroft retiring therefrom and the invention became the sole property of the Petitioner, by whom it had been since used and enjoyed, and licenses granted; but no regular articles of dissolution or assignment of the Patent were executed until the year 1840; that no sufficient remuneration had been afforded to the Petitioner or the parties by whom the Patent was first obtained, for the skill, labour and capital employed in perfecting and working the same.

The Petitioner then went on to state circumstances to account for the losses incurred by himself and partners, which consisted in the changes in fashion by which the demand for printed yarns had varied; and after stating that a large stock of such goods remained on hand, he declared the amount of the outlay to be £5250, and the gross profits not to have exceeded £7400, and prayed for a prolongation of the Letters Patent for a period of seven years.

Against this application caveats* were entered by [173] three several parties, but two of them having been withdrawn, the third, entered on the part of Louis Schwabe, was alone litigated; the grounds of which were as follows:—

1st.—That the supposed invention for which the Patent was granted was not new, but well known at the time, and is not, as described in the specification, of any value to the public.

2nd.—That a Patent was granted to Louis Schwabe, on the 22nd January 1831, for certain processes and apparatus for preparing, beaming, printing and weaving yarns of cotton, linen, silk, woollen, and other fibrous substances, so that any design, device or figure printed on such yarn may be preserved when such yarn is woven into cloth or other fabric, and that the said John Woodcroft did not and could not manufacture patterns or designs under the said Patent, granted to the said Bennet Woodcroft; but that he had by pirating the invention of the said Louis Schwabe been enabled to do so since the year 1831; and that if the term of the said Letters Patent be prolonged, he would, under pretence thereof, and by threats of legal proceedings, be enabled to continue the infringement of the said Patent of the said Louis Schwabe, to his great injury.

* (7 Dec. 1840) An application having been made to fix a day for the hearing of the Petition, the Counsel for the Petitioner applied to the Court to know the rule respecting the appearance by Counsel of the parties entering Caveats, and whether each party opposing would be entitled to be heard by two Counsel.

Lord Brougham observed, that the rule respecting the number of Counsel entitled to be heard being the same here as in the House of Lords, viz. two only on either side, two Counsel only would be heard to oppose the Petition, unless the parties had independent and distinct grounds of opposition founded on separate and independent interests.

3rdly.—That the method of manufacturing such designs having been first made known by the specification of Louis Schwabe, foreigners had adopted the plan, and introduced such manufactured goods into this kingdom; and, in consequence thereof, the public being deterred from making the same designs, arising from the claims set up by the said John Woodcroft, were much injured from the competition which would otherwise be made by Louis Schwabe.

[174] 4thly.—That the said Louis Schwabe had been prevented from carrying his invention into full practice in consequence of the very large expense to be incurred in litigating the validity of Bennet Woodcroft's Patent; and that he had in consequence thereof waited until the expiration thereof, to reap the benefit of his own invention.

5thly.—That the said John Woodcroft had, under the Patent granted to the said Bennet Woodcroft, received great profits.

The Petitioner having produced the Letters Patent, and proved the notice in the Gazette and advertisements etc., tendered witnesses to prove the loss incurred as alleged in his Petition; and produced certain abstracts of accounts taken from the books of the concern, showing a profit to the amount of only £900 upon the balance of account on value of stock and plant; and examined witnesses in support of the allegations in the Petition.

Sir W. Follett, Q.C., and Mr. Teed, Q.C., for the Petitioner.

Mr. M. D. Hill, Q.C., and Mr. Edmund Moore, for the Caveat.

The evidence on behalf of the Petitioner being closed,

Lord Brougham, on the part of their Lordships, refused the application for prolongation, the Committee not thinking that there were sufficient merits to warrant them putting the powers of the Act 5 and 6 Will. IV. c. 83, in force.

[Mews' Dig. tit. PATENT, F. CONFIRMATION ETC., 2 c. S.C. 1 Web. P.C. 740. The extension of patents is now regulated by s. 25 of the Patents Act, 1883 (46 and 47 Vict. c. 57), and rules scheduled to O. in C. of 26 Nov. 1897 (Stat. R. and O., 1899, p. 1837).]

[175] ON PETITION FROM PRINCE EDWARD'S ISLAND.

IN RE SAMUEL CAMBRIDGE * [11 Feb. 1841].

By the Royal Instructions to the Governor of Prince Edward's Island, an appeal is given to the Governor and Council, from the decision of the supreme Court, in all cases where the amount at issue is of the value of £300, and from the Council to Her Majesty, where the amount at issue is £500. An action having been commenced, and judgment obtained in the Supreme Court, for £135, an application was made for leave to appeal from such judgment to Her Majesty in Council, notwithstanding its being below the appealable amount.

Held by the Judicial Committee, that there being an intermediate Court of Appeal in the Island, no appeal could be received from the Supreme Court; but their Lordships, under the circumstances, advised the allowance of the appeal to the Governor and Council in the Island.

This was an application for leave to appeal from a judgment of the Supreme Court of Prince Edward's Island, allowing a demurrer to a plea of a certificate, under a commission of bankruptcy, to an action brought against the Petitioner by a former creditor.

Previous to the year 1835, the Petitioner carried on business in partnership with his brother as a ship builder. The business was managed and carried on at Bristol, the Petitioner residing in Prince Edward's Island. The affairs of the partnership becoming involved, the Petitioner's brother was made a bankrupt, and shortly after the Petitioner having arrived in England, a commission of

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

bankruptcy was taken out against him also, under which he obtained his certificate. Having returned to the Island, an action was commenced against him by one of his former creditors for the sum of £135, 8s. 4d.

To this action he pleaded his certificate, to which the Plaintiff demurred. The demurrer was argued before the Chief Justice of the Supreme Court, by whom it was overruled.

By the Royal Instructions to the governor of Prince Edward's Island he is directed to allow appeals to himself and Council in cases where the value appealed [176] from amounts to £300 sterling, and to the King in Council only where the value appealed from amounts to £500.

In consequence of these regulations the judgment given by the Supreme Court was not appealable either to the Governor and Council, or to her Majesty; but the Petitioner having many creditors in the island for sums under £300, and being fearful of having separate actions commenced against him, now presented a petition to Her Majesty in Council, praying for leave to appeal from the decision of the Supreme Court, and that an immediate order might be made to that Court, directing that an appeal to Her Majesty in Council might be allowed on the Petitioner giving such security for costs as should be required.

Mr. Charles Buller now moved for the order as prayed, and cited *Re Tupper* (2 Knapp. P.C. Cases, 201).

Lord Brougham.—The case is one of considerable hardship, and is certainly entitled to favourable consideration: but there is no instance of allowing an appeal from the Supreme Court at once to the Queen in Council, there being, by the constitution of the Island, a Court of Appeal, namely, the Governor and Council, from whose decision alone such an appeal lies. The proper and only course their Lordships can take is to advise her Majesty to allow the case to be appealed to the Governor and Council: it may then be brought before us in a future stage if the parties are not satisfied with the decision.

[Mews' Dig. tit. COLONY, iii. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*. Appeal lies to Privy Council, either (i) through Supreme Court of Canada (see 38 Vict. No 11 (Can.) amended by R.S.C. 1886, No 135; and 54 and 55 Vict. No. 25; and cf. *St. Andrew's Church, Montreal v. Johnston*, 1877, 3 A.C. 159; and *A.-G. for Nova Scotia v. Gregory*, 1886, 11 A.C. 229); or (ii.) direct by Royal Instruction of 13th Dec. 1838, on conditions stated in *In re Cambridge*. See also *In re Monckton*, 1837, 1 Moo. P.C. 455.]

[177] ON APPEAL FROM THE ECCLESIASTICAL COURT OF THE ISLE OF MAN.

GEORGE JACKSON,—*Appellant*: THOMAS WILSON and JOHN WILSON,—
Respondents * [11 Dec. 1838].

By the Ecclesiastical Law of the Isle of Man, an Executor or Administrator becomes liable for the full amount of the debts of the deceased; first, if he be Executor *de son tort*; secondly, if he omits to return an Inventory of the assets to the Episcopal registry, as he is sworn to do; and thirdly, if there be a fraudulent omission in the Inventory of any part of the assets of the deceased, of which he has taken possession [3 Moo. P.C. 192].

Where, therefore, an Executor omitted from the Inventory a sum of £25, taken by him out of the desk of the deceased, the Judicial Committee held (affirming the judgment of the Courts below) that such omission was fraudulent, and rendered the Executor liable to the full amount of the deceased's debts [3 Moo. P.C. 198, 199].

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy [Sir Thomas Erskine].

This was an Appeal from an order of the Staff of Government, or Court of Appeal of the Isle of Man, confirming a previous order of the Vicar-General of the Island, in a cause in which the Respondents were Plaintiffs, and the Appellant, Defendant.

The suit was instituted in the Court of the Vicar-General, by the Respondents, on behalf of themselves and such other of the creditors of Richard Jackson, deceased, as should come in and contribute to the [178] expense of the suit against the Appellant, the sworn Administrator of the estate of Richard Jackson, and sought to make the Appellant personally liable for the full amount of all the debts due by the deceased, on the ground that he had not duly administered the estate, according to the law of the Island.

It appeared that in October 1832, the Appellant was appointed Administrator of the estate of his son, Richard Jackson, who, in his lifetime, had been engaged in a small concern as a coachmaker at Douglas, in the Island. Under this authority, he proceeded to sell by auction the household furniture and the stock in trade of the deceased; but in consequence (as was alleged) of the inadequate prices offered, the public sale was stopped, and the property subsequently sold to various persons by private contract.

On the 21st of April 1835, the Appellant returned an inventory and account of his proceedings to the Episcopal Registry, and on the 28th of April and 2nd of June 1835, a further statement of monies received on account of the deceased's estate.

The claims entered and proved against the estate by the creditors of the deceased amounted to £488 5s.; the assets received by the Appellant, as stated by the above accounts, amounted to the sum of £223 17s. 4d. only, leaving a deficiency of £264 7s. 8d. against the estate.

On the 8th of June 1835, the Respondents commenced proceedings against the Appellant, by presenting a petition on behalf of themselves and the other creditors of the deceased, to the Vicar-General of the Isle of Man, alleging that the disposing of the property of the deceased by private contract was an illegal act; that the Appellant had not, as such Adminis-[179]-trator, sufficiently accounted for the sums he had received, nor received various sums he ought to have received, as therein specified; and that he had possessed himself of parts of the personal estate of the deceased, of which he had made no return; and that the returns made were false and fraudulent, inasmuch as the Appellant had not made return of the goods, property, and effects, or accounted for the sums therein mentioned, especially the sum of £25 alleged to have been taken by the Appellant out of the deceased's desk, whereby and by reason whereof, the Respondents insisted, that the Appellant had made himself personally liable to pay the whole amount of the claims entered and proved against the deceased's estate, which they accordingly prayed might be ordered

The petition came on to be heard, in June 1835, when it was ordered that the depositions of witnesses should be taken, and that the petition should stand over in the mean time.

Pursuant to this order, depositions were taken by the Episcopal register, the witnesses being cross-examined on behalf of the Appellant. On the 27th of November 1835, his Reverence the Vicar-General made the following order upon the petition.

"Upon hearing this petition in the presence of parties or their advocates, and upon reading the depositions and proceedings in this cause, and upon hearing what was otherwise offered, argued, and alleged, on behalf of the parties respectively, I am of opinion that the Defendant George Jackson, in his capacity aforesaid, not having properly administered the said estate as thereunto required, has made himself personally liable and answerable to pay to the petitioners the amount of their respective claims at [180] the rate of 20s. British, in the pound. It is therefore hereby ordered, that the Defendant do pay to the Petitioners the amount of their claims, at the said rate of 20s. British, in the pound, together with the costs of the proceedings to be taxed."

The Appellant appealed from this order to the Court of Appeal, the Staff of Government of the Island, and on the 18th of February 1836, the Court of Appeal made the following order:

"Upon hearing this Appeal in presence of parties or their advocates, and upon reference to the Vicar General Hartwell's judgment, bearing date 27th of November

1835; and, upon consideration had thereof, and of what was otherwise pleaded, offered, argued, and alleged, on behalf of the parties respectively—this Court is of opinion that the said judgment appealed from ought to be affirmed, and this Appeal dismissed with costs: and the same is so ordered and decreed accordingly.”

From this Decree the Appellant appealed to Her Majesty in Council, and prayed that the judgments of both Courts might be reversed for the following reasons:—

First. Because there was no evidence that the Appellant had been guilty of any fraudulent conduct whatever in the administration of the deceased's estate, whereby to make himself personally answerable to any creditor, but on the contrary it was proved that he had done his best to make the effects produce their utmost value.

Secondly. Because, supposing that by any error in his accounts the Appellant had omitted to debit himself with any sum or sums for which he was legally chargeable, he ought, upon obvious principles of equity, [181] to be charged in account with such sum or sums only wherewith he had so omitted to debit himself: and, assuming the evidence for the Respondents to be unquestioned, such error or omission amounted only to a sum of £29 6s. 10d., whereas the deficiency of assets for which the Appellant had been adjudged liable was nearly ten times that amount.

The Respondents, on the other hand, prayed the affirmance of the Decrees below, for the following reason:—

Because the Appellant not having duly administered the estate, according to the law of the Island, was by law liable to pay to the Respondents the amount of their respective claims.

Mr. Campbell for the Appellant, argued that the errors shown in the returns were not such as constituted fraud: that the assertion of the returns being fraudulent, by the Respondent in his original Petition to the Vicar-General, was not warranted by the facts and circumstances there disclosed, or subsequently proved, and ought not to have been assumed by the Ecclesiastical Court. He contended, moreover, that there was no warrant, or authority in law, for fixing an administrator, even though making a false or erroneous return of the assets of a deceased, with a personal liability for his debts, and cited Act. of Tynwald, A.D. 1738. *Mills' Stat. Laws of Isle of Man*, 250-2, and *Johnson's Jurisprudence of the Isle of Man*, 91.

Mr. Turner, Q.C., for the Respondents, contended that by the law of the Isle of Man, a party taking out administration puts himself in the [182] precise situation of the deceased, and becomes liable to his debts as well as entitled to his assets: he maintained that it sufficiently appeared from the statement of the Petition, and the evidence taken thereon, that the Appellant had received sums for which he had not accounted, and with which he was chargeable—and that the omission of them by the Appellant in his original inventory was sufficient by the law of the Island to constitute a fraud, and to fix him with the liabilities of the deceased.

Lord Brougham, after alluding to the practice prevailing in Scotland, of benefit of inventory, and the rule of the civil law, that by excluding from the inventory any part of the property of a deceased, an heir forfeited double its amount—(Cod., lib. 6, tit. 30, l. 22, § 10. Dig. lib. 35, tit. 2, l. 24, lib. 34, tit. 9, l. 6. Voet., lib. 28, tit. 8, n. 16. *Bruce v. Earl of Southesk*, *Morr. Dict.* 5329)—observed, that though the rule stated respecting the administrator's personal liability, was wholly at variance with the practice prevailing in our Courts, yet, as both the Ecclesiastical Court and the Court of Appeal in the Island had proceeded upon the assumption that such was the law there, their Lordships could not reverse the decisions of the Courts below without ample proof that they had miscarried, and that the judgment would, therefore, be postponed until their Lordships had satisfied themselves of the Manks laws and practice upon the subject.

The Cause accordingly stood over for the examination of precedents in the Courts of the Vicar-General and Chancellor of the Diocese of Man, several of [183] which were transmitted to their Lordships,* when judgment was delivered by

Mr. Baron Parke (July 8, 1839).—This case, which was argued in December last, stood over for the purpose of obtaining information as to the law of the Isle of Man,

* The Editor is indebted to his friend Mr. Reeve, the Appeal Clerk of the Council Office, for the opportunity of publishing these precedents.

on which it depends. [184] That information, though not in so complete a state as might have been wished, has been only recently supplied; and the Court is now to pronounce its opinion upon the case.

[185] The appeal arises out of a proceeding in the Ecclesiastical Court of the

1789.—October 29.

I. Order of Consistory Court of Isle of Man, on the Petition of J. Cottier and others, Executors of the last Will and Testament of Evan Moore, deceased. The Petition stated that they had inventoried and sold the goods, chattels and effects of the deceased, and found that the same, or the proceeds thereof, were very deficient to pay and discharge the several debts and legacies, and other lawful claims and demands against the same. That the deceased was at the time of his death well entitled and possessed of certain real estate within the Island, which was subject to make up the said deficiency in the goods and effects of the deceased, but the same could not be sold or otherwise disposed of for that purpose, without the judgment or authority of the temporal Court: and that the Petitioners were unable to obtain such authority, until the exact deficiency was ascertained, certified and adjudged by the Vicar-General: and prayed that the amount of the personal assets, with the debts and other legal claims and charges against the same might be ascertained and settled, and the exact deficiency adjudged and certified, so that the Petitioners might be enabled to charge the real estate therewith.

The Petition came on for hearing on the 24th of July 1789, and was continued to the 1st of August, and further to 29th of October 1789, when upon hearing and it appearing as alleged, it was Ordered that the Register deduct from the amount of the inventory and account sale of the personal estate of the deceased, his funeral expenses, Court fees, taxed costs and expenses for the administration of his estate, and other debts which have a priority of payment by law, and afterwards distribute the remainder of the said amount, penny-pound-like, amongst the creditors of the said Evan Moore, who have legally entered and proved their claims against his estate: and it was likewise further Ordered, that in case there should remain any surplus after such distribution, that the said Registrar do distribute the same, *pari passu*, amongst the legatees of the said Evan Moore.

1797.—February 3.

II. An Order made on the Petition of A. Sayle and J. Corkill, two of the creditors of Robert Kelly, deceased. The Petitioners stated that they had entered and proved their claims, and had obtained orders of the Court for the same, which orders were put into the hands of the summoner to execute, who was stopped by an order, granted on the petition of the Executrix of Robert Kelly: that the said Executrix had taken no steps to have a settlement made of the goods and effects of the deceased, so that before long, there would be no goods or effects to be had to pay the just debts of the deceased, which caused the petitioners to apply to the Court for relief, and prayed that the Executrix may show cause why a distribution should not be made, and the debts paid, and in default, that the said orders obtained by the petitioners, might be enforced. The Petition having come on for hearing on the day above mentioned, it was Ordered that the Executrix should, within the space of one calendar month, complete and perfect a full, true, and just inventory and account sale of all and singular the goods, rights, credits, chattels and effects of the said Robert Kelly, deceased, and exhibit the same in the Episcopal Registry, and that the Registrar should immediately afterwards, (in case there should not be a sufficiency of assets, for the full payment and satisfaction of all the said Robert Kelly's just debts,) deduct from the amount of the estate of the said Robert Kelly, all such debts as had a priority of payment therefrom, and afterwards distribute the remainder of the said estate penny pound-like amongst all the common creditors of the said estate, and that the Executrix do forthwith pay unto them their respective dividends thereof ascertained, and struck by the said Registrar, in manner aforesaid; otherwise that she be committed to prison, there to remain until she yield due obedience thereto, and pay all fees.

Island, by the Respondents against the Appellant, as Administrator of Richard Jackson, in order to make him personally liable to the full [186] amount of the debts due from the deceased, on the ground, *first*, that he had illegally disposed of part of the estate, by private contract, and *secondly*, that he had received monies for which

1804.—September 21.

III. Order made by dismissing an order to stay a proceeding under a previous order, obtained by the widow of one John Rogerson, deceased, against the administrator of his estate, and directing payment to her of the amount of her order obtained against him, forthwith with costs.

1804.—November 23.

IV. A like order annulling a previous order of suspension, obtained by the Executors of W. Quirk against enforcing an order for the payment of the sum of £32, the amount of a debt proved against the estate, on the ground that the estate was insufficient for the payment of the debts due and owing therefrom; the Petitioner, (a creditor,) undertaking to refund, and give security (see 1 Oughton, 369, 370; *Higgins v. Higgins*, 4 Hagg. 242) to repay so much of the said sum, if any, as would make the payment to be made to the Petitioner equal to the payments to be made to the other creditors, in proportion to their respective demands, in case the estate should prove insufficient for payment of the debts due and owing thereby.

1805.—August 16.

V. Order made, dismissing a petition presented by the Executor of Philip Garrett, praying for the suspension of an order upon him for payment of a legacy, on the allegation that the estate of the Testator was insufficient to discharge the debts, and that the legatee had neglected to prosecute his claim for more than two years, and having absconded from the Island, could not be served with process under the order of suspension.

1806.—March 7.

VI. Order made upon the petition of Mylchreest and others, Churchwardens of the parish of German against Halsal, Executor of Myloorry or Morriion deceased, for payment of the sum of £5 with costs, being the amount of a legacy bequeathed by Myloorry to the poor of the parish of German. The Petition, after stating the particulars of the bequest and the refusal of the Executor to pay the same on the ground of insufficiency or assets, alleged that he had not returned a full and perfect inventory, and prayed that he might be so ordered, the Petitioner undertaking to prove, if a sufficient inventory was returned, that the assets would be amply sufficient to pay the said legacy. Witnesses were examined, and evidence taken in support of the Petition, whereupon the Court made the order as prayed.

1806.—July 31.

VII. Order made upon the Petition of Mylrea, one of the creditors of Radcliffe deceased, against Catherine Inch and Henry her husband, she being the sworn administratrix of the said Daniel Radcliffe, for the payment of £147 16s. 2d. British, the amount of a debt proved against the estate of the deceased by the Petitioner, with costs. The Petition set forth the death of Radcliffe, the appointment of Catherine Inch, then Catherine Radcliffe, administratrix, and the possession by her of all the goods and effects of the deceased; and alleged that there were large sums of money outstanding and due to him at the time of his decease, which the administratrix had refused or neglected to inventory: it then set forth an order obtained by the Petitioner, against the said Catherine Inch, and her husband Henry, to return an inventory, which having been granted against the said Catherine only, could not be enforced, and prayed that the same might be extended against Henry Inch as well as Catherine his wife, and for further relief. The Petition having stood over, was ordered to come on for hearing the day above-mentioned, when the Petitioner was to be prepared to substantiate any claim he might have upon or against the estate of the deceased: the Petition having come on, witnesses were examined, and exhibits

he had not accounted [187] in his inventory, particularly a sum of £25 which he took out of the desk of the deceased, and the Petition stated that the accounts were false and fraudulent, inasmuch as he had not made a return of goods and [188] effects, as by law he was bound to do. Depositions were taken in the cause, and the Vicar-General pronounced his judgment, that the defendant below had made himself taken in support of the allegations, and in proof of the debt claimed, and the order made as above set forth.

1806.—September 12. •

VIII. Order made in a cause wherein the creditors of the estate of Isabella Quirk were plaintiffs, and Catherine Kewley the Executrix of the estate of the said Isabella Quirk was Defendant, stating that upon the hearing of the cause, it appearing to the Court that the estate of the Defendant was not sufficient to pay her debts, it was therefore ordered and adjudged that the Deputy Registrar should deduct from the amount of the estate the debts that had priority of payment out of the same, and afterwards proportion and distribute the remainder thereof, *pavi passu*, amongst the common creditors of the said estate, who have legally entered and proved their claims against the same; and that the Defendant should immediately afterwards pay unto them their respective dividends thereof, so proportioned and ascertained by the said Registrar.

1808.—September 22.

IX. Order made on the Petition of Corlett, who had obtained an order or judgment for the sum of £30 14s. 0½d. against John Costain as administrator of the estate of Robert Costain, for removing the suspension of the said order or judgment, which was thereby directed forthwith to be enforced, with costs.

1809.—November 9.

X. Order made on the Petition of Bridson, one of the creditors of Margaret Moore deceased, against Thomas Moore, Executor or Administrator *de son tort* of the said Margaret Moore, for payment of the sum of £34 19s. 4d., due from her estate to the Petitioner, with costs. The Petition stated that the said Margaret Moore died intestate and indebted to the Petitioner; that the said Robert Moore had possessed considerable sums of money, which were the effects of the said Margaret Moore, but had not taken out letters of administration or returned to the proper Registry any account of his proceedings in the premises, by reason whereof the Petitioner was advised that an Executor or Administrator in his own wrong was subject to the full payment of the debts of the said Margaret Moore, and prayed that he might be ordered to pay the Petitioner the amount of his demand, or that he might be compelled to sue out letters of administration, or that some other proper person might be appointed Administrator of the effects of the said Margaret Moore. The Petition was ordered to stand over for the special examination of witnesses, and having come on for final hearing on the day above mentioned, it appearing to the Court that the said Robert Moore was an Executor in his own wrong, it was ordered as prayed and above set forth.

1811.—February 21.

XI. Order dismissing the Petition of Garrett, a creditor of the estate of Elinor Corrin, deceased, against John Cowie, the Executor of the said Elinor Corrin, on the ground that the allegations of an insufficient inventory having been returned, were not proved.

1816.—October 10.

XII. Order made on the Petition of William Kelly, the Deputy Summoner-General (to whom the goods and effects of Sarah White, deceased, had been handed over by a previous order of the Court, to be inventoried, and sold for the benefit of the creditors,) against an order of commitment obtained by Green, one of the creditors of the deceased, who had duly entered and proved his debt, and prayed that he might be discharged out of custody, and for an act of distribution of the estate, *pavi passu*, among the creditors. The Petition was in the usual form, and contained the usual allegation, except that it alleged that in consequence of the Executors

personally liable to the creditors in [189] not having properly administered the estate. From this judgment there was an appeal to the Lieutenant-Governor, and on the 18th February 1836, the Judgment was affirmed with costs: and a further appeal took place to his late Majesty in Council.

[190] The first question to be disposed of is, what is the law of the Island as to named in the will of the deceased, disagreeing as to the Executorship thereof, the Petitioner in his official capacity as Deputy Summoner-General, was deputed as before stated: it appeared that no inventory had been returned, nor distribution made of the deceased's estate, though the Petitioner admitted having received some portions thereof, out of which, he had paid Green on account of his debt, and as it was alleged, as much as his distributive share would amount to, when the inventory should be returned, and the estate realized. The Court dismissed the Petition, thereby confirming the order of commitment, and fixing the Petitioner with the full amount of the debt.

1817.—January 31.

XIII. Order on the Petition of Leatham, a creditor of Beatson, deceased, against Harrison and Leigh, administrators, for payment of £286, with interest and costs. The Petition stated a previous order, or a judgment for the said debt, and the refusal of the administrators to pay the same, on the ground of the insufficiency of assets, and alleged that the deceased had, during his lifetime, carried on an extensive business in partnership, from which considerable profits were derived, and a large sum due at the time of his death, no account of which however had been rendered by the administrators in their inventory of the deceased's effects. The order for payment was made as above stated, the Administrators not having returned an inventory or appraisement of such partnership matters, or otherwise so conducted themselves in the management of the estate, as to exonerate them from the payment of any part of the Petitioner's claim, and order against them, of which the Petitioner was declared entitled to enforce payment to the full amount.

1818.—December 16.

XIV. Order on the petition of Cubbon and Quaggin, administrators of Robert Cubbon, deceased. The Petitioners stated the personal estate of the deceased to be insufficient for the payment of the demands proved and established against the same, and prayed that the proper officer might be ordered to make an equal distribution to, and amongst the creditors, deducting any preferable claim; the order was, that the Episcopal Registrar proceed to make an account or statement of the said personal estate and assets, and also of the debts proved against the same, and that he make an act of distribution of the net proceeds of the said estate and effects among the several creditors, *pari passu*, or in such proportions as they should appear entitled to the same, and that upon payment to the said creditors of their respective dividends or shares of the said personal estate and assets, all orders as in favour of the said creditors against the Petitioners, and all proceedings thereon be stayed and suspended, so far as appertaineth to the jurisdiction of the Ecclesiastical Court.

1823.—October 25.

XV. Order made on the Petition of Cowley, son of Daniel Cowley, deceased, against Kneale and Cowley, the sworn and acting administrators of the estate of the said Daniel Cowley. The petition stated an application made by the Petitioner, to compel the Administrators to render an account of their proceedings—that an account was accordingly returned by them, which upon the face of it was fraudulent and erroneous. That Petitioner therefore presented another Petition, impeaching the said account, which the Administrators at first and for a long time defended, but ultimately obtained permission to withdraw,—that thereupon they put in a new account which the Petitioner impeached as more fraudulent and erroneous than that previously rendered, as was proved by the depositions taken in the cause; and prayed that the Administrators might be presented for their repeated contempts in giving false and fraudulent accounts of their transactions, and that they might be imprisoned until they did justice, and further that proceedings might be had against

the liability of personal representatives, and, secondly, whether the facts proved are sufficient to bring the case within the rule of law, and to warrant the Judgment complained of.

[191] There appears to be no statute or written treatise of the law of the Island,* in which the liability of Executors and Administrators is laid down: but from the their bail in their default, and for costs: upon hearing which Petition, the Administrators were ordered to return into the Episcopal Registry a full, true and amended inventory of the goods and chattels of the personal estate of the deceased, and it appearing to the Court that the former inventories were fraudulent and evasive, the Administrators were thereby ordered to pay all the costs incurred from the time when the first inventory was returned.

1827.—June 27.

XVI. Order for the distribution of the estate of William Banks, deceased, by the Episcopal Registrar. The Petition was presented by the Administrators, stating the insufficiency of assets as appeared by the return already made by them, and whereupon the order was made as prayed. This order was followed by an order of the 16th of August 1833, made upon the Petition of the Administrators, for the distribution by the Registrar of a sum of money received by them on account of the estate of the deceased, subsequent to the order of 1827, and brought by them into Court.

1833.—January 31.

XVII. Order of the Staff of Government in Court of Appeal, in the Island, confirming a previous order of the Consistorial Court, for the stay of execution upon a judgment obtained by Elizabeth Pearson, representative of Eunice Pearson, deceased, against Thomas Moore, as Administrator of Margaret Moore, deceased, for the sum of £100. The Petition which was presented by Thomas Moore, stated an order of the Consistory Court obtained against him in 1833, for recovery of the aforesaid sum of £100, with interest from 1802, the amount alleged of a debt due on a promissory note given by Margaret Moore, the grandmother of Thomas Moore, and whose personal representative he was, and William Harper, to Eunice Pearson, deceased: the proceedings commenced in 1789, and had been pending until 1830, and the Petition prayed a suspension of the order on the ground of the insufficiency of the assets in the hands of the personal representative of Margaret Moore. The original order was suspended pending the hearing of the Petition which was ultimately dismissed with costs, and that order confirmed by the Court of Appeal.

1838.—March 8.

XVIII. Order on petition of Karran, sworn Administrator of the estate of Clague, deceased, alleging the insufficiency of the estate to pay the several creditors who have proved their debts, that the Episcopal Registrar make distribution among the creditors.

* The absence, as noticed by Mr. Baron Parke, of any Statute or treatise respecting the liabilities of Executors and Administrators, and the mode of distributing the estate of a deceased in the Isle of Man, has induced the Editor to make such inquiry into the subject as the scanty materials respecting the laws and customs of the Isle of Man enabled him: the result of which he ventures to append. The works consulted have been the Reports of the Commissioners of Inquiry for the Isle of Man, 1792 and 1805; Stowell's Abridgment of the Statutes of the Isle of Man, 1792; The *Lex Scripta* of the Isle of Man, 1819; The Statutes of the Isle of Man compiled and arranged by Mills, 1821, continued by Geneste, 1832, and Jeffcott, 1836; and Johnston's Jurisprudence of the Isle of Man. The Editor has also had the opportunity of looking through the collection of laws and precedents made in 1686, by Deemster Parr, a MS. work of great authority, and which is received and acted on by the Courts in the Isle of Man, and by the Privy Council. See *Cain v. Cain*, 2 Moore's Privy Council Cases, 222.

In these authorities it is stated, that by the ancient law of the Island the Ecclesiastical Court has jurisdiction in all causes respecting Wills or concerning legacies or debts of a deceased, and that the proceedings in that Court, when not otherwise

information of which we have availed ourselves, of the Clerk of the Rolls of the Island, and from several judgments of the Ecclesiastical Court, it appears that [192] an executor or administrator, is liable for the full amount of the debts of the deceased, *first*, if he be executor *de son tort* (*ante*, No. x.), *secondly*, unless he returns an inventory of the assets of the deceased to the Epis[193]-copal Registry, as he is

noticed by the local laws, are regulated conformably to those in England, "*juxta legem divinum et canones sanctæ ecclesiæ*" (Johnson's Juris. Isle of Man, 91; Isle of Man Rep. App. C. No. 3).

With respect, however, to this peculiar branch of the jurisdiction of the Ecclesiastical Courts in the Island, the proceedings cannot be determined by any analogy to the course of the Ecclesiastical Courts here. For the Court of Chancery in England having exclusive jurisdiction over trusts, and as incident thereto, being accustomed to take accounts and to marshal and distribute the assets of a deceased; has exercised since the time of the Commonwealth (*Dicks v. Smith*, 5 T.R. 690; Toller's Executors, 479; Williams's Law of Executors and Administrators, 1584), a concurrent jurisdiction with the Ecclesiastical Courts in the administration of debts and legacies, and there being no Statute directing resort in the first instance to the Spiritual Court, the Courts of Equity have virtually superseded the authority of the Ecclesiastical Courts in such cases.

For the law, therefore, said to prevail in the Isle of Man we must look to the law and the practice of the Spiritual Courts anciently existing here, and for the manner of proceeding, to that which appears to have been the course of those Courts, modified or altered by the statutes of the Island, and the decision of the Manks Tribunals.

The limits of a Note must confine the inquiry to the particular law established by the case in the text.

It is well known that at a very early period of the history of this country the Civil and Ecclesiastical Courts were, for a time, united; that the cognizance of testamentary causes in the Ecclesiastical Courts is dated from that period;—that they afterwards became separate, and that the latter adopted the laws of Rome, that is, the Civil Law, as the rule of their proceedings.

It is to that law, therefore, we must look for the history of the executor's liability and the origin of the benefit of inventory (3 Bl. Com. 61, 2, 3; 4 Bl. Com. 421, 2).

By the Civil Law the heir was the universal successor to all the property of the deceased, without reference to its being real or personal (1 Brown's Civil Law, 341; Domat. Book, tit. 1, s. 5, p. 592), and that whether he was heir by institution, *heres factus* or succeeded *ab intestato*, as *heres natus*; but the effect of the succession in either character, was to render him personally liable for the debts and engagements of the deceased, either singly or in respect to that part of the inheritance to which he succeeded (Cod. lib. 4, tit. 2, l. 1; Voet. lib. 28, tit. 8, n. 27; lib. 29, tit. 2, n. 20). He might, however, if he thought fit, release himself from the liability by repudiating the succession (Dig. lib. 29, tit. 2, l. 18): and was allowed a time *jus deliberandi* to decide upon accepting it (Dig. lib. 28, l. 4, s. 1, 2, l. 2, 3, 4; Cod. lib. 6, tit. 30, l. 9, l. 19); but having once adiated or accepted the inheritance he became liable *in solidum*, to all the creditors and legatories of the deceased (Cod. lib. 6, tit. 30, l. 19; Voet. lib. 28, tit. 8, n. 27).

To prevent the hardship that arose from this personal liability, where the estate, notwithstanding the opportunities given for enquiry during the *tempus deliberandi*, turned out to be insolvent, a law was passed by Justinian, which permitted the heir to accept the succession with a liability only to the extent of the property of the deceased (Cod. lib. 6, tit. 30, l. 22; Voet. lib. 28, tit. 8, n. 13).

This was termed adiating the succession with *benefit of inventory*, it being an express condition of this privilege that the heir should exhibit an inventory within a reasonable time, of all the property, moveable and immoveable, in the possession or controul of the deceased, or to which he was entitled at the time of his death (Dig. lib. 5, tit. 3, l. 19; Cod. lib. 6, tit. 30, l. 22, s. 2, 3, 11; Noule. l. 2, s. 1).

If the heir fraudulently, or as it was termed *dolo malo*, excluded from the inventory any part of the property, he forfeited double its amount, or was debarred the benefit of inventory (Cod. lib. 6, tit. 30, l. 22, s. 10; Dig. lib. 35, tit. 2, l. 24; lib. 34, tit. 9, l. 6; Voet. lib. 28, tit. 2, n. 16; Domat. B. 1, T. 2, s. 5).

The early Ecclesiastical Courts adopted these principles, and applied the rules to

sworn to do, at the time the Will is proved (*ante*, Nos. vii. xi. and xii.); and, *thirdly*, if there be a fraudulent omission in the inventory of any part of the assets of the deceased of which the Executor or Admini-^[194]istrator had taken possession (*ante*, No. xiii.). Whether a mere omission, not being fraudulent to insert all the assets, would have that effect, it is not necessary to decide; but it would seem that it would not (*ante*, Nos. ii. v. xiii.).

Executors, who, in the Spiritual Courts, are the representatives of a deceased, requiring them, on accepting the executorship, in the first instance, to cause an inventory to be made of the deceased's effects, before probate, or at least before administering the effects, which they were to swear to (Swinb. pt. 6, s. 5, 6; pt. 7, pl. 1, 2, 3. 2 Vol. p. 756. Ed. 1803; 1 Ought. tit. 233, s. 2, note 1, 3; *Phillips v. Bignell*, 1 Phill. 240); or in default they were liable to be punished at the discretion of the Bishop or Ordinary (Consist. of Othobon, Athem. 107; Lind. 176; 4 Burns' Ecc. Law. 405, 418-19): the reason being least the Executor being disposed to deal unfairly, should defraud the creditors or legatees by concealing the goods of the deceased; and the penalty is thus stated by Swinburne:—"If the Executor enter to the Testator's goods and will make no inventory thereof, then may every legatee recover his whole legacy at his hands, for, in this case, the law presumeth that there is sufficient goods to pay all the legacies, and the Executor doth secretly and fraudulently substract the same" (Swinb. pt. 3, pl. 8, vol. i. p. 324).

But if he made and exhibited an inventory on oath, he was no further accountable than for what was contained in the inventory, unless the creditors or legatees could prove there were more goods belonging to the succession, in which case the Executors or Administrators were obliged to charge themselves therewith. Hence all Executors and Administrators in England were allowed the benefit of inventory, and were supposed to accept the succession always under that benefit (Domat. B. 1, T. 2, s. 1; Swinb. on Wills, Part 3, s. 17).

By the Statute 21 Hen. VIII. c. v. s. 4, Executors and Administrators are directed to make or cause to be made, a true and perfect inventory of all the goods, etc., and deliver the same upon oath to the Ordinary, etc.; and by the 22nd and 23rd Car. II. c. 10, an Administrator must enter into a bond with sureties, conditioned among other things, for exhibiting into the Registry of the Court, at or before a day specified, a like inventory. The effect of these Statutes has been to supersede, for the most part, the practice of exhibiting inventories at all in the Ecclesiastical Courts; the Temporal Courts having held on prohibition, that under the Statute of Hen. VIII., those Courts are merely ministerial, and cannot inquire into the sufficiency or insufficiency of the inventory, which must be impeached in the Temporal Courts (*Hinton v. Parker*, 8 Mod. 168; *Catchside v. Oringdon*, 3 Burr. 1922; *Henderson v. French*, 5 M. and Sel. 406; *Griffiths v. Anthony*, 5 Adol. and Ell. 623), where also any breach of the condition of the bond given under the Statute of Car. II. can alone be enforced. The return of an inventory may, however, still be insisted on in the Ecclesiastical Court, if required at the instance of any one interested, or having an apparent interest in the deceased's effects (*Phillips v. Bignell*, 1 Phill. 241; *Griffiths v. Bennett*, 2 Phill. 364).

Having thus stated the origin of the Executor or Administrator's liability and protection in our Spiritual Courts, from whence the law of the Ecclesiastical Courts in the Isle of Man is said to be borrowed, we now pass to the consideration of the jurisdiction of these Courts, and the form of proceeding therein, as founded on the Acts of Tynwald and the customary law of the Island.

In a return made by the Deemster and twenty-four Keys, A.D. 1609, it is recited that, by the ancient laws of the Island, the Vicar-General or Spiritual Courts, ought not to intermeddle with any manner of debt, or for proving of Wills longer than for a twelvemonth and a day from the day of the death of a party; and afterwards it is to be heard and tried in the Temporal Courts; and further, if any debt be challenged in the Temporal Court to be due from any dead person, "we find it," says the return, "not recoverable in law unless the same was within the twelvemonth and a day, claimed for in the Spiritual Court" (Mills' Stat. p. 80; Isle of Man. Rpt. (A) 22).

Notwithstanding the rule above referred to, a process appears to have afterwards prevailed in the island, of dating the time for entering claims against the estate of a deceased from the grant of a probate instead of the death of the party, and to remedy this the act of Tynwald of 1665 was passed, by which probate was to be obtained,

xv.); and that [195] the Executor would be entitled to amend his inventory. On the other hand, it is clear from the precedents (*ante*, Nos. i. vii. xiv. xvi. xviii.) furnished on the part of the Appellant, that the Court is in the habit of ordering a distribution, *pro rata*, [196] amongst the creditors, where the assets are insufficient, and not fixing the Executor or Administrator with the full amount; but in these cases it is

“ within three months next after the death of the party upon pain of fine and severe punishment, on the persons or parties that should fail in the performance, or neglect the same after due and lawful notice and summons given by the Officers of the Spiritual Court appointed in such matters:” And it was further enacted that, “ the time for intermeddling with the debts, and for entering claims, and proving the same in the Spiritual Court for the future should be within twelve months and a day after probate and making of such Wills and Decrees, at the end and term of three months aforesaid, and not otherwise ” (Mills’ Stat. of Man, 129, 134).

No period being limited for the commencement of actions, except after the decease of a party indebted, it appears to have become a very general practice to postpone the assertion of claims until the death of the party, the alleged debtor, and then to institute a suit in the Ecclesiastical Court against his personal representatives. This suit being founded and proceeding entirely on the oath of the creditor, afforded great opportunity for fraud and perjury, and seems to have been so used: and to remedy these evils the Act of Tynwald, A.D. 1738, for the limitation of suits, was passed; which after reciting the inconveniences alluded to, ordained and enacted, “ That all claims hereinafter to be entered and made in the Spiritual Court of the Isle, against Executors or Administrators of decedents for or on account of any of the causes thereinbefore mentioned, and more especially for debts or other demands by what nature soever without specialty, shall be entered, prosecuted and made by claimers within the Island, in one year, and by persons beyond seas within three years from the Probate of the Will or granting Administration, and at no time after, and then the cognizance of such claims so entered to belong to the Temporal Court according to the statute of 1665:” and the time for bringing actions in the Temporal Courts was limited to three years from the cause of action.

Thus suits brought in the Ecclesiastical Courts against Executors or Administrators for demands due from the deceased, can only be so brought within one, or in case the party claiming is beyond seas, within three years from the granting of Probate, and the cause of action must have arisen within three years previous to the death of the party against whose estate the claim is made.

With respect to the mode of proceeding in the Ecclesiastical Court, from the precedents furnished, the following appears to be the usual course. As soon as Probate or Administration is granted, the creditor or legatee enters his claim against the estate (*ante*, No. ii.) with the Registrar of the Court, and presents a petition to the Vicar-General, praying for an order against the Executor or Administrator for the amount of the debt or legacy claimed. If the claim is in respect of a debt, the petition is sworn to by affidavit, whereupon the Vicar-General makes an order upon the Executor or Administrator for payment (*ante*, No. xii.). Notice of the order thus obtained is served upon the Executor or Administrator, and if not complied with, the order is placed in the hands of the summoner of the parish, or the summoner-general to execute (*ante*, No. ii.). The order being in the alternative that if not obeyed a constable to go; the Executor or Administrator, unless he take some step to suspend its operation, is liable to be arrested if he refuse to comply therewith. If, therefore, he has been unable to get in the assets of the deceased, or there is an actual or apprehended deficiency (*ante*, Nos. i. xiv.) in them to satisfy the claims of the legatees, creditors, or either of them, or the Executor or Administrator dispute the legality of the debt or legacy claimed, then in any of these cases he presents a counter petition, setting forth the circumstances, and praying for a stay order (*ante*, Nos. iii. ix. xvii. xviii.) or inhibition against the order obtained by the legatee or creditor, or if he dispute the validity of the claim (*ante*, No. ii.) altogether, for an order to vacate such order. If, again, these grounds of defence or either of them, be anticipated by the legatee or creditor, he prays an order upon the Executor or Administrator, to administer or to account (*ante*, Nos. ii. vi. vii. ix. x. xv. xvi.) and to make out or complete (if insufficient) an inventory of the goods, rights, credits, chattels,

expressly averred, or may be inferred from the statements in them, that [197] a proper inventory or account of them had been rendered to the Ecclesiastical Court. Another precedent furnished by the Appellants (*ante*, No. xv.), shows that a fraudulent account is not necessarily followed by a decla-[198]-ration of the liability of the Executor to the full amount of the debts; but the prayer of the Petition in that case was only for presentment of the Executor, for not giving a proper account and payment of all the money the Executor had misapplied, and the Decree was for an amended inventory and costs.

From these sources of information, we think that the law of the Island is, that if there be a fraudulent omission of any of the assets, of which the personal representative has taken possession, he is liable for the full amount of debts, and this law has probably been adopted from the civil law, particularly as modified by the law of Scotland, where the heir who enters is liable, if he fraudulently omit anything from the inventory which he shall be found to have intermeddled with or possessed.

Adopting this as the rule of law, we think that the Courts below were warranted, by the evidence, in con-[199]-cluding that there had been an omission from the inventory of a fraudulent nature. One of the witnesses deposes, that either £23 or £25 was taken out of the desk in the deceased's bed-room, on the day of his death, by the Defendant. There was reasonable evidence that it was the deceased's desk, and that the Defendant below had no access to it in his lifetime, and all mention of that sum is omitted in the account rendered by the Defendant.

This evidence, if believed (and there is no reason to disbelieve it), called for explanation by the Defendant, and as no explanation was given, or attempted to be given, the Courts below were fully warranted in considering that this sum was omitted, in order to prevent the Defendant being called upon to pay it to the creditors.

This single item is sufficient to support the view of the case taken in both of the Courts below, without entering into a discussion as to the other small items which have not been entered, or improperly entered, in the accounts rendered by the Appellant. We therefore think that the judgment of the Court below must be affirmed, and with costs.

[Mews' Dig. tit. EXECUTOR AND ADMINISTRATOR, III. LIABILITIES, c. *For Personal Acts and Omissions*. As to transmission of documents or information to Privy Council from Court below (3 Moo. P.C. 183), see *Mason v. A.-G. of Jamaica*, 1843, 4 Moo. P.C. 231; *McCarthy v. Judah*, 1858, 12 Moo. P.C. 47; and cf. *Le Quesne v. Nicolle*, 1829, 1 Knapp, 257. As to benefit of inventory in Scots Law (3 Moo. P.C. 182), see *Stair*, iii. 4, 32; *More's Notes*, 321; *Bankt.* ii. 311; *Ersk.* iii. 8, 68-71; *Bell's Com.* i. 706; *Bell's Princ.* ss. 1926-28; *Bell, Convey.* ii. 1114. See also *Freyhans v. Cramer*, 1829, 1 Knapp, 107.]

[200] ON APPEAL FROM THE COURT OF FIRST INSTANCE OF THE ISLAND OF TRINIDAD.

GEORGE WILDES and JOHN PICKERSGILL.—*Appellants*; The ATTORNEY-GENERAL of Trinidad,—*Respondent* * [July 2, 1840].

The Crown have no preferential claim against the Estate of the Treasurer of Trinidad for monies not forming part of the public revenue of the Island,

and effects of the deceased (*ante*, No. ii.). This appears to be granted as of course, a day (*ante*, No. v.) being given to show cause, whereupon witnesses are examined on both sides by interrogatories, and the time enlarged, if required, upon further application to the Court for that purpose. The order ultimately made may be direct, or on terms, or if the allegations (*ante*, Nos. iv. viii. x. xi. xiii. xv.) in the petition are not proved, the same will be dismissed with costs.

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine and the Right Hon. Dr. Lushington.

though received by him, under an Order of the Court of Audience, from the Escribanos or Registrars of the Courts. The security entered into by him in pursuance of the Orders in Council being limited to such funds as those Orders provided for.

This was an Appeal from a sentence of the Court of First Instance of Civil Judicature in the Island of Trinidad, pronounced on the 19th of November 1835, in favour of the Crown, in a suit originally instituted by the Appellants against Henry St. Hill, formerly Treasurer of the Island, and in which the Respondent, the Attorney-General of the Island, on behalf of his late Majesty, interposed his Terceria and claimed a preference under the following circumstances:—

By an Order in Council of 17th August 1815, making certain alterations in the provisions of a former Order of the 21st of July 1813, for levying taxes within the Island of Trinidad, it was, among other things, “ Ordered and declared that the then present public Treasurer of the said Island, or any other person thereafter to be appointed Treasurer, should, for the faithful and due performance of his duty in his said office of Treasurer, from and after the promulgation of that Order, enter into [201] a new recognizance, himself in the sum of £3000 currency, together with two sureties, to be approved of by the Governor or Officer, administering for the time being, the Civil Government of the said Island, each in the sum of £3000 currency, unto His Majesty, his heirs and successors, conditioned for the true and faithful performance of the said Treasurer’s duty, for accounting for the due payment of all such sums of money as should be received by him in the course of his said office, which said persons at the time of entering into such recognizance should take and subscribe the following oath before the Governor, Lieutenant-Governor, or person administering for the time being the Civil Government of the said Island.

“ I do swear that I do in my conscience believe that after payment of all my just debts, I am truly and *bona fide* worth £3000 current money of the said Island, in real estate within the Government.’

“ Which said oath should be certified on the said recognizance.

“ And it was thereby further Ordered and declared that the said recognizance so to be executed as aforesaid, should be charged on the lands, tenements and hereditaments of the person or persons so executing the same from the date thereof, until duly released and discharged: and that the same when enforced, should be used and applied for the public service of the said Island.

“ And it was thereby further Ordered and declared that all sums of money to be raised under and by virtue of that Order, should be placed in the hands of the Public Treasurer of the said Island, and should [202] not be issued by him, but upon a warrant or warrants under the hand and seal of the Governor, Lieutenant-Governor, or Officer, administering, for the time being, the Civil Government of the said Island, which warrant or warrants should severally specify the public service to which the sums drawn for were to be paid.”

In the month of June 1816, a Decree was made by the Royal Court of Audience, whereby it was declared that it appeared to the Court, that it would be more proper to confide the care of the judicial deposits to the custody of the Public Treasurer, to whom an additional allowance should be made for his extraordinary responsibility and trouble: and who was therefore ordered to receive into his custody and charge all deposits of whatsoever nature the same might be, from the respective Escribanos or Registrars of the Courts of the Island.

In 1819, Henry St. Hill was duly appointed Treasurer of Trinidad, by His Excellency the then Governor—and by a deed of recognizance bearing date the 7th of January 1819, reciting that he was ready to enter into the recognizance or security required, in and by the Proclamation of His Royal Highness the Prince Regent in Council, of the 17th of August 1815, to be given by the Treasurer of the said Island of Trinidad, or the person to be appointed Treasurer thereof, and to produce and give the further security required in and by the said Proclamation, in the persons and properties of William Hardin Burnley and Joseph Graham, both of the said Island, who being present had declared themselves willing to become sureties, and to enter into the recognizance and oblige themselves and their pro-

perties respectively, as in and by the said Proclama-[203]-tion was required to be done: he covenanted that he would well and faithfully perform the duties of Treasurer of the said Island, as the same were and ought to be performed, without consuming, wasting, embezzling, losing, misspending, misapplying, or making away with, any of the monies or effects whatsoever, which were or should be paid or delivered to him, or committed to his charge or custody, and that he would not issue or pay but upon the warrant or warrants issued or given under the hand and seal of the Governor, Lieutenant-Governor, or Officer, administering for the time being, the Civil Government of the said Island, any of the monies or effects paid, delivered, or committed to his charge or custody, as Treasurer as aforesaid; and that he should and would duly and faithfully account, for the due payment and issuing, of all and every such sum or sums of money, as should be received by him, in the course of his said office as Treasurer, and should in all respects and matters, conform to the laws, regulations, and ordinances respecting the said office of Treasurer, and obey and execute the lawful orders and directions of the said Governor, Lieutenant-Governor, or Officer, administering for the time being, the Civil Government of the Island, or of any person or persons duly authorised to give such directions and orders relating to the said office of Treasurer. And for the due performance and faithful discharge of the said matters and duties in his said office or capacity of Treasurer of the said Island, the said Henry St. Hill did by the said Deed acknowledge himself to be indebted, and did thereby bind and oblige himself, as required by the said Order in Council, unto His Majesty the King, his heirs and successors, in the full and entire sum of £3000 current money of the [204] said Island: and as a security for the faithful and true performance and discharge of the said matters, duties, covenants, and obligations, and for the payment of the said sum of £3000 currency unto his said Majesty, his heirs or successors, in case of the departure from, or violation of, the said duties of Treasurer of the said Island, or a breach or infraction by him the said Henry St. Hill, of the said promises, covenants and obligations, by him thereinbefore promised, covenanted, and agreed, and stipulated, to be performed, done and executed: the said Henry St. Hill did by the said Deed, for himself and his assigns, expressly charge and mortgage unto his said Majesty, his heirs and successors, all the property of him the said Henry St. Hill, in the said Island and elsewhere, real, personal, mixed, and present and future, and did thereby also specially mortgage for the purposes aforesaid, a certain estate called Wellington, together with all the messuages, tenements, buildings, hereditaments, and premises thereto belonging, and certain slaves thereon being and thereto attached, subject however to two prior and existing mortgages and hypothecation thereof, one in favour of Thomas Walker, and the other in favour of Thomas Wilson. And the said William Hardin Burnley and Joseph Graham did also in and by the said Deed, severally acknowledge themselves to be indebted to his said Majesty and his successors, in the sum of £3000 currency, as required by the said proclamation, as sureties of the said Henry St. Hill, for the due and faithful discharge and performance by him of the duties of the said office of Treasurer of the said Island, and of the matters, covenants, and obligations, by him the said Henry St. Hill thereinbefore promised and covenanted to be by him done and performed, and did bind them-[205]-selves severally *in solidum*, and as principal payers did for themselves severally, and their respective heirs, oblige, charge and expressly pledge, mortgage, and hypothecate unto His Majesty and his successors, their respective properties, present and future, real, mixed and personal, for the payment to his said Majesty of the said sum of £3000, in case of his departure or violation from, and of his said duties as Treasurer aforesaid, or of the breach or infraction of the said Henry St. Hill of the said promises, covenants, and obligations thereinbefore stipulated, promised and agreed by and on the part of him the said Henry St. Hill, to be performed, done, and executed. And the said Joseph Graham declared the said pledge or mortgage so by him made and given, to be subject to an existing prior mortgage, by him given, for the due and faithful performance by him of the office of *Depositario* General of the said Island; it being well understood, and being the intention of the parties thereto, that the said security, mortgage, pledge, or hypothecation so as aforesaid given by the said William Hardin Burnley and Joseph Graham, should not extend, last, or continue

beyond the period of three years, to be fully completed and ended, and to be computed or reckoned from the date and execution of that instrument: at the expiration of which time the said Henry St. Hill did acknowledge himself to be obliged, and did oblige and bind himself to produce, procure, and furnish, fresh, and other security of sufficient persons and on real property in the said Island, to the amount or value, and as required, in and by the said Order in Council, of the 17th of August 1815, and for the purposes expressed in that Deed or Instrument.

On the 10th of August 1822, the security above [206] given was renewed by a Deed of Recognizance, precisely in the same form, and containing the like provisions as that of the 7th of January 1819, by which also the same parties, Burnley and Graham, became sureties for St. Hill. No period was, however, limited, for the expiration of the security, under this latter Deed.

In January 1829, the Appellants advanced a sum of £4500 sterling to Henry St. Hill and Thomas St. Hill, his brother: for the repayment of which with interest, as well as to secure any further advances, the St. Hills mortgaged a plantation called Perseverance, and the plantation Wellington, with the buildings, slaves, and effects upon them; and covenanted to repay the monies so advanced by certain specified shipments of sugar, and in default the Appellants were to be at liberty to foreclose the mortgage, and to bring the two plantations to a judicial sale in satisfaction of any balance that might be due in respect of such loan and interest.

Default was made in the second shipment of sugar, and the Appellants instituted proceedings against Henry St. Hill in the Court of First Instance, to carry the mortgage into effect, and on the 21st of July 1831 judgment was given in favour of the Appellants, for the sum of £4772 9s. 10d. sterling.

Previous to this, and in the month of February 1831, St. Hill being deficient in his accounts as Treasurer, proceedings were instituted against him by the Attorney-General in the Court of *Intendant*, by fine or exchequer, and a judgment obtained for the Crown for the sum of £15,322 5s. 6d. sterling, upon which execution issued, and a levy was made upon certain properties of the St. Hills, in the Island, including the plantation Wellington, and two-thirds of the estate [207] called Perseverance, both of which estates were by an Order of the same Court, directed to be sold to satisfy the above judgment of the Crown: but before the order for the sale was executed, St. Hill and also the Appellants applied to stay the sale, on the ground that no debt to the Crown had been proved or admitted, and that the Appellants were mortgagees of the estates in question and had not been heard: they claimed therefore to interpose their *Terceria*.

The Court of *Intendant*, however, in October 1831, rejected the application both of St. Hill and the Appellants, and the estates in question and effects upon them were put up for sale, but were not actually sold.

On the 26th of April 1832, the Court of First Instance ordered execution to issue on the judgment obtained by the Appellants against Henry St. Hill in that Court: and on the 3rd of October 1832, an officer took in execution, at the suit of the Appellants, all the right, title, and interest of Henry St. Hill, in the two plantations, Perseverance and Wellington, which had already been taken in execution at the suit of the Crown: and a sale of such right, title, and interest, was ordered by the Court of First Instance to take place on the 20th of November 1833.

On the 18th of November 1833, the Attorney-General of the Island, on behalf of the Crown, filed a protest in the Court of First Instance, against the sale of the two estates, alleging that the same were in execution already at the suit of the Crown, that Henry St. Hill was a debtor to the Crown, and claimed a preference for the Crown debts.

On the 15th of June 1835, the Attorney-General on behalf of the Crown, appeared in the Court of First [208] Instance, and declared to interpose his *Terceria* and claim of preference on behalf of the Crown, in respect of the debt so due to the Crown from Henry St. Hill, as Treasurer, and which was still unsatisfied, and that there was then due to the Crown in respect of such debt the sum of £33,201 11s. 2d. currency, which ought to be satisfied out of the two estates in question, in preference to the claims of the Appellants.

The Appellants opposed this claim, alleging, amongst other things, that the whole debt claimed by the Crown of St. Hill was in respect of money received by him from the different *Escribanos*, pursuant to the order of the Court of Royal

Audience: and they further alleged that the Court of Audience had no authority to make such an order, and that if made, the money received under it by St. Hill would not have been received by him in the course of his duty as Treasurer, and that the judgment of the Court of Intendant was not binding against the claim of the Appellants.

The case was heard before the Court of First Instance, in November 1835, when judgment of preference was ordered to be entered up in favour of the Crown for the amount claimed, with costs.

The Appellants appealed from this judgment to His Majesty in Council.

Sir William Follett, Q.C., Mr. Burge, Q.C., and Sir John Bayley, for the Appellants.—The deposits received by St. Hill were not received or held by him for or on account of the public, the public not being interested in, or responsible to, for such deposits or any portion of them; but were received by virtue of the order of the Court of Audience which had no authority to impose such a duty upon the [209] Receiver, much less to make him liable to account to the Crown for them.

The monies received from the Escribanos were not monies of the Crown, and could not be included by the recognizance. The Treasurer might have claimed the benefit of the Order in Council, and refused payment but upon an order from the Governor; but that would not entitle the Crown to the monies so held by him, which were in fact the private property of the suitors, and only paid over to the Treasurer for safe custody. The only original jurisdiction of the Court of Audience is in cases of Widows and Minors who are not amenable to the Court of First Instance. West India Rep. pp. 18, 209, 225. By the Law of Spain the preferential claim of the Crown is limited to such debts as arise from the Revenue. Partida, p. v. tit. 13. 1, 23, 25, 26, 33.

The Attorney-General (Sir John Campbell), and Mr. Wightman, for the Respondent.—The debt claimed by the Crown was in respect of monies which came to the hands of St. Hill in due course of his office as Treasurer recognized and appointed by the Crown. It is for the other side, therefore, to show that the monies in question were received by him in any other capacity, and that the Judges of the Court of First Instance were wrong in concluding the contrary. But the Crown having already levied upon the property in question by virtue of the judgment in the Court of Intendant, which judgment was unreversed and in full force at the time the Appellants commenced proceedings in the Court of [210] First Instance, was entitled to maintain and levy upon the property in question, independent of the right to preference by prerogative. The appointment of St. Hill, as Treasurer, was subsequent to the Decree of the Court of Audience, and the recognizance entered into by him includes all payments made to him in his official capacity of Treasurer. West India Rep. 125.

Mr. Baron Parke.—In this case the Appellants claim by virtue of a mortgage and hypothecation dated in the month of January 1829, by which two plantations called Wellington and Perseverance are mortgaged to them by Henry and Thomas St. Hill, to secure the sum of £1500 agreed to be advanced to them by the Appellants and for further advances afterwards to be made. It appears that this sum was advanced, and that default was made in payment of one of the instalments as stipulated; in consequence of which the mortgage became absolute, and a suit was then instituted for the purpose of foreclosing the mortgage and recovering the amount due on the security. Judgment was obtained in the Court of First Instance in the month of July 1831, upon which execution was ordered to be issued on the 2nd of October 1832. The sale under that execution was appointed to take place in January 1833; but was afterwards postponed to the November following, when the Attorney-General on the part of the Crown intervened and claimed a prior right upon the estates by virtue of a judgment obtained in the Court of Intendant in 1831.

Now the question is, whether the Crown had any such prior right. Their Lordships are at a loss to dis-[211] cover upon what precise ground it was that the Judgment of the Court below proceeded in deciding in favour of the Crown. It could not be by virtue of the Judgment in the Court of Intendant, for that was not obtained by the Crown until long subsequent to the date of the mortgage and hypothecation to the Appellants; and, therefore, it must have been in virtue of some other right and on some other ground, that the Crown claimed a priority.

Upon looking at all the proceedings in the Court of First Instance, it seems pretty clear that the claim of the Crown was upon the recognizances, entered into with the Governor in the month of January 1819 and August 1822. The Judgment of the Court below has, however, been argued at the Bar to have proceeded upon the preference given by the Spanish Law to a debt due to the Crown.

Now, admitting there is a preference due to the Crown, it appears that it is only for debts due to the Crown from the Treasurer in his public capacity, and which form a part of the public revenue—debts due to the Exchequer of the Crown; and whatever effect may be given to the Decree of the Court of Royal Audience, in consequence of which the Public Treasurer received the private deposits from the Escribanos, we think it is impossible to say that it could constitute a debt from the Crown to the individual suitors, or a debt from the Treasurer to the Crown as parcel of the public revenue; and, therefore, it seems to us that the Judgment cannot be supported on the ground of this being a debt due from the Crown as parcel of the public revenue for which it could have a priority by the Spanish Law. Indeed, it seems to be doubtful, according to the authori-[212]-ties, whether if this had been parcel of the public debt there would have been any priority, because it does not appear to be clear that the sums received by the Treasurer, which were to constitute a debt to the Crown, were received prior to the time when this mortgage took effect. However, it seems to admit of very little doubt that the Court below have proceeded upon the effect of the recognizance which bound the real estate in particular, and all the estate the Treasurer had at that time; and upon the effect of that Instrument we certainly are fully as competent to form an opinion as the Court below, which appears to have considered that, according to the construction of the Instrument, there is a claim on the part of the Crown, not merely for the sums of money which had been received as parcel of the public revenue, but for all sums of money which had been received by the Treasurer in the course of his office, and amongst the rest for those sums which he received pursuant to the Order of the Court of Royal Audience from the Escribanos of the different Courts, which sums were originally, no doubt, private property; and the question comes to this, what is the true meaning and construction of the recognizances which were entered into in the months of January 1819 and August 1822? Do these instruments, or rather does the latter, for they are similar in effect, apply to all sums of money which may be placed in St. Hill's hands whilst he is in the office of Treasurer, or which are ordered to be put into his hands by the Courts of the Colony, as holding that office, or does it apply only to the public revenue of the Crown which is to be employed for public purposes?

Now, upon the construction of the Instrument of August 1822, their Lordships entertain no doubt. [213] It is clear the recognizance was given in pursuance of the Order in Council of the year 1815. It recites that Order in Council: it states that the Treasurer had already entered into the recognizance or security required, "in and by the Proclamation of His Royal Highness the Prince Regent in Council, bearing date at Carlton House, the 17th day of August 1815, to be given by the Treasurer of the said island, or the person to be appointed Treasurer thereof, etc." Then it recites that the first recognizance which had been given for a term of three years had expired, that he was desirous of renewing the said security, and had offered the persons of Joseph Graham and Henry Graham in addition to the special securities on real property; and these persons being also present declared themselves willing to become "securities as aforesaid of the said Henry St. Hill, and to enter into the recognizances and oblige themselves and their properties respectively as in and by the said Proclamation is required to be done and given to persons becoming the sureties of the Treasurer of the said Island of Trinidad." Therefore, it is perfectly clear upon this recital that the sureties entered into this recognizance solely with a view to this Proclamation, and conceived themselves bound only to the extent to which the Proclamation would bind them. The Instrument then proceeds to say what the provisions of the recognizance are. "Now, therefore, the said Henry St. Hill doth hereby engage, covenant, and promise that he, the said Henry St. Hill, shall and will well and faithfully perform the duties of Treasurer of the said Island of Trinidad, as the same are or ought to be performed by him, without consuming, wasting, embezzling, losing, mis-spending, mis-apply-[214]-ing, or making away with any of the effects or monies whatsoever which are or shall be paid or delivered

to him or committed to his charge or custody." Now, if the Instrument had stopped there, and there had been no recital of the Order in Council, there certainly would have been good ground to contend that, inasmuch as there was entrusted to him by virtue of his office of Treasurer, not merely the custody of the public revenue, but the custody of the private money of the suitors from the Escribanos, this recognizance might have extended to protect their interests and to have given to the Crown the power of suing upon the recognizance and enforcing it as a Trustee for those individuals; but we think that construction cannot be given to the recognizance, when we look to the recital, which is always a key to the construction of the Instrument, that this security was solely in pursuance of the Order in Council of the 17th of August 1815; and further we find in this recognizance, "that he will not issue nor pay but upon the warrant or warrants issued or given under the hand and seal of the Governor or Officer administering for the time being the Civil Government of the said Island of Trinidad, any of the monies or effects paid, delivered or committed to his charge or custody as Treasurer aforesaid."

Now that, we think, shows very clearly that the recognizance is for the purpose of securing the due payment of those monies only for which the Governor is to give his warrant, and that is merely the public monies of the Colony which are applicable to the public purposes of the Colony.

This will be clearer when we look at the Order in Council itself, in pursuance of which it is expressly [215] recited that this recognizance was given. That Order directs the recognizance to be given; it directs it also to continue in force until duly released and discharged; and it also provides "that the same when enforced shall be used and applied for the public service of the said Island," clearly showing that the object of that recognizance was to secure the public revenue, and not to answer the purposes of private individuals. Then, also, the mode in which the monies which are raised and placed in the hands of the Treasurer are to be placed out, is described; and it is plain what is meant by the term warrant or order contained in this recognizance; and from the following clause it appears clear that the warrants mentioned, only related to the public money:—"and it is hereby further ordered and declared, that all sums of money to be raised under and by virtue of this Order shall be placed in the hands of the Public Treasurer of the said Island, and shall not be issued by him, but upon a warrant or warrants under the hand and seal of the Governor, Lieutenant-Governor, or Officer administering for the time being the Civil Government of the said Island, which warrant or warrants shall severally specify the public service to which the sums drawn for are to be paid." So that the warrants relate not to private sums of money due to private individuals, but merely to the public revenue of the colony.

It seems to their Lordships, therefore, that upon the true construction of this Instrument, neither the securities nor the principal have their Estates bound to any greater extent than to secure such sums of money as come into the hands of the Public Treasurer, and such as belong to the Crown, as revenue. We by no means see our way clear to the general law of the [216] Island independent of this recognizance, but we think the recognizance does not go to the extent of binding the estate for a defalcation or making away with the money of the suitors, and the result will be that the Judgment of the Court below having proceeded, as we think, upon a wrong ground, must be reversed.

See *Davidson v. Johnson*, ante, vol. i. [Moo. P.C.] 409.

[Mews' Dig. tit. CROWN, E. CROWN DEBT 2, *Priorities of.*]

ON PETITION FROM THE ISLAND OF GRENADA.

In re JOHN WELLS* [July 8, 1840].

The Chief Justice of the Supreme Court of Grenada has no power, alone, and

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine.

without the consent of the Assistant Justices, to issue a rule whereby the practice of the Court is altered. Two rules of Court made by the Chief Justice, prohibiting the Assistant Justices from doing any act in Chambers except in the absence from the Island or illness of the Chief Justice. Held by the Judicial Committee to be illegal, and ordered to be rescinded.

This case came on to be heard before the Judicial Committee, upon a Petition of Complaint presented to Her Majesty in Council by the Petitioner, an Assistant Justice of the Supreme Court of Judicature of Grenada.

The object of the Petition was to obtain the judgment of their Lordships on the validity of two Rules of Court made by John Sanderson, Esq., the Chief Justice, prohibiting the Assistant Justices from doing any act in chambers: and which, the Petitioner contended, [217] were repugnant to, and at variance with, the laws of the Island.

By an Act of the Legislature of Grenada, passed on the 4th October 1800, it was, amongst other things, enacted, that the Court of King's Bench and Grand Sessions of the Peace, and the Court of Common Pleas, theretofore subsisting in the Island, and all and singular the powers and authorities of the same Courts respectively, should be united in one grand Court, which should be called, "The Supreme Court of Judicature," and should consist of the Chief Justice and such other persons as had been already nominated and appointed Assistant Justices, and then presided as Justices of the Court of Common Pleas, and such others (not exceeding five in the whole number of such Justices) who should from time to time in case of vacancy be appointed under the Great Seal of the Colony to be Chief and Assistant Justices of the Supreme Court, which Court should be a Court of Record, and should exercise within the precincts of the Colony of Grenada and the Grenadines, all jurisdictions, powers, and authorities as fully and amply as the Court of King's Bench, Common Pleas, and Exchequer within the Kingdom of England had and ought to have; and by the same Act the said Justices or any one of them was and were thereby empowered to hold the said Court, and it was enacted that the proceedings and practice of the said Court thereby established should be regulated and governed in all cases, civil and criminal, wherein it was not otherwise provided by that Act, by the same rules as were already specified and established for the proceedings of the Courts of King's Bench, and Grand Sessions, and Common Pleas, by the several Acts therein recited [218] for re-establishing the same, as nearly conformable as local circumstances would admit to the practice and proceedings of the Courts of King's Bench, Common Pleas, and Exchequer in England.

By an Act passed on the 4th day of March, 1834, it was enacted, "that so much and all such parts of the Common Law of England as have not been altered by any Acts or Statutes of the Parliaments of England, Great Britain, or the United Kingdom of Great Britain and Ireland, or by any Act or Acts of the Legislature of this Island, and all such parts of the Statute Law of England, Great Britain, and the United Kingdom of Great Britain and Ireland, so far as such parts of the said Common and Statute Law are applicable to the circumstances and condition of that Colony, and were in force on the last day of the Session of the Parliament of the United Kingdom of Great Britain and Ireland, which was held in the second and third years of the reign of His present Majesty King William the Fourth, shall be and the same are hereby declared to be in force."

The Supreme Court of Judicature of Grenada as established under the above Acts, consists of a Chief Justice and Assistant Justices, the whole number of Justices not exceeding five. The Chief Justice is appointed by the Crown; the Assistant Justices by the Governor of the Island.

In the year 1832 John Sanderson was appointed Chief Justice of the Supreme Court by his late Majesty, and in 1835 the Petitioner was appointed an Assistant Justice by Sir Lionel Smith, the then Commander in Chief, Chancellor and Governor over the windward Islands and Colonies.

[219] In December 1838, the Chief Justice, without having at all consulted the Petitioner upon the subject, and without the Petitioner being in any manner privy thereto, caused the following Rules to be published in the public newspapers of the Island.

“ Rules of Court.

7th December 1838. Present: His Honour John Sanderson, Chief Justice.

“ It is ruled and ordered that no application shall be made at Chambers to any of the Judges of this Court other than the Chief Justice, except in case of his absence from the Island, or his sickness, or being a party.

“ Wednesday, 12th December 1838. Present: The Chief Justice.

“ A Rule to explain and extend the last Rule, No. 49.

“ Whereas the titles of Chief Justice and Assistant Justice imply assistance and not original authority, or concurrent and not independent authority in the Assistant; And whereas business in Chambers is matter of practice, of which a Colonial Assistant Justice has no knowledge, and in which, from practical ignorance, he may do wrong by errors which may in after times produce results inconvenient in justice and irremediable in law; And whereas such practices by Assistant Justices without authority of a professional Chief Justice have been heretofore erroneously had, and the Court act being in some parts inconsistent with or repugnant to other parts of the same act, for remedy thereof it is hereby ordered and ruled, that no Assistant Justice [220] shall do any act in Chambers without the presence and concurrence of the Chief Justice, except in the case of his absence from the Island or being a party interested in the act, or other legal disability, or being unable to do business by reason of sickness, after application shall have been first made to him to do the act required; and all applications shall be made at the Chambers of the Chief Justice from the hours of ten o'clock in the morning until twelve o'clock, and from two o'clock until four o'clock in the afternoon every day, Sundays, Good Friday, and Christmas-day excepted.”

The Petitioner considering that these Rules were inconsistent with the laws of Grenada, felt it his duty to bring them under the consideration of Her Majesty in Council, and for that purpose presented a Petition setting forth the circumstances above stated, together with extracts from acts of the legislature of Grenada, by which the office of Assistant Justice was recognised, and duties imposed on the persons holding it in common with the Chief Justice.

The Petition, having been referred by Her Majesty to the Judicial Committee, was replied to by the Chief Justice in a counter statement, and printed cases, with an appendix containing extracts from the authorities relied on, and an abstract of the rules of the Supreme Court of Grenada, was lodged. The Petition now came on to be heard.

Sir Frederick Pollock, Q.C., and Mr. Burge, Q.C., for the Petitioner, insisted that the Chief Justice had no power to make such Rules, and that the same were contrary to law. They cited various acts of the Legislature of [221] Grenada, by which the Assistant Justices of the Court of King's Bench and Grand Sessions of the Peace, and the Common Pleas, were expressly authorized and directed to discharge duties of great importance at Chambers, and that without the presence or concurrence of the Chief Justice; and especially the act empowering any two or more of the Justices of the Court of King's Bench and Grand Sessions of the Peace, being also Justices of the Court of Common Pleas, to take and admit bail at any time of the year as freely as the Court of King's Bench in England can do in Term time or the Judges thereof out of Term (No. 30, c. 23, p. 9, Smith's Grenada Laws). Also an Act empowering any of the Justices of the Court of Common Pleas to vacate recognizances upon Bills of Exchange protested for non-acceptance upon summons taken out before them, and to make such orders touching the vacating of the recognizances as should be agreeable to justice (No. 43, p. 133, *ib.*). Also the Act of 1790, for re-establishing the Court of Common Pleas, giving the Assistant Judges power to grant further time to plead—to take bail—to grant *habeas corpus*—to take depositions of witnesses *in extremis*—to fix amount of actual levy to be made on executions—to attach goods, etc., of a defendant in an action, and whereby it was specially enacted, “ That in cases not therein or thereby sufficiently provided for, it should be in the power of the Justices of the Court of Common Pleas thereby established, or the majority of them, to make and establish General Rules of Practice to be observed in the same Court, and to appoint or direct the forms of process issuing out of the same Court, as nearly as might be, conformable to the prac-[222]-

tice of the Court of Common Pleas in England in like cases" (No. 62, p. 189, Smith's Grenada Laws).

Mr. Serjeant Stephen and Mr. Sharman, for the Chief Justice, in support of the Rules, contended that the Rules in question were in furtherance of public justice, and not contrary to law,—and argued against the validity of the Law of the 4th of October 1800, no summons having issued to the Members of the Legislature previous to the passing thereof, as required by the 11th Law of Grenada, No. 29, 14th October 1767. They insisted also that the Rules were in accordance with the spirit and intentions of the Acts of 27th March 1784, c. 6, providing that after the record in error is transcribed, it should be brought forthwith to the Chief Justice to be certified, and in case he should be sick or absent, then to the next senior Justice;—the Act of 30th of April 1784, c. 16, whereby the Secretary is required to return to the Chief Justice, or, in his absence, to the senior Justice for the time being, an abstract of all forfeited recognizances, in order that they might be put in force according to law;—the Act of 23rd Dec. 1790, c. 30, whereby it is enacted "that all writs shall run in his Majesty's name, and bear *teste* in the name and under the seal of the Chief Justice for the time being, or, in case of his death or absence from the Island, or being a party in the suit, then in the name and under the seal of the Puisne Judge of the said Court in the Commission on the Island."

[223] Lord Brougham.—The question is confined to a very narrow compass—are the orders legal or illegal? Their Lordships on this point entertain no doubt, and they will report to Her Majesty that they are illegal. It was very extravagant to suppose that the Assistant Justices could have power to act in Court and not in Chambers without the concurrence of the Chief Justice. The rules must be rescinded.

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

THOMAS HUDSON BATEMAN and ROBERT HENRY WELCH, *Appellants*;
ELLEN PENNINGTON,—*Respondent* * [July 10, 1840].

Probate granted of a paper written in ink, but dated and signed in pencil, with the addition "in case of accident, I sign this my Will;" having also an attestation clause unsigned: the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. On reversing the decision of the Prerogative Court rejecting an allegation pleading circumstances to entitle a paper to probate, the Judicial Committee retained the cause, and ultimately granted probate of the Instrument.

This was a cause of proving, in solemn form of law, the Will of Richard Sparling Berry, bearing date the 5th day of October 1837, promoted by the Appellants, Thomas Hudson Bateman and Robert Henry Welch, two of his Executors therein named, against the Re-[224]-spondent, Ellen Pennington, the aunt and only next of kin of the deceased.

The Testator died suddenly, on the night of the 29th of January 1838. On the following morning search was made, and in the repositories of the deceased was found two testamentary papers. The body of the first paper was written in ink, but the date of the 5th of October 1837 was inserted in pencil in the third line; the signature of the Testator was likewise written in pencil, and was preceded by the following words, also in pencil—"in case of accident I sign this my will;" there was also a clause of attestation, but without the subscription of any witness. By this instrument the Testator, among other things, named and appointed William Sparling, Thomas Hudson Bateman, and Robert Henry Welch, his Executors.

The second paper was without date, but it was subscribed by the Testator in ink: to this paper also there was a clause of attestation, without the subscription

* Present: Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

of any witness. In this instrument William Sparling, Thomas Green, and Robert Henry Welch were named as joint Executors.

The deceased, at the time of his death, was seised of, or entitled to, real estate of considerable value, and was also possessed of personal estate of the value of £28,000.

Shortly after the Testator's death, proceedings were instituted in the Prerogative Court of Canterbury, on behalf of the Appellants as the Executors named in the paper dated the 5th of October 1837, calling upon Mrs. Ellen Pennington, Widow, the aunt and only next of kin of the deceased, to see the Will propounded in solemn form of law. An allegation setting forth the above facts and propounding the paper was, [225] after argument, on the 11th of June 1838, rejected by the learned Judge.

From this rejection an Appeal was interposed by the Appellants.

Mr. Pemberton, Q.C., and Dr. Addams, for the Appellants.—The question which the Court of Probate would ultimately have had to decide was, whether the paper of the 5th of October 1837 was not intended by the deceased as an interim instrument. "In case of accident I sign this my Will;" these words import the intention not to die intestate. *Castle v. Torre* (2 Moore's P.C. Cases, 133). The circumstances of the words being in pencil, and apparently added after the body of the paper was written, cannot vary the effect of the paper. There is no dispute respecting the handwriting—both pencil and ink are in that of the deceased. If the Will purported to dispose of personalty only, there could be no question of its validity;—does the fact then of there being an attestation clause, and a disposition of the real estate as well as the personal, so avoid the paper as to make it not admissible to Probate? In *Smith v. Brown* (3 Knapp, P.C. Cases, 1), the real and personal estates were blended together, both funds were charged with the payment of debts and legacies; there was besides, no internal evidence, as here, to show that the paper was intended to operate as an interim instrument. In *Warburton v. Burrows* (1 Addams, Ecc. Rep. 383), an unexecuted Will was pronounced for, though it appeared that the fair copy had been prepared for execution two months previous to the death [226] of the Testator; there was evidence to show that it had received his final approval; that he was of procrastinating habit; and that he died suddenly of apoplexy. But the Court below ought at least to have admitted the allegation and allowed proof of the facts pleaded, whatever ultimate decision it might have come to. *Stewart v. Stewart* (2 Moore's P.C. Cases, 193). There is enough upon the face of the paper to entitle us to propound it, even if the Court of Probate should think it was not entitled to proof.

Mr. Kindersley, Q.C., and Dr. Phillimore, for the Respondent.—The presumption of law being against the validity of the Instrument, the circumstances pleaded in the allegation, if proved, would not be of force sufficient to rebut that presumption. That is the ground upon which the Court below proceeded. The doctrine of the Ecclesiastical Courts is, that *prima facie* the presumption is that pencil alterations are deliberative, and those in ink final. *Hawkes v. Hawkes* (1 Hagg. Ecc. Rep. 321). *Edwards v. Astley* (*ib.* 491). In the former it is considered merely as a memorandum for future deliberation, not intended to operate as a final instrument. *Rymes v. Clarkson* (1 Phill. Rep. 35). It is true this presumption may be rebutted; but no fact pleaded in this allegation is sufficient for that purpose: the words relied on, "in case of accident I sign this my Will," do not import that the deceased intended that paper to act as a Will; but at the highest, show that they were his final instructions. There is, besides, an attestation clause unwitnessed; [227] and that again affords a presumption against the paper as a Will. *Beatty v. Beatty* (1 Add. Ecc. Rep. 154). *Harris v. Bedford* (2 Phill. Ecc. Rep. 177). There were sufficient grounds for the Judgment of the Court below, which assumes that if the facts stated in the allegation were proved, they would not be sufficient to entitle the paper to Probate.

Lord Brougham.—The pressure of the case arises from the words in pencil, "in case of accident I sign this my Will;" and the question is, are they deliberative or final? If the words had been, 'I sign this my Will, in case of accidents,' though such signature was in pencil, could it be contended to be only deliberative? or if he had said, 'I write this in pencil, in case of accidents,' and had then signed his name, could that be held not to be a good signing? But all the circumstances

of the case must be looked at; and the question their Lordships have to determine is, not whether the circumstance of the date and signature being in pencil, imports that the paper was deliberative, or the circumstance of the attestation clause being unwitnessed is so strong a presumption against the paper as a Will, that the fact stated in the allegation, namely, the intention of the deceased to die testate, and the sudden death ought not to be admitted to proof in order to rebut the presumption afforded by the condition of the instrument itself. All the cases show that, in either instance, the fact of the signing being in pencil, though *prima facie* a presumption that the act is only deliberative, yet it may be shown to be otherwise; and so the presumption against a Will having an attestation clause without witnesses may be [228] repelled. And, in either case, if the facts in this allegation are proved, the legal presumption would be negatived, and the Appellant entitled to Probate. Their Lordships are, therefore, of opinion that the sentence of the Court below, rejecting the allegation, ought to be reversed, and that the Appellant must be admitted to his proofs; for which purpose they will retain the Cause.

The allegation and exhibits being admitted to proof, five witnesses were examined by Commission. No allegation was offered on the part of the Respondent. Publication was decreed, and the cause assigned for final hearing before the Judicial Committee, when their Lordships * decreed Probate (July 3rd, 1841): the costs of all parties to be paid out of the estate.

[Mews' Dig. tit. WILL. IV. EXECUTION, b. *Attestation*. On point (i.) pencil alterations before execution, cf. *Francis v. Grover*, 1845; 5 Hare, 39; *In bonis Hall*, 1871, 2 P. and D. 256; *In bonis Adams*, 1872, 2 P. and D. 367: (ii.) as to allowance of costs out of estate, cf. *Davis v. Gregory*, 1873, 3 P. and D. 28.]

[229] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

THE VERY REVEREND THE DEAN OF JERSEY.—*Appellant*: THE RECTOR OF THE PARISH OF —,—*Respondent* † [July 31, 1840].

The Ecclesiastical Court of Jersey has jurisdiction, under the 17th and 46th Canons, to entertain a suit against a Clergyman, charging him with certain acts of conduct, "which created a scandal against morality and religion, and especially against the Established Church of which he is a Minister," though the alleged acts, if proved, would constitute a criminal offence, over which the Ecclesiastical Court has no jurisdiction: the gravamen of the charge being, the scandal induced by the reports of the acts in question, for which a clergyman is amenable to his Ordinary, and not their criminality, for which he is liable to the criminal tribunal of the Island [3 Moo. P.C. 248].

By the 21st Canon it is enacted, that "the Dean, in causes which shall be handled in Court, shall ask the advice and opinion of the Ministers who shall be present." The Ministers are only Assessors, and have no voice in the decision of the Court, which rests with the Dean or Commissary alone [3 Moo. P.C. 249].

Appeal abated by the death of the Dean of Jersey, pending the Appeal, revived in the name of his successor, though not prosecuted within the time required by the 57th Canon [3 Moo. P.C. 230].

The Appellant in this case was the Very Reverend Francis Jeune, Dean of the Island of Jersey and Rector of the Parish of St. Helier in the same Island. The Respondent was Rector of the Parish of — in the Island.

The Appeal was originally granted to the Very Reverend Corbet Hue, deceased,

* Present: Lord Brougham, Mr. Baron Parke, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

† Present: The Lord President (Marquis of Lansdowne), Lord Lyndhurst, Lord Brougham, and Sir Herbert Jenner.

late Dean of Jersey, from a sentence of the Royal Court of that Island, in the nature of a writ of Prohibition, dated the 24th [230] day of November 1837, whereby the Court annulled certain proceedings which had been taken in the Ecclesiastical Court against the Respondent, and ordered that all the Acts which referred thereto should be erased from the records of that Court.

The Very Reverend Corbet Hue died in the month of December 1837, shortly after the above-mentioned decision of the Royal Court had been rendered, and before any proceedings had been taken by him for prosecuting the Appeal.

On the 5th of March 1838, Her Majesty was pleased, by Letters Patent, to constitute and appoint the Very Reverend Francis Jeune, D.C.L., Dean of the Island of Jersey; and in the month of November 1838, the Dean presented a Petition to Her Majesty in Council, praying that Her Majesty would be pleased to order the said Appeal so granted to the Reverend Corbet Hue, deceased, to be revived, and that he might stand and be the Appellant in such Appeal, as Dean in the said Island of Jersey.

This Petition came on for hearing on the 12th of February 1839,* when it was opposed by the Respondent, who contended that the suit having become abated by the death of the Dean, was at an end; and moreover that the Appeal not having been prosecuted within the time required by the 57th Canon, was lost, and could not now be revived.

Lord Brougham.—We think in this case, that under the circumstances, [231] the rule, requiring the prosecution of the Appeal within a year and a day, must be waived, and that the Appellant ought to be let in and the suit revived, as the Appellant could not have done much good in coming before.

The Appeal being thus revived came on for hearing on its merits. The facts of the case, and the questions raised on the construction of the Canons of 1623, on both sides, are fully stated and set forth in the Judgment.

Dr. Addams for the Appellant, and

The Queen's Advocate (Sir John Dodson), for the Respondent.

Sir Herbert Jenner (March 11, 1841).—This is an Appeal from the Royal Court of Jersey, in which the Dean of Jersey is the Appellant, and the Reverend —, the Rector of the Parish of — in that Island, is Respondent. The object of the Appeal is to obtain the remissal of a sentence of the Royal Court, in a return of a Writ of Prohibition to the Ecclesiastical Court, annulling certain proceedings which had then been instituted against the Respondent, and directing that all the acts and records in that cause should be erased from the Rolls of the Court.

This sentence appears to have proceeded upon two grounds: First, that the Ecclesiastical Court was incompetent to entertain the suit. Secondly, that the Dean, or his Commissary, pronounced a sentence, declaring its competency, in opposition to the opinion [232] of the majority of the assessors by whom he was assisted.

It appears that the Ecclesiastical Law of the Island of Jersey is to be found in a body of Canons and Constitutions Ecclesiastical, which were compiled by the order of James I. in 1623, by Abbott, the Archbishop of Canterbury, Williams, Bishop of London, then Lord Keeper, and Andrews, Bishop of Winchester. These Canons and Constitutions were framed after the models of the English Canons, with some modifications adapted to the particular customs and usages of the Island. These laws were confirmed by Royal Charter in 1623, and the King therein declared his "will and command that the said Canons and Constitutions hereafter following, shall from henceforth, in all points, be duly observed in our said Isle, for the perpetual government of the said Isle, in causes Ecclesiastical, unless the same, or some part or parts thereof, upon further experience and trial thereof, by the mutual consent of the Lord Bishop of Winton for the time being, the Governor, Bailiff, and Jurats of the said Isle, and of the Dean and Ministers, and other our

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy [Sir Thomas Erskine], and the Right Hon. Dr. Lushington.

officers of our said Isle for the time being, representing the body of the said Isle, and by the Royal authority of us, our heirs or successors, shall receive any additions or alterations as time and occasion shall justly require." It does not appear that any alteration or addition has been made, and, therefore, these laws remain effectual in the manner therein stated.

The Ecclesiastical Jurisdiction, as constituted by these Canons, is exercised by the Dean in his Court, in which he presides either in person or by his Commissary, whom he has power to appoint by the 30th of these Canons, and he is to be assisted by certain [233] assessors who are the ministers of the several parishes within the Island, whose advice and opinion the Dean is required to ask in all causes which shall be handled in Court, as appears by the 21st Canon. The 22nd Canon enumerates the cases of which the Dean has cognizance, and the offences which he is empowered to punish according to the Ecclesiastical Law, without prejudice to the power of the Civil Magistrate in regard of bodily punishment for the said crimes, amongst which are to be found adultery, incest, and fornication.

The 46th Canon also enacted that the King's Procurator, or, in his absence, the Advocate, may be present in Court, and there prosecute the censure and punishment of all causes of crime and scandal. The 56th directs that all Appeals in causes ecclesiastical shall be heard and determined by the Bishop of Winchester in person, or, in the vacancy of that See, by the Archbishop of Canterbury in person.

There are other directions contained in the Canons regulating the conduct and behaviour of ministers, of the proceedings in the Court, and all subjects connected with the ecclesiastical affairs of the Island.

In this Court so constituted the proceedings out of which the present question arises, originated.

It appears that in the month of October 1836, the Avocat Promoteur made a representation to the Ecclesiastical Court to the effect, "that rumours of a most serious nature had for some time past been publicly circulated touching the conduct of the Rev. — (the Respondent), accusing him of leading a most scandalous life, and of having committed indecent as well as criminal acts, in having made the most shameful proposals to men, and of having met them at undue [234] hours, and under suspicious circumstances, to the great scandal of religion, and specially of the Established Church, of which he is a minister."

The representation proceeded to state, that in the month of April preceding, a Remonstrance had been presented to the Royal Court by the Respondent, setting forth, "That for a considerable time he had been exposed to the most outrageous calumnies, and to insinuations of a most horrible nature, on the part of a certain party therein mentioned, who had on several occasions, and also very recently, dared to spread in public the most untrue reports, tending to represent the Remonstrant as having been guilty of a crime of the most horrible description which can be conceived, a crime which, if found guilty, would subject him to the penalty of death; that the same party had also declared, in the presence of several witnesses, that his object in propagating these most odious calumnies against the honour and character of the Remonstrant was to compel him to abandon his Living, and to quit the Island for ever, but that, if he consented to appoint a Curate, he would be shielded from all further annoyances in this respect; that the same party had also publicly stated that a prosecution was about to be commenced against him, the Remonstrant, in the Ecclesiastical Court, to deprive him of his Living; that these infamous calumnies had been circulated with a view to ruin the character of the Remonstrant, and to deprive him of the esteem and confidence of the inhabitants of the parish of —, of which he is Rector;" and, in conclusion, he prayed "that the party in question might be summoned before the Court, and, after proof made of the above allegations, that he should be condemned to make an [235] honourable compensation to the Remonstrant, and to pay him the sum of £5000 sterling by way of damages."

The representation of the Avocat then went on to state that the party accusing had examined three witnesses, whose depositions he, the Avocat, had not been able to procure, but who, he was credibly informed, deposed to certain disgusting actions and very suspicious meetings with men, by the Rector of —; that a few days after the examination of these witnesses in the presence of the Rector, he had with-

drawn his action against the party accusing, under circumstances which not only have given rise to the most violent suspicions, but might be construed into a tacit acknowledgment of his guilt, he having obliged himself, by an agreement in writing, not only to abandon the suit, but also subjected himself to a large penalty if for the future he discharged the duties of his parish—conduct on the part of the Rector of — which would render him unworthy to exercise his sacred calling.

This was the substance and effect of the statement made by the Avocat, who was the prosecutor in this case, and which I have thought it right to state pretty fully, as it is the foundation of the proceedings in the Ecclesiastical Court, as well as of the sentence pronounced by the Royal Court, and it is that upon which the question here to be decided must principally turn: and the Avocat having made that representation, concluded with praying that he might be allowed to cite the Respondent before the Court to answer this representation, and that previous to proceeding further the Court should in the first instance, as customary in such cases, call on the churchwardens of the parish of —, in conformity with their oath and the [236] duties of their office, to make a report touching the reports above mentioned. This was accordingly ordered to be done.

On the next Court day, 5th December 1836, neither the Respondent nor the churchwardens appeared, and it was then ordered that they should be again summoned, in pain of contumacy; and on the prayer of the Avocat, notice was given to the Respondent that he was suspended from exercising the duties of his calling until a final sentence should be pronounced in the cause.

Here the matter appears to have rested for some time, and no further steps were taken until the 9th of December 1837 (the cause of that delay does not very exactly appear), except that it is to be collected from the entry in the Acts of Court on that day, that the Respondent had appeared in the interval to the citation; for he then objected to the Court proceeding, on the ground that there was not a sufficient number of Assessors on the Bench to form a quorum. He was, therefore, directed to state his objection in writing. The Respondent then objected that there were not a sufficient number of Assessors in the Island to form a quorum. This latter objection was overruled by the Court, which was then adjourned to the 16th October, on which day the Court overruled the former objection made by the Respondent as to the deficiency of the number of Assessors, and declared its competency to proceed. The Respondent then objected to five of the Assessors, as not being sufficiently indifferent and unprejudiced. With regard to three of them, the Court overruled the objection, as coming at too late a period in the cause, the Respondent having already pleaded before them, but directed the objection as to the other two to be lodged in the Registry, the Defendant being [237] allowed to appeal from all these sentences to the Bishop of Winchester.

He then, through his Counsel, applied for and obtained time, to the following Court day, to submit a question to the Court, touching its competency to entertain the case; and upon that day, the 23rd of October, he propounded his objections to the competency of the Court. Those objections were not founded as the former had been, with respect to any deficiency in the number of Assessors, nor on any part of its constitution, but on the ground that it had not jurisdiction to entertain the question; and he then goes on to assign the reasons why the Court was not competent to entertain the question, which were pretty much the same as those argued before their Lordships at the hearing. The first of those reasons was:—That the 22nd Canon enumerates all the offences which come under the cognizance of the Court, and that all other crimes, particularly all those of a more serious nature, are included according to the maxim, "*Exclusa consentia omnia quae lex non enumerando inclusit*"; that the Ecclesiastical Court had no right by its Canons to take cognizance of capital crimes, a right which is equally denied to the English Ecclesiastical Courts according to the Laws of the Established Church, which appears, from the preamble of the Jersey Canon Law, are the source and foundation of the Law; that in such cases, the Ecclesiastical Court cannot proceed against a Defendant to deprivation, until he has been regularly convicted before a competent tribunal. And he then proceeds to argue further against the competency of such a tribunal to take cognizance of such a crime, the actual commission of which, he alleges, is imputed to him; that is, in the allegation of the Avocat; [238] part of

the proof being his tacit avowal and confession of his guilt. He further urged, that if the Court entertained this cause, it would trench upon the right which the laws and customs of the Island give, without exception, to every one accused of a capital crime, of being tried by a jury. He then is stated to have cited precedents which have taken place in England in similar cases, in which the incompetency of Ecclesiastical Courts have been formally recognized, and he demands that the Court would declare its incompetency.

The Court, after having heard the arguments on both sides, postponed giving its judgment till the next Court day: upon that day, the 23rd of October, at the sitting of the Court, the Respondent took some objections to its proceedings on account of the absence of one of the Assessors, who had been present on the preceding Court day. This objection being overruled, the Court proceeded to take the opinions of the Assessors present, and also directed the opinion of the absent Assessor to be recorded. The opinions of the majority of the Assessors were against the competency of the Court to entertain the cause: but the Dean, notwithstanding this, decided that it was competent to render its Judgment.

The Defendant then objected that the Judge could not give a Judgment contrary to the opinion of the Assessors present. The Judge however decided that his opinion ought, although contrary to that of the Assessors, to prevail, to form a Judgment of the Court, the Dean, or his Commissary, being the sole Judge of that Court. The Commissary, who presided, then proceeded to say, that the objection of the Defendant made on the 23rd of October might have deserved consideration if it had come after the criminal prosecution commenced against him in the Royal Court, inasmuch as it would not be just to try the same individual before two tribunals at one and the same time, nor to try him again for the same offence, after a sentence rendered by a competent tribunal, except only by taking the Judgment of such tribunal as the foundation of such ecclesiastical sentence which might result therefrom, if such Judgment were one of condemnation.

He then proceeded to observe, that considering that the Royal Court has taken no step of this kind, it is to be presumed that it has not viewed the case as one within its jurisdiction, and consequently there is nothing to prevent this Court from entertaining the suit, inasmuch as it would be a monstrous and absurd doctrine, that while it could punish by ecclesiastical censures, the ministers and members of the Church for ordinary faults, there should be no means of bringing to justice, persons guilty of the most atrocious crimes, in cases where the Royal Court does not deem it necessary to proceed against them, doctrines which the Legislature never could have intended to sanction, in framing the Laws which have been quoted in support of the Respondent's objections: and it might be further questioned whether those Laws were applicable to the jurisprudence of this Island, which is guided by its peculiar law and usages, and not by those of the mother country. Now whether this reasoning of the Commissary is in all respects well-founded, and to be maintained and supported, it is not necessary here to inquire, for that did not form the ground upon which the Court eventually decided the question as to its competency to entertain the suit. For the learned Commissary goes on to state: But even supposing it [240] were so, the case actually before the Court is not one to which they (the objections) could be made applicable, because the statement made by the Avocat Promoteur does not charge the Defendant with the commission of a capital crime, but merely with acts and proceedings which, however revolting in themselves, would not probably, before a Court of Justice, carry with it the punishment of death; that consequently this cause comes clearly within the limits prescribed by the Canons to the jurisdiction of the Court, although the horrible crime alluded to in these proceedings is not specifically designated in the enumeration made in the 22nd Canon of the subjects submitted to it: that it should not have the right of entertaining a suit instituted for this crime, inasmuch as it is not for the commission of the said crime that the Respondent was cited before it, but for having caused by the proceedings in question, according to the tenor of the representation, "a great detriment to morality and religion, and especially to the Established Church, of which he is a minister." And this, he observes, "falls evidently under the commission of scandal, and consequently, without any doubt, within the jurisdiction of the Court." Upon this last question, as to the competence of the

Court to entertain the suit, it expressly disclaimed the intention of trying the Respondent for the crime which he alleged the representation of the Promoteur imputed to him, and declared that the inquiry in that Court was limited and confined to the scandal which had been occasioned by his conduct, with respect to which it affirmed its competency to proceed.

It then proceeded to notice a further objection which had been raised by the Respondent, namely, that it was not competent to the Avocat to proceed, without having [241] first obtained the report of the churchwardens. This objection the Court overruled, and finally rejected the Defendant's plea, at the same time allowing him to appeal from the sentences to the Bishop of Winchester. The final hearing of the suit was then adjourned to the 13th of November.

In the meantime, however, the Respondent presented a Remonstrance to the Royal Court, in which he set forth the substance of the statement of the Promoteur, which, he again alleged, charged him with the commission of an offence of the most revolting nature, which representation, as he contended, ought to have been instantly rejected by the Court, on considering the proper limits of its jurisdiction; but that, on the contrary, it based its proceedings upon it, in an action brought against the Remonstrant. That the Court attempted to proceed against him by an illegal suspension without having heard him, and without the churchwardens of the parish of ——— having made any report, and without a single witness having been examined.

He then proceeded to urge, that on the 23rd of October 1837, two of the Assessors, of three then present, had given their opinion that the Court was incompetent, the third that the Court was competent, to entertain the suit, so far as thereto authorised by the 17th Canon; but the Dean's Commissary decided, as he states, on the 6th of November, that his opinion, although contrary to that of the Assessors, should prevail, and form the Judgment of the Court; and he caused it to be so stated, in the Act of the Court of 6th of November 1837. "That the Ecclesiastical Court was competent to entertain the suit."

The Respondent then submitted that the Ecclesiastical Court could not, by the 58th Canon, exercise any jurisdiction beyond, or contrary to, the tenor of its Canons, and could not take cognizance of all crimes, but only of those which are specially referred to by law, amongst which the offence imputed to the Respondent is not named. In that passage, he clearly refers to the offences mentioned in the 22nd Canon. He further urged that the Ecclesiastical Court had invaded the jurisdiction of the Royal Court, and also the right which belongs to every citizen, of being tried before a jury, in cases of so gross a nature, and he therefore prayed that the Dean or his Commissary might be summoned to appear before the Court, to see that the said prosecution be annulled, and that all Acts of the Ecclesiastical Court, relating to the same, be ordered to be erased from the Registers of the Court, and that the Dean or his Commissary be provisionally prohibited from proceeding in the cause, until the Royal Court shall have decided touching the competency or incompetency of the Ecclesiastical Court, and prayed relief generally.

The Dean then appeared to answer the Remonstrance, and again declared that the representation made against the Respondent did not accuse him of the crime there mentioned. Upon this, one of the Judges who was present, declared he was of opinion that the Ecclesiastical Court was not competent, as the crime imputed to the Defendant was of a most serious nature; another declared his opinion to be, that as the question submitted to the Court was one which affected, not only the Ecclesiastical Court, but also society generally, as well as the Remonstrant in the highest degree, the matter should be decided by the full Court. This opinion was adopted, and the Court directed it to be [243] notified to the Ecclesiastical Court, that all further proceedings should in the meantime be suspended.

On the 24th of November, the Royal Court again assembled, at which time it appeared that seven Judges besides the Chief Magistrate were upon the Bench. The question was argued by counsel on both sides, and the Chief Magistrate having collected the opinions of the Judges, it appeared that three of the seven were of opinion that the accusation framed against the Respondent was within the competency of the Ecclesiastical Court, and that the Royal Court could not receive the said Remonstrance; and that four, evidently adopting the suggestion of the Respondent,

that the representation of the Promoteur charged him with the actual commission of the crime, were of opinion, "Considering that it appears by the acts of the Ecclesiastical Court, that the accusation against the Respondent is of the highest gravity (*de la plus haut gravité*); that moreover the majority of the Assessors of the Ecclesiastical Judge, who must know the attributes of the Court to which they belong, gave their opinion that the said accusation is not within the competency of the Ecclesiastical Court,—that it would be contrary to every principle of justice and equity, that a Judge should have the power of giving Judgment in opposition to the opinion of the majority of his Assessors." The Court then annulled the proceedings of the Ecclesiastical Court against the Respondent, and ordered that all the acts relating thereto should be erased from the Rolls of the said Court.

Now it is from this sentence of the Royal Court that the present appeal has been brought; and the question for their Lordships to determine is, whether this sentence, being in the nature and having the effect of [244] a Writ of Prohibition to the Ecclesiastical Court, can be maintained upon the two grounds upon which it is founded.

In the course of the argument, some question was raised as to the extent of the power of the Royal Court to issue a prohibition to the Ecclesiastical Court, but that argument was not very strongly insisted upon, and if it were necessary to determine that point, their Lordships might possibly require some further information on that subject than has been furnished, before it pronounced any opinion upon it. But on the view which their Lordships are inclined to take of this case, that course does not appear to be requisite.

The first thing to be ascertained is, what is the nature of the suit which was instituted in the Ecclesiastical Court, and which the Respondent was called upon to answer. Did the representation on which the citation was issued charge him with having committed the offence alluded to, or merely with certain acts of conduct "which created a scandal against morality and religion, and especially against the Established Church, of which he is a minister?" The consideration applicable to the case will be different, according as the one or the other of these representations shall be the correct character of the suit: the Respondent alleges that the former is the true character of the offence imputed to him. The Dean or his Commissary entirely disclaims this, and alleges that the latter description is the true one. If, as the Respondent alleges, the representation would charge him with the commission of the offence, then it will be necessary to inquire whether the offence is included in the number of those designated in the 22nd Canon, by which, as is contended, the jurisdiction of the Court is limited, and beyond [245] which it is expressly prohibited from proceeding, by the 58th Canon.

Now it is clear that this offence is not included by name amongst those which are declared to be the subjects of ecclesiastical cognizance: it is limited to "incestuous persons, adulterers, and fornicators," who are subject to punishment in the Ecclesiastical Court; but the particular crime here alluded to is not among the number of those expressly designated, and though the term made use of (*Paillardissa*) might, in its general acceptation, be used as descriptive of all kinds of incontinence, yet when used in conjunction with adultery, and incest, as in the 22nd Canon, it is a question of considerable doubt whether it is not to be considered as there used, in its more limited and restricted sense, as designating fornication and incest, as opposed to the higher species of crime. If, therefore, there were no other ground upon which the jurisdiction of the Ecclesiastical Court could be supported, it might be a matter of considerable doubt whether that jurisdiction could be maintained under the 22nd Canon, for it appears that both the laity and the clergy would be subject to the same jurisdiction, and the Court therefore would be unwilling unnecessarily to determine that point, unless it was forced upon them.

But it seems to their Lordships, that the object of the suit in the Ecclesiastical Court was not, as alleged by the Respondent, to inquire whether he had been actually guilty of the crime, but whether his conduct had been such as to create scandal, for which, as a clergyman, he was amenable to his Ordinary. This was the view taken of it by the Dean, in his answer to the Remonstrance of the Respondent in the Royal Court, as well as in deciding the competency of the suit. And this [246] appears to their Lordships to be the true description of the suit. The representation of the

Avocat Promoteur, in the first place, nowhere avows that the Defendant had committed the offence. It merely alleges the existence of certain reports of his having lived a most scandalous life; of having committed indecent as well as criminal acts, which it explains to be that of having made the most shameful proposals to men, and of having met them at undue hours, and under suspicious circumstances, to the great scandal of religion, and of the Established Church of which he is a minister.

Now this scandal forms the gravamen of the charge: the other matter stated in the representation is to the effect, that his conduct in bringing an action against the author and circulator of these calumnies, and afterwards withdrawing his action, after three witnesses had been examined; moreover, binding himself, under a heavy penalty, not to perform the duties of his parish,—had given strength and solidity to the reports, and thereby showed that the Avocat Promoteur was not proceeding upon vague and uncertain rumours. The Ecclesiastical Court did not decide that it had jurisdiction over the criminal act, but simply that it had jurisdiction to inquire into the scandal which had been occasioned by the conduct imputed to the Respondent. If this be the true character of the inquiry into which the Ecclesiastical Court proposed to enter, the first ground upon which the prohibition was founded must necessarily fail.

It was indeed contended in argument, that the causes of scandal which, by the 46th Canon, the Procurateur, or the advocate in his absence, was empowered to prosecute, must be understood to mean [247] the scandal arising out of the offences mentioned in the 22nd Canon, and none others. But it seems to their Lordships, that this is not the true construction of the Canon, but that it extends to all causes of scandal mentioned in the Canons, and that any clergyman violating the provisions of the 17th Canon is equally amenable to the Ecclesiastical Court, and may be therein prosecuted by the Avocat. Now that 17th Canon expressly declares, "that every one of the ministers shall be careful to observe that decency and gravity of apparel which becomes his profession and may preserve due respect to his person; and they shall be very circumspect in the whole course of their lives, to keep themselves from such company, actions, and haunts, as may bring any blame or blemish upon them. Nor shall they dishonour their calling by games, taverns, usuries, trades or occupations not befitting their functions, but shall study to excel all others in purity of life, gravity, and virtue."

This Canon is applicable to the clergy only.

The 22nd Canon, in many of its provisions, applies to the laity equally with the clergy, but the 17th is applicable to the clergy only, and unless it can be contended that a clergyman is at liberty to set the provisions of this Canon at defiance, that he may with impunity commit such actions, and frequent such haunts as may bring a blemish upon him, there must be some means of punishing and restraining him; and before what Court can that be but in that of his Ordinary? There is no other which can take cognizance of such conduct, and it belongs peculiarly to the Ordinary to take care that no scandal be created to the Church or to religion, by any of its ministers within his jurisdiction.

[248] Now, that the charge against the Respondent is such as to bring scandal upon the Church, cannot be doubted—whether it be true or false is the point to be inquired into; that is, whether his conduct has been such as is represented.

It was said, indeed, that the charge was so equivocal that evidence of the capital offence might be admitted under it, but the bare possibility that such may be the case can hardly be considered a sufficient ground for prohibiting the Court from proceeding.

Their Lordships are, therefore, of opinion, that as the 46th Canon, which empowers "the King's Procurator, and in his absence the Advocate, to be present from time to time in the Court, and there prosecute the censure and punishment of all causes of crime and scandal;" and as the Respondent has by his conduct, which has been stated in the representation of the Avocat Promoteur, brought himself within the provisions of the 17th and 46th Canons,—that the first ground upon which the prohibition to the Ecclesiastical Court issued cannot be sustained, but that the Respondent has, by his conduct, as described in the representation of the Avocat Promoteur, brought a scandal upon the Church, and as such is liable to be proceeded against in the Ecclesiastical Court.

With respect to the second ground upon which the prohibition is founded, namely, that it is not competent to the Dean or his Commissary to give judgment in opposition to the opinion of the majority of the Assessors, their Lordships are also of opinion that this ground is insufficient to support the prohibition.

The 21st Canon indeed requires that the Dean shall ask the advice and opinion of the Assessors, but does not declare that he shall be bound by them; and it [249] should seem, by one of the other Canons, it is required that before proceeding to the removal of the minister of a church by suspension or sequestration, it is necessary for the Dean, and it is expressly enacted, that he shall proceed by the advice and consent of two ministers, and in case the ministers should continue refractory, the Dean, by the consent of the greater part of the ministers present in the Island, shall proceed even to deprivation, and therefore the silence with respect to the binding effect of the opinion of the Assessors, mentioned in the 21st section, is strongly confirmatory of the view to which I have just referred, and its binding effect is strongly negatived by the article I have just mentioned, which expressly enacts, that in those cases, the advice and consent of the majority of the ministers shall be obtained; and, in a note upon this very Canon, the Editor of the "History of Jersey," in which these Canons are printed, makes this remark:—"This Canon is absurd, as it gives the Dean the power of asking the opinion of others, and then following his own; instances of which have sometimes occurred under former Deans." So that in former times, the interpretation of that Canon has been that which their Lordships are inclined to put upon it. He says, "There has been, however, nothing of the kind within the last half century." He adds, "It is unknown how this 21st Canon found its way amongst those Constitutions, as it is not in the Canons presented to James I., and from which the present ones were revised and corrected with the consent of all parties." He then hazards a conjecture,—"that it might have been by the contrivance of Dean Bandinel;" but he gives no reason for that conjecture. [250] He then quotes a few of the Canons as presented to James I., which he considers as more equitable, and moulded according to the manner of proceeding in Civil matters. They are to the effect, "That the Dean shall have the same authority,"—that is, the Canon offered to James I. by the ministers, but afterwards rejected by him,—"That the Dean shall have the same authority in the Ecclesiastical Court as the Bailly in the Civil Court, and shall judge all causes between party and party by the plurality of the voices of the Ministers and Assessors, as the Bailly does by those of the Jurats by whom he is assisted." Another of these supposed Canons, quoted in the same book, enacts, that the Dean shall not hold his Court without the assistance of three ministers at the least, and he is empowered, in cases of difficulty and importance, to summon a greater number. These Canons, however, were rejected, and form no part of the present Ecclesiastical law of the Island: but the rejection of them shows that it was not thought advisable to bind the Dean by the opinion of his Assessors, as the Bailly is bound by that of the Jurats, but that he should be left at liberty, after asking their opinion and advice, to decide according to what he considered to be the law.

That the Royal Court should consider that "it would be contrary to every principle of justice and equity, that a Judge should have the power of giving judgment in opposition to the opinion of the majority of his Assessors," may be accounted for by the fact, that in that Court the Bailly is but the mouth and organ of the Court, "though he presides in all the debates, sums up the opinions, and pronounces sentence; yet [251] has no deliberative voice himself, unless, upon an equal division of the Bench he throws his weight into one scale, to end the matter."

Such however does not appear to be the case with the Dean, or his Commissary, in the Ecclesiastical Court, who are left to form their own opinion of what the justice and merits of the case require at their hands.

Under these circumstances, their Lordships are of opinion, that upon neither of the grounds stated can the sentence of the Royal Court be sustained, and, therefore, they are of opinion that the sentence must be reversed, and with costs.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 13. *Jersey v. Guernsey*, c. *Laws*, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, b. : also tit. ECCLESIASTICAL LAW, III. CONVOCATION AND CANONS, XXVIII. *Practice*, 1. On point (i.) as to P.C. II. 105 4a

jurisdiction of Ecclesiastical Court where charges, if proved, would amount to criminal offence, considered and followed in *Burder v. Anon.*, 1844, 3 Curt. 835; but see now Clergy Discipline Act, 1892 (55 and 56 Vict. c. 32); (ii.) as to revivor of appeal, see *Elphinstone v. Purchas*, 1870, L.R. 3 P.C. 248, 252. For powers of Judicial Committee as to costs, see 3 and 4 Will. IV. c. 41, s. 15; 6 and 7 Vict. c. 38, s. 12; O. in C. of 13th June 1853 (Stat. R. and O. Rev. iv. p. 305.)

[252] ON APPEAL FROM THE SUPREME COURT AT FORT WILLIAM
IN BENGAL.

JAMES CLARK, Assignee of Thomas Shepherd, a Bankrupt,—*Appellant*; BABOO ROUPLAUL MULLICK,—*Respondent*.

AND BY REVIVOR, BETWEEN

The said JAMES CLARK,—*Appellant*; SREE MUTTY DOORGAMONEY DOSSEE, Executrix; and PRAWNKISSEN MULLICK, and SREEKISSEN MULLICK, Executors of BABOO ROUPLAUL MULLICK, deceased,—*Respondents* * [Dec. 9 and 11, 1840].

Assumpsit by the surviving Assignee of a Bankrupt, under an English Commission, against a debtor, a native of India, and resident within the jurisdiction of the Supreme Court of Calcutta. Plea: That the Defendant had not undertaken or promised in the manner or form as the Plaintiff, *Assignee as aforesaid*, had complained against him. Two days after issue joined, the Defendant gave notice that he intended to dispute the trading, petitioning creditor's debt, and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the Commission, Adjudication, and Assignment to the Plaintiff, and his co-assignee, which purported to be certified by the Clerk of the Enrolments, and to be under the seal of the Court of Bankruptcy in England, pursuant to the 2nd and 3rd Will. IV., c. 114, s. 9, were given in evidence; but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in England. A verdict was given for the Plaintiff, liberty being reserved for the Defendant to move for a nonsuit. A rule *nisi* was afterwards granted, and after argument made absolute, and the verdict set aside, and Judgment of nonsuit entered for the Defendant, on the grounds that there was no evidence of an act of Bankruptcy; of trading subsequent to the passing of the 6th Geo. IV., c. 16; and that neither that Act, nor the 2nd and 3rd Will. IV., c. 114, extended to India:—Held on Appeal affirming the Judgment of the Court below,—

- 1st. That the plea of *non assumpsit* put the Bankruptcy and Assignment at issue sufficiently without any notice [3 Moo. P.C. 278, 281].
- 2nd. That the form of the plea "*Assignee as aforesaid*" was not an admission of the Plaintiff's title as Assignee of the Bankrupt, but only used in reference to the description the Plaintiff had given of himself in the declaration [3 Moo. P.C. 278].
- 3rd. That the Statutes 6th Geo. IV., c. 16, and the 2nd and 3rd Will. IV., c. 114, made to facilitate the proof of Bankruptcy and Assignment in England, did not extend to the Courts in India, and that in those Courts such evidence of the Bankruptcy must be given, as would have been required to prove the fact if no Statutory regulations had been made [3 Moo. P.C. 279, 280].

* Present: Members of the Judicial Committee,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington. Privy Councillors,—Assessors: Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

Where, by the custom in India, the Respondent (being a Hindoo woman of rank) could not be personally served with an Order of Revivor, the Judicial Committee allowed service to be substituted on her Dewan or chief servant [3 Moo. P.C. 257].

Baboo Rouplaul Mullick, a native merchant resident at Calcutta, within the jurisdiction of [253] the Supreme Court, on the 31st of May 1825, made five promissory notes in favour of Thomas Shepherd, each for the sum of 3812 s. r., 12 a., with interest at 3 per cent., and payable at three, four, five, six, and seven years after their respective dates.

On the 1th of July 1826, a Commission of Bankruptcy, under the Great Seal of Great Britain, was issued against Shepherd, under which he was duly declared a bankrupt; and Andrew John Nash and Thomas Wyatt were chosen Assignees of his estate and effects, the usual assignment being executed to them by the Commissioners.

On the 18th of January 1829, Nash died, leaving [254] Wyatt, his co-assignee, surviving; and on the 23rd of March, in the same year, Wyatt, as such surviving assignee, sent out a power of attorney to his agents, William Bruce, John Allen, and Henry Thomas Poode, authorising them to obtain possession of the five promissory notes, which were then in the hands of Richard Marnell, the bankrupt's agent at Calcutta; and to demand payment thereof, and in default of payment, to sue for and recover the amount from Mullick.

By virtue of this power, Messrs. Bruce and Co. obtained possession of the notes, and demanded payment from Mullick, who having refused, Bruce and Co. brought an action of Assumpsit in the Supreme Court at Fort William, in the name of Wyatt, as the surviving assignee, against Mullick.

In this action, the Plaintiff declared in his character of surviving assignee of Thomas Shepherd, the bankrupt; and the Defendant (the original Respondent) pleaded thereto, that he did not undertake or promise in the manner and form, "as the said Thomas Wyatt, assignee as aforesaid, had above thereof complained against him, and of this, etc."

Two days after pleading the above plea, the Defendant gave the Plaintiff notice in writing, that he intended to dispute the trading, petitioning creditor's debt, and the act of bankruptcy.

Upon this plea issue was joined, and on the 26th of June 1833, the cause came on for trial before Sir John Franks and Sir Edward Ryan. On the part of the Plaintiff, the Defendant's signature to the five promissory notes was duly proved, as was also the death of Nash, the deceased assignee; and the Plaintiff [255] also gave in evidence copies of the Commission of Bankruptcy issued against Shepherd, and of the depositions of the petitioning creditor's debt, the trading, and the act of bankruptcy, and of the Commissioners' adjudication, and the assignment from the Commissioners to the Assignees; all which copies purported to be certified by Thomas Church, the Clerk of Enrolments in Bankruptcy, and to be under the seal of the Court of Bankruptcy, pursuant to the provisions of the 2nd and 3rd Will. IV., c. 114, s. 9.

No evidence was tendered as to the authenticity of the above papers, or of the seal, or certificate, or of the place from whence they respectively came, except that it was proved by Mr. Judge, the Plaintiff's attorney, that he received them with a letter and an Act of Parliament, about the end of March then last past, from Messrs. Vandercom and Co., Solicitors, resident in London. The Counsel for the Defendant objected to the reception in evidence of these several papers, on the following grounds,—first, that even if properly authenticated, they were not receivable in evidence, inasmuch as the statute 6 Geo. IV., c. 16, and the statute 2 and 3 Will. IV., c. 114, did not extend to govern the rules of evidence in the Supreme Court in Calcutta; secondly, that the several papers were not properly authenticated; and, thirdly, that in order to render the depositions admissible in evidence, if receivable at all, it should have been proved that the deponents were dead. The Court, however, overruled the objections, and the several papers were produced and read in evidence, and a verdict was passed for the Plaintiff for 19,064 sicca rupees, 12

anas (the amount of the five notes, with interest, at 3 per cent.), liberty [256] being reserved to the Defendant to move to enter a nonsuit.

In the following term, the Defendant obtained a rule *nisi*, calling on the Plaintiff to show cause why the verdict should not be set aside, and a non suit entered, on the ground that the verdict was contrary to evidence;—that evidence was admitted which was not legal evidence;—that there was no evidence of the Bankruptcy; that there was no legal evidence of any act of trading after the period when the 6th Geo. IV., c. 16, came into operation:—that the trading, since the 1st of September 1825, was expressly negatived; and that the 6th Geo. IV., c. 16, was a local act, and not in force in India.

On the 27th of January 1834, the rule came on for argument before Sir John Franks and Sir John Peter Grant, when the Court took time to consider their Judgment; and on the 5th of February following, Judgment was given, making the rule absolute for setting aside the verdict, and entering Judgment of nonsuit with costs of the cause, together with costs of the rule; on the ground stated in the rule *nisi*.

Against this Judgment the Plaintiff obtained leave to appeal to his late Majesty in Council; but before the transcript of the proceedings reached England, Wyatt died.

On the 16th of March 1836, the present Appellant was appointed Official Assignee of the Bankrupt Shepherd's estate and effects; and thereupon, as such Assignee, he presented his petition to revive the Appeal, which, by an order of his late Majesty of the 8th of June 1838, was duly allowed.

Pending these proceedings, and on the 2nd of July 1837, the original Respondent, Rouplaul Mullick, [257] died, having duly made and published his last Will and Testament, and thereof appointed the three present Respondents, Sree Mutty Doorgamoney Dossee, his widow, and Prawnkissen Mullick, and Sreekissen Mullick, his sons, Executrix and Executors, who proved the same.

By an Order of Her Majesty in Council of the 10th of January 1839, the Appeal was ordered to be revived against these Respondents.

The Respondents, Prawnkissen Mullick and Sreekissen Mullick, were personally served with the above Order of Revivor; but the other Respondent, Sree Mutty Doorgamoney Dossee, the Executrix, being a Hindoo woman of rank, service upon her personally could not be effected; in consequence of which

Mr. Edmund Moore, for the Appellant, moved (July 5, 1839 *), on affidavit of that fact, for leave to substitute service of the Order of Revivor on the Dewan or chief servant of the Respondent Sree Mutty Doorgamoney Dossee, in support of which application he referred to Bengal Regulation III. of 1803, sec. XV. 21 Geo. III., c. 70, sec. 17.

The Judicial Committee granted the application, and an order was made for substitutional service, in accordance with the terms of sec. XV. of Regulation III. of 1803.

The Respondent having appeared, the Appeal came on for hearing.

[258] Sir William W. Follett, Q.C., and Mr. Edmund Moore, for the Appellants.—This case is of the first importance, and must be determined with reference to the comity of nations, and the principles of the Civil and Municipal Law.

By the Civil Law, moveables, which include actions and debts, follow the person, and are consequently governed by the law of domicile (Livermore's Diss. 162, 251), which determines the validity of their transfer. The only exception is where there is some positive customary law, providing for the particular species of property, or giving it an implied locality (Story's Com. 337, edit. 1835; 3 Burge's Com. 906). Upon this principle, one independent State will, by the comity of nations, give effect to the laws and judicial acts of another (Henry on For. Law, 4). These are personal, real, or mixed. Of those that are personal, concerning the application of which our inquiry will be presently, they are particular or universal, *i.e.*, such as are purely political and distinctive, or such as take effect at birth, or at an indefinite period, as from mar-

* Present: Members of the Judicial Committee,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington. Privy Councillors,—Assessors: Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

riage, by letters patent, or by a judgment or decree of a competent Court; the latter follow the law of domicile, and are recognised and admitted by every civilised state (*ib.* 4 and 5).

The statement of these general principles is necessary for the argument we submit, for it is upon their due application that we maintain the Judgment of the Court below to have been erroneous. As far as we can arrive at the reason of that Judgment, the Supreme Court appears to have founded its decision upon two grounds: first, that the Bankrupt Laws, as a Code, [259] were not applicable to India, so as to carry the Statutes regulating the rules of evidence as to proof of the petitioning creditor's debt, and other matters, into operation there; and, secondly, that the requisites of the Statutes themselves had not been complied with. If the first objection is tenable, all inquiry into the second is immaterial; but if the Court below were wrong in repudiating the Bankrupt Laws as a Code, and rejecting the Statutes as forming part of that Code, then it will be necessary to show that the provisions of the Statutes have been complied with, and that our title as assignees was perfected under them.

Before the Statute 1 and 2 Will. IV., c. 56, the assignees derived their title by virtue of the assignment; until that was completed, they had no interest in the bankrupt's estate: but now, by sec. 25 of that Statute, the personal estate and effects, and the real estate of the bankrupt, become vested in the assignees by virtue of their appointment. It is not necessary to inquire into the manner in which the appointment is to be made; it is sufficient to observe, that it is a solemn act, confirmed and established by the Commissioners, and as such is an adjudication by a competent Court, which cannot be questioned or inquired into by any other than the Court of Appeal. The affirmative of the proposition we contend for must, we admit, depend upon the general recognition of the Bankrupt Laws of other countries in our own Courts, as well as of our own in foreign countries. For this purpose it will be necessary to examine, in the first instance, the cases in which the Bankrupt Laws of other countries have been held binding in our own Courts.

It is well known that the question of the recognition of foreign Bankrupt Laws was, for a long time, a [260] mooted point. Sir Joseph Jekyl, Lord Raymond, and Lord Talbot, all gave opinions, when at the Bar, against their admission; but Lord Talbot afterwards held, that though the Statutes of Bankruptcy did not extend to the Colonies, yet that the personal property of an English bankrupt in the Plantations passed to his assignees. *Cleve v. Mills* (Cooke, Bankrupt Laws, 297). This was the first step; and the principle was more fully acknowledged and acted on by Lord Hardwicke, in *Mackintosh v. Ogilvie* (3 Swan, 365), where a creditor, a bankrupt residing in England, having, upon sentence obtained subsequent to the bankruptcy, proceeded by process from the Court in Scotland to recover sums due to the bankrupt's estate there, to an amount much beyond his own debt, was, upon evidence of his intention to quit the kingdom, restrained by a writ of *ne erant regno*. In 1762 a case was determined before the Privy Council, *Assignees of Buchanan and Hamilton v. Hudson and Others* (3 Burge's Com. 910), upon Appeal from the Court of Chancery in Virginia, whereby the rights of the assignees to the bankrupt's effects in Virginia, in the hands of the executors of certain legatees for whom the bankrupt was a trustee, was established, and the operation of our Bankrupt Laws on property situate in another country was fully established. *Solomons v. Ross*, in 1764, and *Jollet v. Deponthieu*, in 1769 (1 H. Black. 131, note (e), Ed. by Meymot, 1837), were cases in which the Courts here gave effect to the Bankrupt Laws of Holland. *Neal v. Cottingham* (1 H. Black. 134), which was an intermediate case, was decided in Ireland; there the Bankrupt Laws of England were recognised; and in [261] *Re Wilson* (cited in *Sill v. Worswick*, 1 H. Black. 691), determined by Lord Hardwicke, that learned Judge held, that the property of a bankrupt situate in Scotland was, by the assignment, vested in his assignees under an English bankruptcy. In *Le Chevalier v. Lynch* (Douglas, 170), Lord Mansfield says, "If a bankrupt has money owing to him out of England, as at St. Christopher's, Gibraltar, etc., the assignment under the Bankrupt Laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them, and shall not turn them round by saying he is only accountable to the bankrupt;" and he cites Wilson's case as establishing that rule.

In *Ex parte Blakes* (1 Cox, 398; Livermore's Diss. 151), Lord Thurlow is reported to have said, that "he had no idea of any country refusing to take notice of the rights of the assignees under our laws, and he believed no country on earth would do it, besides the Courts in America." *Sill v. Worswick* (1 H. Black. 664), determined that a creditor of a bankrupt, who by means of an affidavit of debt made in England, after the act of bankruptcy was committed, but before the assignment, had attached money due to the bankrupt in the West Indies, which he afterwards received, might be sued by the assignees for money had and received: all the previous authorities were examined both in the argument and the judgment of that case; and though the case as put by Lord Loughborough turned rather upon the right of a creditor of a bankrupt in England, knowing of the bankruptcy, availing himself, by process commenced in England, to retain his debt against the assignees, and to obtain a preference over the other creditors, than upon the recognition of the Bankrupt Laws in the Plantations, [262] yet the circumstances respecting their recognition were very fully discussed, and that case has always been considered a leading authority for the point we are now arguing; and has been followed by *Hunter v. Potts* (4 Term Rep. 182), and *Philips v. Hunter* (2 H. Black. 402). In *The Royal Bank of Scotland v. Cuthbert* (1 Rose, Bankr. Cases, 462), and *Sekrig v. Davies* (2 Rose, Bankr. Cases, 97, 291; S.C. 2 Dow's Reps. 230), it was decided that a Commission of Bankruptcy vests in the assignees under it all the property of the bankrupt, wherever situate.

These decisions were before the 6th of Geo. IV., c. 16, and must have been upon the principle of the comity of nations, rather than the effect of the Statutes of Bankruptcy then in operation, and, taken in conjunction with those previously cited, led to the enactments of that Statute. Now we maintain that these authorities fully established the recognition of the Bankrupt Laws as a Code, and that as the Statutes of Bankruptcy are a part of that Code, their recognition must follow to the extent to which these Statutes are capable of application in a foreign country. The very objection made by the Court below, viz., that the requisites of the Statute of 6 Geo. IV., c. 16, and 3 and 4 of Wm. IV., c. 113, have not been complied with, affirms that proposition. How can the Supreme Court decide upon the due observance of the Statutes, if they have no application to India? And if that Court does decide, then it is interpreting a law which it refuses to recognise—that is an absurdity. We proceed, therefore, to show, that the requisites of the Statutes have been fully complied with.

By the 1st Jas. I., c. 15, s. 13, it was enacted, [263] that the Commissioners should have power to grant and assign, or otherwise to order and dispose of, all or any of the debts due or to be due, to or for the benefit of the bankrupt, by what person or persons soever, and in what manner and form soever, to the use of the creditors of the bankrupt: the 5th Geo. II., c. 30, enlarged the authority of the Commissioners in that respect; but by the 6th of Geo. IV., c. 16, s. 63, the Commissioners are empowered to assign all the present and future personal estate of the bankrupt, wheresoever the same may be found or known; and all debts due to the bankrupt, wherever the same may be found or known; and the same authority is given them by the 64th sec. over the real estate of the bankrupt, whether in England, Scotland, Ireland, or any of the dominions, plantations or colonies belonging to His Majesty. The 1st and 2nd Wm. IV., c. 56, s. 25, 26 and 27, modifies these provisions, by vesting the real and personal estate absolutely in the assignees, without any assignment from the Commissioners. As respects the right, therefore, of the Commissioners, and the recognition of that right by foreign Courts, these Statutes and the authorities are conclusive: the question then is, in what manner are the assignees to establish their title; and have they pursued the proper mode here? The Respondents have taken issue on both these points. Before the 5th Geo. II., c. 30, s. 41, the depositions could not be given in evidence in an action to try the validity of the bankruptcy, because the Plaintiffs had not had the benefit of cross-examining the witnesses as to the facts deposed to, *Francisco v. Gilmore* (1 Bos. and Pul. 177): to remedy that defect, that Statute made [264] a copy of the proceedings in bankruptcy, evidence in certain cases, after being entered of record; no provision, however, was made, respecting the mode in which such copy was to be authenticated: the 49th Geo. III., c. 121, s. 10 and 11, therefore enacted, that the

depositions and proceedings themselves should be evidence to prove the petitioning creditor's debt, trading, and act of bankruptcy; the 6th Geo. IV., c. 16, s. 92, declared such depositions, etc., to be conclusive evidence of the facts contained in them, unless the bankrupt should give notice of his intention to dispute the Commission within a limited time; and the 2nd and 3rd Wm. IV., c. 114, s. 9, enacts, that such depositions and proceedings, purporting to be sealed with the seal of the Court of Bankruptcy, shall be received as evidence of such documents respectively. Thus, therefore, the depositions and proceedings in bankruptcy, when under the Seal of the Court, are made conclusive, and no question can be raised respecting the matters contained in them, unless in the case of notice by the bankrupt, of his intention to dispute the act of trading, petitioning creditor's debt, or commission. Suppose the Supreme Court, for the sake of argument, to be unconnected and unacquainted with the law of England. If a judgment of a foreign Court was brought in suit before it, all that would be requisite by the comity of nations would be, that the law of the foreign Court should be proved. If the act was an Act of a Court of Justice, as a judgment, then it would be presumed to be consistent with the law of that Court, until the contrary was proved, *Alvon v. Furnival* (1 Cro. Mee. and Ros. 277); if in conformity with a decree of a fo-[265]-reign State, then the Court would take cognizance of the decree, as matter of public notoriety. But the case is much stronger here; the Bankrupt laws, at least so much of them as existed previous to the 13th Geo. III., c. 63, under which the Supreme Court in India was established, were part of the law of England; the commission and assignment were acts of as valid authority and as binding on all the subjects of this realm then as now; the only alteration is in the mode of proving the acts of the Court of Bankruptcy. Is the Supreme Court to be permitted to say, we acknowledge and receive your Bankrupt Laws, nay, we act on them, but we require proof of your title, not according to your own laws, but according to what we think requisite? By 21st Geo. III., c. 70, s. 6, it is provided that authenticated copies of orders and depositions of the Supreme Court should be receivable in evidence in any of the Courts of Law or Equity, in Westminster Hall. Is the rule only for England? and that too when the authority making the rule is the Legislature itself? We submit, therefore, that by the comity of nations,—under the authority of the acts giving existence to the Supreme Court, as well as by the law of England,—the Supreme Court is bound to receive an adjudication in bankruptcy, in the same manner and by the same evidence as it would be receivable here; and that purporting to be sealed with the seal of the Court, it cannot be questioned, unless the authenticity of the document is impeached. It appears that the Judges of the Supreme Court were of this opinion, for they determined that the requisites of the Statutes 6th Geo. IV., c. 16, and 2nd and 3rd Wm. IV., c. 114, had not been complied with.

[266] By sec. 90 of the Statute of 6th Geo. IV. [c. 16], it is provided, that in actions by or against any assignee or other person acting under the Commission, no proof shall be required, at the time of trial, of the petitioning creditor's debt, trading, or act of bankruptcy, unless the other party, if defendant, shall, at or before pleading, give notice of his intention to dispute those matters. By the record and plea in the action, it appears that Wyatt, having declared as surviving assignee of Shepherd against Mullick, the Defendant, the latter obtained leave to imparle until the third term, that is to say, the 15th of June in the same year, on which day he put in his plea, alleging that he did not undertake or promise "in manner and form as the said Thomas Wyatt, assignee as aforesaid, had above thereof complained." This is an admission on the record of the Plaintiffs' title, which no notice to dispute could remove; but supposing such notice available, when is it given? not till two days after the time of pleading, viz., on the 17th: that is fatal to it, even if the title of the assignee was in issue. Yet, notwithstanding these objections, the Court below admits the notice, and proceeds to examine the Statutes, and, as the Respondent insists, decides, that even assuming that the copy of the Commission, and the adjudication and assignment, were receivable in evidence, yet that the 92nd sec. of 6th of Geo. IV., c. 16, is so far repealed or controlled by the 2nd and 3rd Wm. IV., c. 114, s. 9, that depositions are not receivable in evidence, without proof being first given of the death of the defendants. Now though there is undoubtedly some confusion between the 7th and 9th sections, it cannot be maintained that the former

overrides the latter; and interpreting them [267] together, it is quite clear that the 7th applies only to particular and individual depositions, and not to the record of the proceedings, under the seal of the Court. On all these grounds, we submit that the title of the assignee was acknowledged and admitted on the record, and could not be questioned by the Defendant; that the copies of the proceedings being under the seal of the Court, were conclusive as to the matters contained in them, and that no proof of a trading, subsequent to the 6th Geo. IV., c. 16, was necessary or requisite; and even if necessary, was not negatived by any proof on the other side.

Mr. Serjeant Spankie, and Mr. E. Vaughan Williams, for the Respondents.—We admit the general reasoning on the other side respecting the recognition of the rights of the assignees of a bankrupt in a foreign or colonial Court. We cannot dispute that the assignees of the bankrupts, legally appointed, have a right to the property of the bankrupt, wheresoever situate; the position we dispute is, that the Supreme Court in India, or any other Court, in the Colonies of England, is bound, without inquiry or examination, to admit the title of the assignees, or, in other words, the validity of the assignment. To give effect, in fact, to a title founded upon the provisions of an Act of the British Parliament, without looking to see whether those provisions have been properly complied with. The comity of nations has not been carried to that extent in any of the cases cited; all that it requires is to give effect to a title, when that title is shown to have been legally and properly acquired, according to the law of the domicile of the owner. It is upon this principle that [268] foreign judgments are recognised and enforced in our Courts here, as well as in the colonial Courts.

The adjudication of the Court of Bankruptcy here must, if sought to be made available in the East Indies, be proved as a foreign judgment. For this purpose, the seal of the Court does not prove itself even where the Judge's handwriting, subscribed to the judgment, is proved; the seal itself must be proved to be the official seal of the Court, *Henry v. Adey* (3 East, 220); that case was in circumstances very similar to the present, and has been followed by *Black v. Lord Braybrooke* (2 Starkie, N.P.R. 7; 6 M. and S. 39), *Appleton v. Lord Braybrooke* (2 Starkie, N.P.R. 6; 6 M. and S. 34), *Alvers v. Bunbury* (4 Camp. N.P.R. 28); and where the record upon which a foreign judgment has been obtained is put in proof, the Courts here will go so far as to examine whether the judgment has been pronounced by a competent authority, and in a case within the jurisdiction of the Court. *Buchanan v. Rucker* (9 East, 192; 1 Camp. 63), *Cavan v. Stewart* (1 Starkie, c. 525).

The rule, that in a suit between parties both domiciled in England, on a contract made by them in a foreign country, the remedy to be taken is according to the *lex loci solutionis*, and not according to the *lex loci contractus*, was established in *De la Vega v. Vianna* (1 Barn. and Ad. 284); that case overruled the previous decision of *Melan v. The Duke de Fitzjames* (1 Bos. and Pul. 138), which decided that if a defendant be held to bail in this country, on an instrument entered into in France, by which instrument his property only, and not his person, would be liable, the Court, on [269] motion, would discharge him, on his entering a common appearance. So in the case of *Huber v. Steiner* (2 Bing. N.C. 202), where the French Law of Limitations was pleaded to an action of assumpsit, on a promissory note, made at a place which was subject to the law of France, the Lord Chief Justice Tindal, said, "We take it to be clearly established and recognised as part of the law of England, by various decisions, that if the prescription of the French law, which has been opposed to the Plaintiff in the present case, is no more than a limitation of time within which the action upon the note must be brought in the French Courts, it will not form a bar to the right of action in our English Courts, but that the question whether the action is brought within due and proper time must be governed by the English Statute." *The British Linen Company v. Drummond* (10 B. and C. 903; see also *Don v. Lippman*, 5 Clk. and Fin. 1).

But if our Courts here are strict in not admitting the operation of the positive laws of a foreign country to control the mode of executing a contract sought to be enforced here, they are much stricter in rejecting rules respecting evidence imposed by a foreign Court. In *Brown v. Thornton* (6 Ad. and Ell. 185), a copy of a charter-party made in Java, the original of which was entered in the notary's book, which it was in evidence was never permitted to be taken out of the island,

but copies from which are evidence in all Dutch Courts, was rejected as evidence of the charter-party, and the Plaintiff non-suited.

These authorities show that in enforcing or defending a contract made in a foreign country, but [270] sought to be carried into effect here, the Courts will execute it according to the laws of this country. If the contrary doctrine prevailed, it would involve the tribunals of the country in endless perplexity and confusion.

Treating this, therefore, as we insist it is, as a foreign judgment, the Supreme Court had not only power but was bound to examine the record, to see if the judgment had been pronounced by a competent tribunal. It is said that it was precluded from that course, for that the Act of Parliament, 6th Geo. IV., c. 16, and 2nd and 3rd Wm. IV., c. 114, extend to the East Indies, and by these Statutes the proceedings tendered were conclusive.

It is necessary, therefore, to inquire, first, how far Acts of Parliament in general apply to the colonial possessions of this country; and, secondly, whether, if the Statutes of Bankruptcy do apply, their provisions have been properly complied with.

Though the colonial possessions of this country are subject to the control of Parliament, they are not bound by any Acts of Parliament, unless particularly named; this is the doctrine laid down by Lord Coke (4 Inst. 286), by Blackstone (1 Com. 108), by Lord Mansfield, in *Rex v. Vaughan* (4 Burr. 2500), and reported to have been solemnly decided by the Lords of the Privy Council (2 P. Will. 75). Thus the Statute of Frauds, though received in the establishment of the Colonies of Jamaica, Tortola, Antigua, Montserrat, Dominica, Tobago, Grenada, St. Vincent, Bermuda, Upper Canada, and Prince Edward's Island, as part of the English law, was not in force in Barbadoes, the Bahamas, Nova Scotia, or New [271] Brunswick, until enacted by their own legislatures (2 Burge's Com. 526, 785). *Campbell v. Hall* (1 Cowp. 204). In *The Attorney-General v. Stewart* (2 Mer. 143), the same principle was distinctly laid down: the question there was, whether the Statute of Mortmain, 9th Geo. II., c. 1, extended to Grenada, in the West Indies, which it was held not to do; and it was held, that the object of that Statute being wholly political, and the Act intended only to have a local operation, it did not extend to Grenada.

The Statutes of Bankruptcy are peculiarly local; they are fiscal regulations for the recovery and distribution of a bankrupt's estate. The Appellants have found it impossible to contend that the Statutes in all their provisions apply to the Colonies, but they say that such parts of them as are of general enactment apply, and they contend that the rules of evidence, incorporated in the 6th Geo. IV., c. 16, and 1st and 2nd Wm. IV., c. 56, are of such universal application, that they must be held binding in every Court within the British possessions. It is true, that certain rules of evidence, or rather provisions for the reception of evidence, were enacted by those Statutes, and therefore are binding upon the Courts where the Statutes are in force; but the rules formed no part of the Code of Bankruptcy, previous to the Statute of 6th Geo. IV. [c. 16], being, as all other rules of evidence, merely arbitrary, and resting exclusively with the Court; and even now, though it is enacted that the seal of the Court should prove itself, if the seal was impeached as a forgery, there is nothing to prevent the Court inquiring into its authenticity; which, if the Statute [272] were prohibitory, as well as declaratory, would be contrary to its express enactments. The argument, therefore, for their universal application goes too far, even here, to be admitted; but when applied to the Colonies, it is utterly untenable.

But assuming that they did apply to the East Indies, the Judges of the Supreme Court held very properly that these provisions had not been complied with; there is no proof of trading sufficient to support the Commission; the deposition in proof of trading states only that the deponent, Shepherd, "has known the said Thomas Shepherd for the space of ten years now last past, during which time the said Thomas Shepherd did use and exercise the trade and business of a merchant"; that is not sufficient to show a trading subsequently to the 6th Geo. IV., c. 16; if the trading ceased before that Statute took effect, the Commission cannot be supported. *Surtees v. Ellison* (9 Barn. and Cress. 750), *Hewson v. Heard* (ib. 751), *Palmer v. Moore* (ib. 751), and *Ex parte Batten* (1 Mont. and M.A. 287). The affidavit

is not sufficient to support an indictment for perjury—it is not definite; an equivocal deposition is insufficient (1 Starkie, N.P. 558).

With regard then to the points of pleading; first, the objection that the notice of plea was not served pursuant to the Act, has been taken now for the first time; no point was raised against the notice in the Court below, nor is it raised on the Appellant's case; it is an afterthought, and cannot, if tenable, be insisted on now. In Calcutta no pleas are delivered. Rule 31 of the Supreme Court.

[273] It has been further contended, that the Plaintiff's title, as assignee of bankrupt's estate, was admitted on the record, and ought therefore to have been assumed without further proof; this is no admission, before the new rules, for pleading in *assumpsit*; the plea of the general issue put in issue the title of the assignee, even where the breach was laid as by the bankrupt himself: and coupling the plea with the notice, though we admit the pleading to be clumsy, it amounts, in fact and law, but to this, that I did not promise *modo et forma*, as you have complained, viz. "as assignee as aforesaid"; this is but the general issue.

The question, therefore, really is, whether Wyatt has shown any title to sue as assignee. Now, the assignment is not an absolute assignment, it is dependent on the bankrupt's being a trader within the Bankrupt Laws. The assignment, therefore, is not like a probate, for that is a final act; possession of that would be sufficient here; but before the 2nd and 3rd Wm. IV., c. 115, s. 9, the assignment must, like any other documentary title, have been proved; it is not like a judgment, and therefore conclusive, nor would it be so treated by the comity of nations. The case of *Oliver v. Furnival* [1 Cr. M. and R. 277], like the previous one of *Brown v. Thornton* [6 Ad. and E. 185], only goes to the extent of admitting secondary evidence of the authenticity of a foreign instrument; but in the case before us, no such evidence was tendered; the proceedings, being sealed with a seal purporting to be that of the Court of Bankruptcy, were tendered as conclusive from that circumstance. But the seal of a foreign Court does not prove itself. *Henry v. Adey* [3 East, 221].

[274] The assignment must be produced and proved in the usual way by the attesting witness, notwithstanding it is entered of record, pursuant to 6th Geo. IV., c. 16, s. 96, *Gomersall v. Serle* (2 Y. and J. 5); and in *Chambers v. Bernasconi* (1 Crompt. Mee. and R. 347), it has been solemnly decided that depositions of deceased witnesses taken before the Commissioners at the opening of the Commission, and subsequently enrolled by the assignees under the above section, are not admissible in evidence against the assignees in an action brought against them, to invalidate the Commission. We insist, therefore, that the copies of the Commission and proceedings could not be received in evidence, in India, without proof of their authenticity being given, and the custody from whence they came: the Statutes 6th Geo. IV., c. 16, and 2nd and 3rd Wm. IV., c. 114, having no operation in the Colonies or Plantations: and we say further, that even if it could be shown that those Statutes did apply, yet that the requisites of the Statutes are not shown to have been complied with. With respect to the depositions, if admissible, not being so without proof being given of the death of the respective deponents, we do not think it necessary to press that objection: the non-application of the Statutes is sufficient for our argument.

Mr. Moore in reply.—The admission of the recognition of the English Bankrupt Laws in the Colonies, is, in fact, the point we are contending for. The Bankrupt Laws are a Code, which the rules in question are but the means of carrying into effect; where applicable, the Laws of [275] Bankruptcy must carry the rules for their interpretation with them. The rules themselves, therefore, form part of the Code of Bankrupt Laws, and, as such, must, by the comity of nations, be admitted. The rule insisted upon, as laid down by this Court, that Acts of Parliament do not bind the Colonies, unless they are specifically mentioned in them, is not consistent with subsequent decisions; it is too large; for though it may be true as regards personal or local affairs, yet where an Act of Parliament is declaratory of the law previously existing, and only intended to carry that law out, as far as that particular law is applicable, the Act of Parliament interpreting it must go with it, and to that extent must apply to our colonial possessions. The Bankrupt Laws were part and parcel of the law of this country previous to the charter for creating the Supreme Court. They became grafted then in India as part of the law of England:

and as subsequent decisions vary or change, their operation would be recognised; so would also an Act of Parliament for a similar purpose. But Acts of Parliament have been held expressly to take effect in India; thus in *Gardner v. Fell* (1 Jac. and Wal. 22. S.C. 2 Wilson, 32), the Statute of Frauds was held to extend to India, so as to prevent lands situate there passing by an unattested Will. The same doctrine was maintained in *Freeman v. Fairlie* (1 Moore, Ind. App. 305); and both these decisions were recognised and confirmed in a late case here, *The Mayor of Lyons v. The East India Company* (1 Moore, Ind. App. 175). The fact therefore of statutable provisions applying to the Colonies cannot be disputed. With regard then to the objections to the depositions, the [276] deposition of trading is sworn to on the 15th of July 1826, nearly a year subsequent to the Act 6th Geo. IV., c. 16, coming into operation. No case has been cited to show that the affidavits of trading must specify the period or the particulars of each act of trading. The affidavit of Parker is in the usual form adopted in the books of practice (Archbold, Law and Practice of Bankruptcy, pt. ii. p. 9). In *Surtees v. Ellison* (4 Man. and Ry. 586), the proof was, that the trader had ceased to carry on his business as a seed-merchant since 1822, though the act of bankruptcy was committed in 1827; the proof of trading, therefore, was anterior to the 6th Geo. IV., c. 16. The same point arose in *Stanson v. Stead* (4 Man. and Ry. 586), *Palmer v. Moore* (9 Barn. and Cress. 754), and *Ex parte Bathe* (Mont. and M'Ar. 287). In neither of these cases was the Commission superseded because the deposition of trading was insufficient, but because the proof of trading was anterior to the passing of the Act. The notice by Mullick of his intention to dispute the bankruptcy being made two days after the plea, is a fatal defect; it is apparent on the face of it, and may therefore be urged at any time. It has been expressly decided, that on the part of the Defendant the notice must be served either before or at the time of pleading, *Poole v. Bell* (1 Stark N.P. 328), *Radmore v. Gould* (1 Wightwick, 80), and *Gardner v. Slack* (6 Moore, 489): it will not do if served after the plea, *Lawrence v. Crowder* (3 Car. and P. 229): the proper course was for him to move to withdraw his plea. The policy of the Bankrupt Laws has been, from their earliest introduction, that they should be general, at least as respects their operation. Like the Trade and Navigation Laws, they are intended for universal application; and any decision tending to diminish their force or operation must act as a check to the commerce and dealing of nations.

Lord Brougham (December 19).—This was an Appeal from the Judgment of the Supreme Court of Calcutta, in an action of assumpsit brought by the surviving assignee of Thomas Shepherd, a bankrupt, upon promises made by the testator of the Respondents to the bankrupt. The Defendant had pleaded the general issue, and had in that plea denied that he “undertook and promised in manner and form as the said Plaintiff, assignee as aforesaid, hath above complained.” At the trial the Plaintiff gave in evidence a paper, purporting to be a copy of the proceedings in England, endorsed with the signature of a person stated to be Clerk of the Enrolments, and sealed with a seal purporting to be that of the Court of Bankruptcy; no other proof was given of the trading, act of bankruptcy, or petitioning creditor's debt, nor of the commission or assignment. The paper produced was not proved to be a copy of the proceedings in England, nor was the seal proved to be that of the Court of Bankruptcy. There was evidence given of trading in India, but not coming down later than 1824. The promissory notes on which the action was brought were proved to have been made by the Defendant, and the death of the person alleged to be the other assignee, and the Plaintiff's survivorship, were also proved.

An objection was taken that the evidence was not sufficient to prove the bankruptcy and assignment, on the ground that the proceedings are only made evi- [278] dence on this matter by Statutes which do not extend to India; that these proceedings were not duly proved, even if they had been admissible evidence when proved; and that they did not prove, had they been conclusive, a trading subsequent to the 1st of September 1825, the day when the 6th Geo. IV., c. 16, came into operation. A verdict was taken for the Plaintiff, with leave to move to enter a nonsuit, upon the grounds of these objections; and the Court, upon motion and argument, set aside the verdict, and directed a nonsuit to be entered. This Judg-

ment being brought here by Appeal, the points which appear to have been made below were taken, together with one on the form of the plea, which, it was contended, admitted the Plaintiff's title, by admitting him to be assignee; and another on the defect of the notice to prove the bankruptcy. It was further argued, that his capacity of assignee could not be disputed, because it was not specially traversed by the Defendant. But as the new rules of pleading clearly do not extend to India, there can be no doubt whatever that the plea of *non assumpsit* puts the Plaintiff there to a proof of his title, as it did here incontestibly up to the making of those rules. Neither does it appear that the manner in which that plea is framed, imports such an admission as has been contended for. The introduction (wholly unnecessary, no doubt, and very unusual) of the words "*Assignee as aforesaid*," does not appear to their Lordships to be an adoption of the description given by the Plaintiff of the character in which he brings his suit; it is not an admission that he is entitled to sue as assignee, but only a reference to the description which he has given of himself; as if he had said, "Thomas Wyatt, who sues as alleging himself [279] to be assignee of Thomas Shepherd." The question then will turn on the sufficiency of the evidence before the Court below to prove that title.

It is not denied that an assignment validly made under a commission here, has the effect of carrying to the assignee a right to sue in India for debts due to the bankrupt. This follows from all the rights of the bankrupt being duly vested in the assignee—vested in him by operation of the Bankrupt Laws as effectually as if he had himself made a voluntary transfer of them—good by the law of the country where it was executed. But the question is, whether or not this assignment has been duly proved? The Statutes which have been made to facilitate the proof of the bankruptcy and assignment in the Courts of this country do not extend to the Courts of India. It is unnecessary to cite authority for the proposition that the peculiar rules of evidence adopted in one country, whether established by the practice of its Courts, or enacted by the Legislature (as in the present instance) for the Government of those Courts, cannot be extended to regulate the proceedings of Courts in another country, when transactions that took place in the former country come to be inquired of. This was assumed as indisputable, both by the Court and on both sides of the Bar, all through the case of *Brown v. Thornton* (6 Adol. and El. 185); and the principles upon which the proposition rests were clearly recognized in *Huber v. Steiner* (2 Bing. N.S. 202), *British Linen Company v. Drummond* (10 Barn. and Cress. 903), and other cases. The provisions respecting evidence in the Statutes 6th Geo. IV., c. 16, and 2nd and 3rd Wm. IV., c. 114, do not extend to the Courts of India: and in those Courts, evidence [280] must be given such as would have been required to prove the facts had no such Statutory Regulations been made. Now in the present case, the proceedings were not receivable at all, to prove the facts stated in them, and even if the proceedings could have proved these facts, the papers purporting to set them forth were not authenticated, either by the evidence of those who had examined them with the originals, or by proof of the seal under which they were said to be exemplified. But their Lordships do not consider that the depositions, had they been fully and duly before the Court, would have been sufficient to support the Plaintiff's title; inasmuch as they fail to show a trading after the Statute (6th Geo. IV., c. 16) came into operation, which has been repeatedly held to be necessary by the Courts in this country, and the want of which would have made the evidence unavailable even had it been given here. *Surtees v. Ellison* (9 Barn. and Cress. 750), *Hewson v. Heard* (*ib.* 754), and other cases.

An objection upon the notice has been taken at the hearing of this Appeal, which was not made in the Court below, to the ground of moving for a nonsuit. It was stated that the notice to dispute the bankruptcy was dated two days after the plea appears by the record to have been pleaded. If this had been urged below it might have been obviated by showing that the plea was not actually filed before serving the notice. The Defendant had to the first day of term to *imparle*, which would entitle him to plead at any time within the four first days of the term, and the first day being the 15th, the notice was dated on the 17th, within these first four days. The Plaintiff plainly treated the [281] notice as regular: for he endeavoured to prove his title by the assignment, without taking any objection to the irregu-

larity, any more than he availed himself of the supposed admission of his title by the frame of the plea.

But, indeed, as the Statutory provisions respecting notice do not extend to India, any more than those respecting the admission of evidence, the plea of *non assumpsit* put the bankruptcy and assignment in issue sufficiently without any notice.

Their Lordships are therefore of opinion, that the Judgment of the Court below is well grounded, and ought to be affirmed.

But it is necessary to state, that their Lordships in coming to this conclusion do not proceed upon a ground which appears, among others, to have been taken below, which was also taken here, that the provisions of 6th Geo. IV., c. 16, s. 92, are so far repealed by those of 2nd and 3rd Wm. IV., c. 114, s. 7 and 9, as to make the depositions evidence only in the case specified by the latter Act, of the witnesses being dead.

The Judgment of the Court below must be affirmed, with costs.

[S.C. 2 Moo. Ind. App. 263. On point as to application of English bankruptcy law to India (3 Moo. P.C. 279, 280) see note to *Cockerell v. Dickens*, 1840, 3 Moo. P.C. 136; and cf. *Lyons (Mayor of) v. East India Co.*, 1836, 1 Moo. P.C. 175, and note thereto at p. 299. See also the Indian Insolvent Act 1848 (11 and 12 Vict. c. 21.)]

[282] ON APPEAL FROM THE PREROGATIVE COURT OF
CANTERBURY.

CHARLES HARWOOD,—*Appellant*; MARIA BAKER,—*Respondent* * [11th, 12th, 16th and 17th Dec. 1840].

A Will executed by a Testator on his death-bed in favour of his wife, to the exclusion of the other members of his family, the Testator being of a weakened and impaired capacity at the time of the *factum*, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused, pronounced against: the disposition in the Will being a total departure from, and contrary to, the previous expressed intentions of the Testator.

To constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, and the nature of the claims of others, whom by his Will he is excluding from participation in that property [3 Moo. P.C. 290].

This was an Appeal from a sentence of the Prerogative Court of Canterbury, revoking Probate of the Will of Thomas Edward Baker, granted in common form to Mary Ann Baker, afterwards Mary Ann Harwood, the widow of Thomas Edward Baker, and the sole Executor and Universal Legatee named in the said Will; the facts and circumstances of the case are fully set forth in the Judgment.

The case was argued by

Sir William Follett, Q.C., and Dr. Addams, for the Appellant; and

Mr. Pemberton, Q.C., and Dr. Phillimore, on behalf of the Respondent.

The arguments on both sides turned wholly on a [283] comparison of the evidence adduced, and of the degrees of credit due to the several witnesses; but the decision, containing an exposition of the capacity necessary to constitute a testamentary disposition, is given at length. *Ingram v. Wyatt* (1 Hagg. Ecc. Rep. 384), *Marsh v. Tyrrell* (2 Hagg. Ecc. Rep. 84), and *Barry v. Butlin* (2 Moore, P.C. Cases, 480; and 1 Curteis, Ecc. Rep. 614), were referred to.

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine.

Mr. Justice Erskine.—This case came on upon Appeal from the sentence of the Prerogative Court of Canterbury, by which the learned Judge of that Court revoked the probate which had been granted of the Will of Thomas Edward Baker, late of Bath Place, Kensington.

Mr. Baker died in the night of the 27th of March 1833, and shortly after his death, a caveat was entered on behalf of Mr. George Baker, a relation, but not the next of kin of the deceased, against the issuing of any probate of the paper in dispute; but that caveat having been afterwards withdrawn, probate was, on the 18th of April 1833, granted in the common form to the widow of the deceased as sole Executrix, and who was also the Universal Legatee under the Will.

In the month of May 1834, Mrs. Baker married the Appellant Harwood, and she died in the month of October 1835, having by her Will, executed under a power, appointed her husband sole Executor.

In the month of January 1836, the probate which had been granted to Mrs. Baker was called in by Maria Baker, who alleged herself to be next of kin, and who was admitted to oppose the Will; and thereupon the paper was propounded by Mr. Harwood, in a common con-[284]-dicit, upon which three witnesses were examined—Mr. William Knight, Solicitor, the drawer of the Will, Mr. William Smith, a friend of the deceased, and Mr. James Pollock, who attended the deceased in his last illness as the assistant of Mr. Andrew Carrick, a Surgeon and Apothecary. The two former were attesting witnesses to the Will. The third attesting witness, Sophia Reade, was not examined in chief by Mr. Harwood, but was examined upon interrogatories by Maria Baker.

Several other witnesses were afterwards examined on allegations asserted and admitted on both sides, and four several testamentary scripts of the deceased, besides that propounded as his Will, were brought in annexed to the affidavit of script of Mr. Harwood.

The learned Judge having heard the cause on the 5th of August 1837, by his Decree pronounced against the force and validity of the pretended Will, upon the ground that the evidence adduced was not sufficient to prove that the deceased was a capable Testator.

From this Decree the present Appeal has been instituted by Mr. Harwood, and the case was very ably argued in December last, when Judgment was deferred, and now, after a careful examination of all the evidence in the cause, their Lordships concur in the opinion expressed by the learned Judge below, that the party propounding the Will has not satisfactorily proved, as he was bound to do, that the paper in question does contain the last Will and Testament of the deceased.

As their Lordships do not however view some of the evidence in the same light in which it was viewed by the Court below, it will be necessary to state the particular grounds upon which they have come to the same result.

It appears by the evidence, that Mr. Baker died [285] about 12 o'clock in the night of the 27th March 1833; that the paper propounded as his Will was executed about 7 o'clock in the evening of that day. According to the evidence of Carrick, one of his medical attendants, at 9 o'clock that evening, Mr. Baker was nearly insensible, unconscious, incapable of any act whatever—he was actually dying. The Will, when produced, is found to be signed only with a mark, and had evidently been with a very feeble hand. When, therefore, a Court finds that the paper propounded as the Will of the deceased was executed in the manner stated, only two hours before he is found by his medical attendant in an unconscious and dying state, and only five hours before his death, it becomes the duty of the Court to require the most satisfactory proof, that at the time when the Will was executed, the deceased was not only aware of the disposition he was making of his property, but that he was in a state of mind to judge of the propriety of that disposition.

The infirmity of mind suggested by the Respondent, and relied on by the Court below, is not an incapacity arising from any delusion or from any constitutional or long-established infirmity of mind, but one occasioned by a recent accession of bodily disease affecting the brain, and producing torpor, and thereby rendering the mind incapable of exerting those faculties which are essential to a sound and disposing mind and memory.

In order, therefore, to form an accurate opinion of the condition of the mind of

the deceased at the time of making his Will, it will not be necessary to go further back than the 21st of March 1833, when he was first seized with the illness which terminated in [286] his death on the 27th of the same month; for before that time it is admitted by all parties that the deceased was fully competent to make any testamentary disposition of his property.

The earliest account that the evidence furnishes of the nature of the attack and the early progress of the disease, is that which is derived from the statement made by Mrs. Baker, in a letter to Mr. Flooks, a friend of the deceased. This letter is dated April 6th, 1833, about nine days after her husband's death, in which she says, "It is now a fortnight last Thursday (this would be the 22nd of March) since my dear Mr. Baker went into town to attend a meeting of the Bank Directors to declare a dividend, and as he went through Temple Bar he felt himself seized with a violent shivering fit. He however proceeded to the Bank of England, and got, as soon as possible, before a great fire; still the shivering continued, to that degree, that he was unable to go and hear the speaker's speech, which vexed him very much, and he got in a coach, and returned home. When he came back, his looks nearly frightened me to death. We placed him instantly in a hot bed, and from that moment I never left him. He died on the following Wednesday. He was sensible to the last moment: but the stroke, which was paralytic, deprived him of the use of his right side;"—and then she proceeds to allude to the making of the Will, and Mr. Smith's visit.

Mr. Carrick was called in on the 22nd of March, and he says he found the deceased in bed, very ill, having a high degree of fever and erysipelas—affection of the brain, producing a considerable degree of stupor. Carrick then adds, "During the few days he continued to live, I saw him repeatedly, at least four times a-day. [287] For a day or two the disorder was stationary—one could not say he was better or worse—but the bowel complaint continued obstinately; debility gradually increased, and stupor also continued. The brain was implicated, so that he required to be roused before he would speak, though he was quite rational, and expressed his feelings correctly, in reply to the medical inquiries addressed to him. He was not irrational—there was no delirium—only when not roused, he sank into a depressed state of drowsiness and stupor, such as I have described. He knew me perfectly well, and all about him, when roused from the stupor, in which he would have continued if not disturbed. When roused, he answered my questions very rationally, but immediately relapsed into a state of stupor. He was exceedingly drowsy. As far as I could judge, from what I personally observed, I consider the deceased to have been, during the illness of which I am now deposing, incapable of doing a rational act of an important nature, requiring thought, judgment, and reflection, or (on account of great exhaustion of his bodily and mental powers) of resisting undue influence and control."

Mr. Hawkins, who was called in by Carrick, and saw Mr. Baker as it should seem on the 23rd, and every subsequent day till he died, describes Mr. Baker's state in substance much as Carrick does, though he seems to have forgotten the attack of the bowels, and thinks that though they apprehended apoplexy, they ascertained there really was no tendency to it when the disease was fully understood. But these differences in the recollection of the two witnesses cannot affect the credit due to the substance of their testimony, in which they agree: for no suggestion has been made against [288] the perfect honesty of their intentions to represent the truth. Hawkins then entirely agrees with Carrick in describing the effect produced by the disease, for he says, "He was, throughout my attendance upon him, in a torpid and drowsy state. He required to be roused, to say anything, for most of the period of my attendance. He recognized persons, when he was told who they were. He was capable of answering questions—short questions—but not capable of continued conversation." And then he proceeds to state, that even in answering simple questions, he was sometimes besides the mark; a circumstance which, as it appears that the deceased was hard of hearing, and Hawkins himself states that it was necessary to speak loud to make him hear, may be fairly attributed more to the dulness of hearing than to any incoherence of understanding, for none of the other witnesses speak of any such incoherence; but there is one part of Hawkins's testimony, which is given in answer to the eleventh interrogatory, which is of much importance, as indicating a condition of mind not likely to vary at different periods.

so as to admit of the conclusions contended for by the Appellant, that although the mind of the deceased might generally be in a drowsy and torpid state, yet that under circumstances of excitement, it might be roused into a capacity to comprehend and deal with subjects requiring thought, reflection, memory, and judgment.

By the eleventh interrogatory, each witness is asked, "Are not the observers, whether professional or unprofessional, of a sick person in a state of exhaustion, frequently deceived and surprised at the degree of energy such sick persons can bring to bear, when roused by any important subject?" Both Carrick and Hawkins [289]-kins answer this question in the affirmative, and Carrick adds, "I do not consider that the deceased's state of exhaustion was such as not to admit of his attention being aroused to any subject of importance;" an answer which, taken in connection with the rest of his evidence, must in fairness be taken to convey his opinion that the incapacity of the deceased, of which he had previously spoken, was the consequence of exhaustion, which might, therefore, so far be removed by excitement, as to admit of a temporary interval in which the mind might assume a testamentary capacity. Hawkins, however, though he answers the interrogatory also in the affirmative, adds an observation, to show that such answer would not warrant the conclusion that Mr. Baker might have been roused to a state of mental energy by the excitement of an important subject: for he says, "But Mr. Baker's was not a mere state of exhaustion, it was oppression of the brain. His state of exhaustion was not such as would not admit of his arousing his attention so far as to answer a question;" but he adds, "he did not always do that correctly, and I don't think he spoke a single word, but in answer to questions. The importance of a subject would not, I think, have made any difference in arousing his attention." Both of these gentlemen, after being shown the affidavit made by Pollock on the occasion of the proof of the Will by Mrs. Baker, decline swearing that Mr. Baker could not have been, at the time of the execution of the Will, of sufficient capacity to make his Will. Hawkins admits that there might have been a time during his illness when he could understand questions put to him, and answer them so as to make a short Will. And Carrick says, "He had so far thought and judgment, that he could, [290] when roused, express what his feelings were. A simple matter placed before him he might understand, but, from the state of his brain, I do not consider that he was capable of suggesting anything, or of undertaking what was complex."

Both these gentlemen, therefore, seem to think that the deceased might have been sufficiently aroused from the state of torpor to which he had been reduced by his illness, to assent to so simple a disposition of his property as that made by the Will in question: but that it would have been impossible to have made him comprehend the details of a more complex distribution.

But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard: but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of [291] deliberately forming an intelligent purpose of excluding them from any share of his property.

If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity.

Next to the medical attendants, the most important witnesses would be those inmates of Mr. Baker's house, who were in the habit of attending him in his illness,

and who would have the most frequent opportunities of watching and observing the condition of his mind during the progress of his disease. Unfortunately for the ends of justice, the two principal attendants have placed themselves in such a position, that even the Counsel for the parties in whose favour they speak were compelled to renounce all confidence in their evidence. For Sophia Reader, one of Mr. Baker's servants, and one of the attesting witnesses to the Will, (who was not examined in chief on the *conduit*, in consequence of contradictory statements made by her out of Court,) on her examination on the interrogatories administered by the Respondent, describes the deceased as wholly insensible to what was going on, and incapable of understanding the contents of the Will, but she was proved to have stated to Mr. Bee, the clerk of Mr. Harwood's attorney, when examined by him, for the purpose of ascertaining the circumstances under which the Will was made, that the Will was read over to Mr. Baker, who seemed perfectly sensible at the time, and to understand the nature of it, and stated himself to be perfectly satisfied with it. On the testimony of this witness, therefore, whose [292] evidence is directly contradicted by her own attestation to the Will, and by her subsequent statements, and also opposed to the evidence of creditable and respectable witnesses, it is impossible for their Lordships to place any reliance.

Sarah Taylor, who was in constant attendance upon Mr. Baker as nurse, would have been another most material witness, if her evidence had been more consistent with the testimony of those witnesses whose respectability place their veracity above the reach of suspicion, and whose means of knowledge were sufficient to exclude the supposition of mistake; but her statements are obviously so strained beyond the truth in many points, that it is impossible with any safety to rely upon her testimony.

Neither is the evidence of Catherine Macnabb, the only other servant who had any opportunity of observing Mr. Baker's state of mind, of much greater value; for as the two other attendants have extravagantly over-rated the imbecility of Mr. Baker, and the importunity and violence of Mrs. Baker, this witness as extravagantly under-rated the effect of his illness, both upon his mind and body; representing Mr. Baker as not being in a torpid or weak state of either mind or body, and as not being heavy nor more than usually sleepy; her evidence, therefore, may be fairly set against that of Sarah Taylor, and both of them may be rejected as unsafe guides in the investigation of truth.

Marian Elizabeth Rosamond (Mr. Baker's niece) was also examined for the Appellants, and stated that she believed that Mr. Baker was, during the whole of his illness, of sound mind, memory, and understanding, and capable of resisting control and undue influence, [293] and of doing any act requiring thought, judgment, and reflection. In her answer to the fourth interrogatory, she adds, that he was feeble of body, but not of mind, and was quite capable of mental exertion; and in her answer to the seventh interrogatory, she persists in stating that Mr. Baker was sensible to the last moment.

The bias under which this witness may be supposed to speak, would require that any opinion or judgment formed by her upon the subject of Mr. Baker's capacity should be received with caution, and that the facts to which she deposes, as forming the ground of that opinion, should be closely examined, especially when she is found making statements in direct contradiction to those of the medical attendants. She swears that Mr. Baker was not generally during his illness in a torpid state of body or mind. Carrick, Hawkins, and Pollock, all swear that he was; she states that Mr. Baker was sensible to the last moment; Carrick says he was nearly insensible at nine o'clock; unconscious, and worse, at eleven.

But when the evidence of this witness is closely examined, she mentions no one fact up to the time of making the Will, which indicates a mind capable of any exertion, for she admits she never heard any long conversation with any one,—that he asked a question and was answered, or he was asked a question and answered it, or he asked for what he wanted, or he answered when he was asked whether he wanted anything,—and she afterwards adds, the questions he asked were simple, and in general had reference to his wants, or his health. She further mentions his recognition of Hutcheon, but gives no instance of anything being said by the deceased before he signed the paper [294] in question, that indicated any intention on his part to make a Will, or a state of mind capable of entertaining any question of business. She does indeed, in her answer to the eighteenth article, state an expression made use of by Mr. Baker,

after the supposed Will was made, which, if true, shows that Mr. Baker was fully conscious at that time of her claims upon his wife, and that Mrs. Baker would, after his death, have the means of providing for her; but there is nothing in the expression, "Ah, Marian, your aunt will provide for you," that necessarily implies his consciousness, that he had given all his property to his wife.

Other witnesses were examined by the Appellant for the purpose of proving the state of Mr. Baker's mind during his last illness; their evidence, however, is of comparatively light importance. Mrs. House only saw him once, and though she says that he was capable of attending to business properly, if necessary, there is no fact spoken of by her that shows any reasonable foundation for that belief, and though she states that he was not in a torpid state of mind or body when she saw him, she admits that neither she, nor any one else in her presence, had any conversation with him, and she states no facts that would prove him to have been in a different state from that in which the medical attendants saw him; and their opinion is in direct opposition to her's.

Samuel House, her husband, was also examined:—he saw Mr. Baker on the Saturday night and Sunday afternoon before his death, and, according to his account, Mr. Baker's mind was as collected as possible, and he was as capable of doing any act requiring judgment and reflection as any sick man could be, and [295] that he seemed to understand every thing that passed—that his mind was as right as that of the witness, and, but for his weakness, he was quite as capable of business. But this witness appears to have formed his opinion upon very slender grounds; for in his examination in chief, the only facts he states are, that the deceased knew him—and that in the course of the six hours which were spent by him in Mr. Baker's presence, the only observations specified are, that on the Saturday while he was being cupped, he talked about it when he was asked if it hurt him; that he recommended the witness to go home for fear he should make himself ill again; so far showing recollection of the fact that the witness had been recently ill: and that on the Sunday, when Hutchence and Severne called, Mr. Baker knew them both, and inquired of them how they were, as any other person would have done. And in Mr. House's answer to the fourth interrogatory, he admits that there was no conversation with him, or any other person, on those occasions, further than his asking or answering simple questions, and his saying he would, or would not, have what was offered to him.

Any opinion, therefore, of Mr. Baker's capacity for business, built upon such a slight foundation, could carry but little weight when contrasted with the evidence of the medical attendants; and in one particular he is contradicted by Severne and Hutchence, who both state, that to the best of their recollection, when they saw Mr. Baker on the Sunday, Mr. Baker did not speak a word to either of them. Hutchence says he thinks he knew neither of them—and that, in his judgment, he was not capable of doing any act requiring thought, judgment, or reflection; and Severne, [296] though he thinks Mr. Baker recognised him, said he appeared to him in a very helpless state, and incapable of either bodily or mental exertion.

William Chillingworth, a wine merchant, also saw the deceased once during his last illness, one or two days before his death, and says, "So far as he spoke on the occasion I saw him, he was sensible, and showed that he possessed his memory;" but he adds—"I was so short a time with him, that I could not judge how far he was capable of an act requiring thought, judgment, and reflection;" and when the particulars of the single interview of which he speaks are looked to, it is manifest that he had no sufficient opportunity of forming any conclusion upon the testable capacity of the deceased: when he went into his room, he admits that Mr. Baker was either asleep or in a state of lethargy; and when Mrs. Baker called to him, and said, here is Mr. Chillingworth come to see you, he appears to have taken no notice of her; but upon her repeating it, he turned and said, "I don't want any of that Madeira now;" and Chillingworth fairly enough draws from this observation, which was the only one he heard Mr. Baker make, that Mr. Baker recognized him, and had a recollection of what had passed between them on a former occasion, because he says, that when they had last met, Mr. Baker had spoken to him about some Madeira, and had said he would take some of it if it was very fine; but though Chillingworth adds in his answers on interrogatories, that Mr. Baker, though feeble in mind and body, was

not incapable of mental exertion, and that it appeared to him he was quite capable of conversation if he had been inclined to it, little importance can be attached to an opinion formed upon such insufficient grounds.

[297] Upon a revision of the whole of the evidence, their Lordships fully concur in the view which the learned Judge of the Prerogative Court has taken of the general evidence of the deceased's state of mind before the execution of the disputed Will, and their Lordships further agree with the learned Judge in thinking, that, under such circumstances, the evidence of those who attest the capacity of the deceased at the time of the execution, requires to be watched with great caution and jealousy.

Keeping, therefore, in mind the principle, that in all cases, the party propounding the Will is bound to prove, to the satisfaction of the Court, that the paper in question does contain the last Will and Testament of the deceased, and that this obligation is more especially cast upon him, when the evidence in the case shows that the mind of the Testator was generally, about the time of its execution, incompetent to the exertion required for such a purpose; and further keeping in mind that the disposition in question was not in accordance with any purpose deliberately formed before his mind became enfeebled by disease,—we come to the examination of the witnesses, whose evidence is relied on as proving, that at the time of executing the Will in question he was fully competent to form, and did deliberately form, the intention of leaving to his wife the whole of his property.

The first account that we have of any intention entertained by Mr. Baker, after his attack, to make any testamentary disposition, is given by Smith, whose account of Mr. Baker's general state during his illness is so inconsistent with that of the medical attendants, and whose recollection of facts that occurred at that time is so imperfect, that it is impossible to rest with [298] any confidence on the statements which he makes: but his account of the transaction, as far as it can be made out from a very confused and unsatisfactory statement, in substance is this, that having been acquainted with Mr. and Mrs. Baker for many years, and having come up to town upon some private business during the time of Mr. Baker's illness, he called at his house, and there learned, from Mrs. Baker, that her husband was ill in bed. That at Mrs. Baker's request he went up to Mr. Baker's bed-room, and had some conversation with him—in the course of which, however, no allusion was made by Mr. Baker to any wish on his part to make any Will. That at some time after this visit, without any previous allusion by Mr. Baker to the subject, Mrs. Baker requested the witness to go to Salisbury, to inquire of Mr. Tanner, Mr. Baker's solicitor, whether Mr. Baker had made a Will. That he went accordingly, and made inquiry of Mr. Tanner, who gave him a draft of a Will, not signed, which he brought up to town, and gave to Mrs. Baker, who paid him his expenses. That on his return, he found Mr. Baker very ill, and at Mrs. Baker's request remained in the house. He admits, that after his return he never mentioned to Mr. Baker that he had been down to see Tanner, and that no allusion was made by Baker to the subject of his Will, or to any intention of making one; but he says, that some days after his return, the nurse came down and said, Mr. Baker wanted an attorney to make his Will, and that upon her mentioning the name of Mr. Knight, the nurse was ordered to fetch him. That Mr. Knight, who at that time was a perfect stranger to the witness, and also to Mr. Baker, came soon after—and that the witness accompanied Mr. Knight up to Mr. Baker's [299] bed-room. Smith then proceeds to detail the circumstances under which the Will in question was drawn and executed; but as his account does not vary substantially from that given by Knight, and as Knight's testimony is not open to many objections that have been fairly pressed against the accuracy of Smith's statements, we will take the history of the circumstances under which the Will was made, from the deposition of Knight.

But before we proceed to examine his evidence, it will be right to ascertain the degree of credit that ought to be given to his testimony: and this becomes the more necessary, because his veracity has been brought into question by opposing testimony: has been much assailed by the Counsel for the Respondent, and has not, in the opinion of their Lordships, been sufficiently appreciated by the learned Judge in the Court below. Knight appears to have been a Solicitor living in the neighbourhood of Baker's residence, unknown, at the time, either to Mr. or Mrs. Baker, with no previous

bias, therefore, that could be supposed to influence him in aiding Mrs. Baker in any plan to procure, by undue means, the execution of a Will in her favour; neither is there anything in the case to show that Knight had any motive for giving an untrue account of the transaction: and although an attempt has been made by the Appellant to impeach the testimony of Knight, by the proof of subsequent declarations, manifesting a consciousness on his part that the Will had been improperly made, their Lordships are not inclined to give much weight to the testimony by which these declarations are supposed to be proved, which Knight most positively denies.

The principal witness in support of these declarations [300] is John Harris Flocks, a Surveyor near Wilton, in Wiltshire. He states himself to have been a confidential friend of Mr. Baker, from whom he had learned his intention to leave his property amongst his relations, and an annuity only to his wife. That he had some conversation with Mrs. Baker after her husband's death, upon the subject of his Will, and that at his request Knight was sent for—and that upon his arrival the witness repeated to Mrs. Baker, in Knight's presence, what he had before told her, that it was a false Will, and explained to Knight what Mr. Baker had told the witness about his instructions. Knight, he adds, was very silent while he remained, and very shy of saying anything at all; he heard all the conversation; and when Mrs. Baker asked me whether she should make a Will according to Mr. Baker's intentions, or rather said, she would do so, Mr. Knight, I recollect, nodded his head, as approving of it.

Now, although at this interview Knight is not alleged to have made any direct declarations indicative of any consciousness that Mr. Baker's Will had been unfairly obtained, it is obviously insinuated that his shyness, and ready assent to Mrs. Baker's proposal to make a Will, in order to carry out her husband's intention, sprung out of the consciousness that all was not right: and some weight appears to have been given to this part of Flock's evidence by the learned Judge of the Court below, who comments upon the absence of any denial by Knight of his having been present at this interview; but the fact appears to have been overlooked, that although by the tenth interrogatory, administered by Maria Baker, Knight is asked if Mrs. Harwood, formerly Baker, had not admitted, in the presence of Mr. J. Yeates, that she knew that [301] the pretended Will was not good for anything; and also whether he, William Knight, had not declared to Flocks, that if a Bill was filed in Chancery, the said pretended Will was not worth a farthing: and although by the fourteenth article of the first allegation given on behalf of Maria Baker, it is pleaded, that the said William Knight, in June 1834, declared and admitted to the said John Harris Flocks, in the presence of E. Nightingale, when talking with him on the subject of the said pretended Will, that if a Bill were to be filed in Chancery, or a stir to be made about it, the said Will would not be worth a farthing, or to that or the like effect,—yet there is no interrogatory or allegation pointed to the interview between Mrs. Baker, Mr. Flocks, and Mr. Knight, now under discussion: the reason for Knight's silence upon the subject is, therefore, obvious: he had no means of knowing that it was alleged, and the fact of this interview rests entirely upon the evidence of Flocks.

In his evidence on the fourteenth article just alluded to, Flocks states the circumstances of his interview with Knight in June 1834, and swears that upon that occasion, Knight said that the Will was a bad business,—that if a Bill in Chancery was filed, or the Baker family to make a stir about it, the whole would be upset, and the Will would not be worth twopence,—that he said the same thing in different ways two or three times, and said it in a confident way, to assure me he was right,—that Mr. Nightingale, a young man in his employ, was present, though he adds that he does not suppose that he heard all that was said.

Nightingale is also examined to the same fact, and he says, that he remembers Knight saying, that if the family made a stir about Mr. Baker's Will, he did not [302] think it would stand good. He admits, however, that he did not know what led to the observation, and that he did not pay particular attention to the conversation, for that he was in conversation with Mrs. Knight.

Knight is examined to this fact upon the tenth interrogatory, and he denies, in the language of that interrogatory, that he ever declared to Flocks, that if a Bill was filed in Chancery, the Will in question was not worth a farthing, nor anything to that effect; and he adds, I never said a syllable that could be so understood: I deny the suggestion *in toto*, and the man who suggested it must be base and wicked.

He does not indeed, in express terms, deny the words sworn to by Nightingale, because they were not suggested by the question, but the general denial would exclude all such words, and, therefore, we have Knight brought in direct contradiction to Flocks and Nightingale. The evidence, however, of the latter, cannot be much relied on, because the import of the words which he deposes to might be very much varied by the context, which he admits that he did not attend to, and does not pretend to recollect.

It becomes necessary, therefore, to contrast the credit of the two principal witnesses, Knight and Flocks: and when their Lordships look to the conduct of Flocks, in relation to the Will of Mrs. Baker, and the manner in which he attempts in his examination on the seventh article to represent that Mr. Hatt, who drew up Mrs. Baker's Will from the instructions given to Flocks, was an attorney, or at least had been introduced to him as such, though in his answer to the thirty-second interrogatory, he admits that he did not understand that Hatt was a solicitor, but that he was in a solicitor's office,—yet he further admits that he [303] spoke of him to Crop as a solicitor, and then attempts to account for his conduct by representing that he had applied to the landlord to recommend him a lawyer, and that Hatt came to him: and yet is again forced to admit, that he asked the landlord if he knew any person who could write out some law papers, and that he did not want a lawyer exactly, but some person who was accustomed to law matters, and that was the way Hatt came to be sent for: and when, upon the examination of Hatt, it appears, that instead of requiring him to draw up a formal Will from the instructions prepared by Flocks, he, Hatt, was only desired to copy a Will already prepared by Flocks himself, and was not allowed to make any alterations, though informally drawn. When it is found that the Will itself gives to the witness Flocks the greater part of the property to his own use and benefit, though he represents it to have been so made for the purpose of enabling him to carry out Mr. Baker's intentions towards his own family, their Lordships are not disposed to place much confidence in the testimony of this witness, and cannot, therefore, consider the veracity of Knight in any way impeached by the contradiction opposed to him.

Their Lordships, therefore, think it due to Knight, and to the Appellant in this cause, to decide the question of the validity of the Will, upon the assumption that all that Knight has stated of the manner in which the instructions were given, and the Will itself was executed, is accurately true. Knight's account then is this: that having been sent for to make Mr. Baker's Will, as already stated, he went up stairs into Mr. Baker's bed-room, having received no previous instructions from Mrs. Baker, Smith, or anyone else, upon [304] the subject without indeed having seen Mrs. Baker or Mr. Smith,—that he found Mr. Baker ill in bed,—that there were with him Mr. Smith, whom he had not previously known, Sophia Reader, Mr. Baker's servant, and Sarah Taylor, the nurse. Mrs. Baker was not present. Mr. Knight then says, "I sat down by his bedside, and in effect said, that I understood that he had sent for me to make his Will: he said, 'Yes.' I then asked him whether he had made up his mind as to what his intentions or wishes were; and his reply was, that he had, and intended to give everything to his wife: he said that such was his Will, to give everything to his wife, not doubting that she would take care of her niece Marian, or some such name he called her by. I suggested (says Mr. Knight) that he had friends, or some friends; but he said he had made up his mind to leave everything to his wife; still, however, saying that he trusted she would take care of her niece. I think I suggested to him, he should say who was to be his Executor, and he said, 'My wife, she is to be sole Executrix.' That was the whole of the instructions I received. Mr. Smith was close by me, or nearly close by me, the whole of the time, and must have heard, as indeed every person must have heard, all that passed." He adds, "No person interfered in giving me the instructions; the whole came from Mr. Baker's own lips; it was done in no haste. There was I believe some general conversation beside, between Mr. Smith and Mr. Baker, but to which I paid no attention; and after about ten minutes or a quarter of an hour, having had no occasion to make any minute of such very simple instructions, I asked for paper and writing materials, and sat down at a table in the room close to the bed, and wrote [305] the Will out fair for execution. I needed no further instructions. I had nothing to do but to use words sufficiently comprehensive to apply to property

of every description. I made no inquiry as to what Mr. Baker's property consisted of: he did not tell me what it did consist of in giving me instructions. He mentioned his wife's christian name, Mary Ann, I think; and in writing the Will out, I had not any occasion to ask him for further instructions for my guidance. After I had written the Will completely out, and fair for execution, I took it to the bedside and read it carefully, and slowly, and distinctly, to Mr. Baker, and he said it was quite right, or to that effect; and then I desired to have pen and ink brought to me, that he might sign it, and I think Mr. Smith brought them to me, and then Mr. Baker tried to sign his name, and could not. He tried many times, but could not; and not being able to write his name, I said, Well, Mr. Baker, you must make your mark; he, therefore, accordingly made his mark, and sealed and delivered the Will in the usual way. I prepared the Will with the seal, and I gave him the words of publication, and he repeated the words, 'I publish,' etc., 'and request you to sign my Will;' and then I signed my name, and Smith his, and the servant Reader, her's. When the execution of the Will was quite completed, I sealed it up in an envelope, and then delivered it to Smith: I never saw Mr. Baker afterwards." He afterwards adds, "Mr. Pollock, the medical gentleman, came in before I left, and I was pleased that he did, for Mr. Baker alluded to the Will he had made, to Mr. Pollock; he said in answer to Mr. Pollock's inquiry as to how he felt himself, that he was easier, and when Mr. Pollock said that he understood he had [306] been settling his affairs, he said that he was glad that he had."

Taking the facts thus deposed to by Knight as substantially correct, and admitting that Knight (who knew nothing of Mr. Baker's previous intentions, or of the state of stupor in which he had generally been found by his medical attendants) might fairly come to the conclusion, which he says he drew from what he saw of Mr. Baker, namely, that he was perfectly capable of giving instructions for his Will, and of making it, and of doing any act requiring thought, judgment, and reflection, it by no means follows that Knight's conclusion is sound, when all the other circumstances of the case not known to Knight are taken into account. If Knight had known of the usual state of Mr. Baker's mind since the commencement of his illness, he would probably have taken more pains to ascertain the extent of his recollection, and of the powers of his mind, before he acted upon the general instructions for his Will. If he had known of the instructions for former Wills, he would doubtless have questioned him about them, and might have been able, from Mr. Baker's answers, to form an accurate estimate of the capacity of his mind to make a disposition of his property so inconsistent with his former views; but the circumstance of Knight being a total stranger to Mr. Baker and to his family, leaves the case without any clue by which the Court can judge that Mr. Baker had at the time any recollection of the relations for whom it is clear he at one time intended to make a provision, or of the fact that he had ever given instructions for any other Will,—and there is not the slightest evidence of any former declaration by the Testator, that he [307] intended making a Will in accordance with the instructions afterwards given to Knight; on the contrary, there is evidence that before his illness Mrs. Baker had suggested such a disposition to Mr. Baker, but he had answered that she was not capable of taking care of anything, but that she would have enough for herself; that there was his own family to think of; and no expression indicating any change of intention is spoken of by any witness in the suit. Smith indeed supports the inference drawn by Knight, and Smith had had earlier opportunities of observing the conduct of Mr. Baker and of judging of his capacity; but their Lordships are not disposed to place much reliance on the testimony of this witness, for, by his own evidence, his memory appears to be infirm, and his account is throughout confused, and proved to be inaccurate in many points by the testimony of Tanner; and the circumstances that he had gone down to Salisbury by Mrs. Baker's desire to inquire about Mr. Baker's Will,—that he had ascertained the existence of a draught Will, so materially differing from the instructions given to Knight in his presence,—and the fact that he nevertheless did not suggest either to Mr. Baker or to Knight either the existence of such a document, or the fact of his having been down to Salisbury to inquire for it,—lead most forcibly to one of two conclusions, either that Smith was afraid to remind Mr. Baker of his former

intentions, lest he should adhere to them, or that he felt that his mind was too feeble to comprehend so complex an arrangement of his affairs.

But there is another and more important objection to Smith's testimony. According to Tanner's evidence, he, in September or October, prepared the draft [308] of a Will for Mr. Baker from his own instructions; that by the directions of Mr. Baker, that draft Will, when completed, was in October 1831 sent by Tanner to the care of Mr. Hutchence of Coleman-street, London; that at the time it was so sent to Mr. Hutchence, he believes no part of the paper was torn off.

Mr. Hutchence says that about the latter end of 1831, a parcel was left at his warehouse in Coleman-street, to be under his care for Mr. Baker; that it remained under his charge some days, when Mr. Baker called and took it away, thanking him for his care of it, and saying it was his Will from Tanner.

This draft Will is produced as the script marked D, by Mr. Harwood, and when produced, the last and back sheet are torn off—just below the date, which is left partly in blank, taking away that part of the paper on which the signature, or any attempt at a signature, by the deceased would have appeared if the Will had been executed, or if any attempt to execute it had been made by the deceased. Now Smith swears that when he went down to Salisbury to make inquiries of Tanner about Mr. Baker's Will, that Tanner gave him a draft Will, not signed, which he brought back and gave to Mrs. Baker, and that the script D was the draft Will, which he so received from Tanner. Tanner, on the other hand, not only swears, as already stated, that he had sent the script D to Hutchence in October 1831, but most positively asserts that he did not deliver to him any packet when he called upon him about the Will; and then Smith, who is again examined upon the second allegation on behalf of Harwood, though he perseveres in saying that according to his recollection, he could swear that Tanner gave him the draft, and that he returned it to Mr. Baker, admits [309] that, as Tanner swears to the contrary, he may be mistaken, and lowers his confidence down to *almost* swearing that he did give him the draft. Now this is a fact so much connected with the whole object of his journey to Salisbury, that it is impossible to look at this part of Smith's testimony without seeing that there must be a great defect, either in his recollection or in his veracity. There is another point, and one more immediately connected with the question of Mr. Baker's capacity, which, if it had been satisfactorily proved, would have shown that Smith is totally unworthy of the slightest credit. Sanders Trotman, a hairdresser, states that he was employed to shave Mr. Baker on the morning of his death, and that while there, an elderly gentleman, whose name he did not know, and whom he cannot identify as Smith, placed a paper, which the witness believes, on its being shown to him, to have been the script D, but which was not then torn at the bottom, before Mr. Baker, and asked him to sign it; that Mr. Baker tried to write and could not—he seemed to be running the pen down the paper instead of across it, and did not seem to have any idea what he was doing, and so the gentleman took the paper away.

The only persons who, according to this witness's statement, were present, were Sophia Reader, and the nurse Taylor; but inasmuch as by the common consent, the testimony of these witnesses cannot be relied on in respect of the main question of Mr. Baker's capacity, and the *factum* of the Will, it would be unsafe to resort to their evidence for the purpose of proving that Smith was the elderly person who placed this paper before Mr. Baker for his signature, and the only other evidence tending to connect Smith with the [310] transaction spoken to by Trotman, is the evidence of Mr. Pollock, who says that either on the day of Mr. Baker's death, or the day before, but he thinks the day before, Smith showed him a paper, purporting to have been signed by Mr. Baker, as Mr. Baker's Will; but Smith, though charged with having presented the script D to Mr. Baker for his signature, which he most positively and pointedly denies, is not asked whether he had not shown Pollock a paper, which he said was Mr. Baker's Will, neither is he asked whether he had not told Tanner that Mr. Baker had attempted to sign the draft Will, but had blotted and blurred it so that it was of no use, so as to bring the evidence of these two witnesses into direct contradiction upon this point; and therefore though Trotman's evidence may be taken, as showing the state of Mr. Baker's mind on the morning of the day when the disputed Will was executed, neither his evidence nor that of Pollock or

Tanner can be taken as directly impeaching the credit of Smith, still less can the evidence of the two latter witnesses be taken, as proving the fact that the draft Will had been presented to the deceased for execution: there still remains, however, the discrepancy between Smith's evidence and that of Tanner, as to the delivery of the draft Will to Smith, which sufficiently proves that Smith's accuracy cannot be relied on, whatever may be the value of his character for veracity.

The only other witness who speaks of the state of Mr. Baker's mind at that period of his illness at which the Will was executed, upon whose testimony their Lordships can place any reliance, is Pollock, who, as already observed, was at that time assistant to Mr. Carrick, and in that character attended Mr. Baker in [311] his last illness. He saw Mr. Baker repeatedly during his last illness, but was not aware, from himself, of his intention to make his Will, or of his making his Will, till the very day he died.

It appears by Pollock's evidence, that, about seven o'clock of the evening of Mr. Baker's death, a message was brought to Mr. Carrick's, for either Mr. Carrick or Mr. Pollock to go to Mr. Baker's house, about his Will. That Pollock went immediately, and saw Mrs. Baker, who asked him to go up to Mr. Baker, as they were making his Will. That on his going into Mr. Baker's bed-room, he saw Knight engaged with some papers, as he presumed, on the Will. Smith was also present. Pollock went to Mr. Baker's bed-side, and felt his pulse, and asked some medical questions, which he answered as usual. "And then," Pollock adds, "thinking my attendance had been required with reference to the Will which was making, I put some questions to him upon the subject. I first remarked to him, 'You are engaged just now, are you not?' He said, 'Yes, I am.' I then said, 'Then it was not done before?' He replied, 'No, not satisfactorily.' I then said, 'Your mind will be easier when it is done.' He answered, 'Yes, a great deal.' This was all that passed." From this conversation, and from what he had previously observed, Pollock draws the conclusion that Mr. Baker understood the questions put to him, and the answers he made to them; and that he was competent to the understanding a simple disposition of his property; but he adds what, in their Lordships' view of the question before them, is of great importance—that "he would not have been equal to the understanding of a complicated Will; but a mere simple disposition of his property, where there [312] was to be no comparison or weighing of the claims of relations upon him, I think he was equal to." He goes on to say, "I had some doubts before, from the nature of his illness, his dull lethargic state, answering questions when roused, but relapsing again into a state of lethargy, whether he was capable of making a Will, but—my doubts being in his favour—there was always a dull, heavy state of mind to induce me to be cautious in forming and expressing an opinion as to his capacity; he required rousing, but always answered my questions to the point; and I think he was capable of giving instructions for and making a Will of a simple nature. I don't think, from the state he was in, that the idea of making his Will could probably originate with him, but, if asked the question, I think he would have answered correctly, whether he would or would not make it; and, if asked who he would leave his property to, he would have correctly stated who he wished to leave it to. There was no delusion; it was a heavy, clouded state of mind, from which he required to be roused to answer questions; but, when roused, he answered those questions correctly." And in answer to the sixteenth interrogatory, Pollock further says, "I was not asked by Mr. Baker, or any person, to be a witness to his Will. If I had been asked to witness the Will, I should have hesitated about it, without further investigation; but, at the same time, if I had heard it read to him, and been satisfied with the manner in which Mr. Baker conducted himself, and heard the matter, I should have witnessed it without difficulty: the whole would have depended upon circumstances. I cannot now say whether I would or would not have witnessed the Will without questioning Mr. Baker further. I can't say whether the idea of making [313] the Will did or did not originate with Mr. Baker, but I have no reason to believe or suspect that it was unfairly or unduly obtained."

Taking the whole of this gentleman's testimony together, it does not appear very materially to differ from that of Carrick and Hawkins: he seems, indeed, to have entertained doubts more favourable to the capacity of Mr. Baker to make a Will;

but he nevertheless concurs with Hawkins that he was capable of making a short Will; or, as Mr. Pollock expresses it, "a simple Will;" and with Carrick, that he might understand a simple matter placed before him; but he also concurs with Carrick in thinking that he was incapable of understanding what was complex, and Pollock explains what he considers a simple Will, as one that would require no comparison or weighing of the claims of relations upon him.

Now if their Lordships had found from the other evidence that Mr. Baker had, while in a state of health, compared and weighed the claims of his relations, and had formed the deliberate purpose of rejecting them all in favour of his wife, but had omitted to carry that purpose into effect before the attack of illness under which he died; and that during that illness he had acted upon that previous intention, and executed a Will in question, less evidence of the capacity to weigh those claims during his illness might have been sufficient to show that the Will propounded really did contain the expression of the mind and will of the deceased. But when their Lordships find, that up to the date of his illness he had entertained a deliberate purpose of distributing a large portion of his property amongst his relations; and that he had never before [314] the hour in which he gave the instructions for the disputed Will, expressed any intention to leave his property to his wife; and when their Lordships further find (as they cannot but believe to have been the case), that during his illness he had attempted to execute a draft of a Will, containing a disposition of a large portion of his property amongst his relatives—to which, it is probable the deceased referred, when he remarked to Pollock that his Will had not been done satisfactorily before—their Lordships are of opinion that the Appellant has not made out by his evidence that the paper propounded by him as the Will of Mr. Baker really does contain his last Will and Testament.

Their Lordships, therefore, will advise her Majesty to affirm the judgment of the Court below, and to dismiss this Appeal, with costs.

[Mews' Dig. tit. WILL, I. TESTAMENTARY CAPACITY, g. *Soundness of Mind*. As to criterion of testamentary capacity in mental disease, see *Banks v. Goodfellow*, 1870, L.R. 5 Q.B. 568; *Boughton v. Knight*, 1873, 3 P. and D. 73; *Smee v. Smee*, 1879, 5 P.D. 84; *Murjett v. Smith*, 1887, 12 P.D. 116; *Roe v. Vix* (1893), P. 55; and notes to *Barry v. Butlin*, 1838, 2 Moo. P.C. at p. 492; *Dufaur v. Croft*, 1840, 3 Moo. P.C. 148; and cf. *Waring v. Waring*, 1848, 6 Moo. P.C. 341; and *Delafield v. Parish*, 1862, 25 N.Y. 9.]

[315] ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

ALEXANDER MACDONALD and Another,—*Appellants*: JOHN BELL,—

Respondent * [December 14 and 15, 1840].

By the Civil Law, sureties are not discharged from their liability to satisfy the creditor, though the benefit of a hypothec of the debtor is lost by the laches of the creditor to enforce his demands.

This was an Appeal from a Judgment of the Supreme Court at the Cape of Good Hope, pronounced on the 13th of June 1836, in an action in which the Respondent was Plaintiff, and the Appellants Defendants; and in which the Plaintiff in the Court below recovered Judgment for £1500, with interest and costs.

The Action was upon a Bond, of which the following is a translation:—

"Appeared before us, the undersigned Commissioned Members of the Court of Justice of this Government, in lieu of *Schepenen* (Judges having local jurisdiction), Mr. Jan Frederick Reitz, Vendue Commissary at this place, who acknowledged him-

* Present: Lord Brougham, Mr. Baron Parke, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

self to be truly and lawfully indebted to, and in favour of, the Colonial Government 150,000 guilders, Indian valuation, arising from, and being for, monies advanced out of the Government Chest to him, the Appearer, in his aforesaid capacity of Vendue Commis-[316]-sary, renouncing, therefore, the exception of *non numeratæ pecuniæ*, which aforesaid sum of 150,000 guilders the Appearer, by these presents, promised and undertook to satisfy and pay to the Government aforesaid, their order or lawful holder, with the interest thereon at six per cent. per annum, commencing from this date, and to continue to be so reckoned until such time as the whole of the principal sum shall have been paid and liquidated, which payment the Appearer may and shall also be obliged to make three months subsequent to notice having been given or received to that effect; but this sum of 150,000 guilders, although this reciprocal notice has not taken place, shall nevertheless be repaid or accounted for at the demise or removal of the Appearer, or otherwise at the giving over of the Vendue Office to such person as the Government may appoint in the room of the Appearer, provided such payment be then made in one sum, and in good, current, and lawful money, together with such interest as may be then due and unsatisfied thereon.

"For the security hereof the Appearer binds, as a special mortgage, his house and estate, situate in this Table Valley, in the Heere Gracht adjoining the library, moreover generally his person and all his property, moveable and immoveable, none excepted, both such as he now is or may in future become possessed of, submitting them all and the choice thereof to the constraint and execution of all laws and judges, and in particular to the judicature of the Court of Justice aforesaid.

"Appeared also Messrs. Michael Van Breda and Alexander Macdonald, who declared that they do bind themselves *in solidum*, as Sureties for, and co-[317]-principal debtors of, the aforesaid capital and interest to become due thereon, under the express renunciation of the *beneficia ordinis divisionis et excussionis*, with the force and effect of which they, the Sureties, considered themselves fully acquainted; the first Appearer promising at all times to free and hold harmless his said Sureties, in the full amount of this their engagement; and they, the Sureties, reciprocally guaranteeing each other for their respective shares, under obligation of their persons and property according to law.

"In token of truth, we, the Commissioned Members, together with the Appearers, and the Secretary, subscribed these presents, and caused this to be sealed with the public seal.

"Thus done and passed at the Colonial Office of the Cape of Good Hope, in the year of our Lord 1817, upon the 13th day of the month of June.

(Signed)

"J. F. REITZ.

"M. VAN BREDA.

"A. MACDONALD.

"As Commissioned Members,

(Signed)

"T. DEEMEL,

"WALTER BENTINCK.

"In my presence,

(Signed)

"C. BIRD."

The Bond was given under the following circumstances:—

In 1817 the late J. F. Reitz, then being Vendue Master at the Cape, borrowed from the Colonial Government the sum of 150,000 guilders, for the [318] purpose of enabling him to discount the Vendue Rolls of the merchants, which the Vendue Master was accustomed to do, and for the general service of his department; and the Bond in question was executed as a security for the Loan and interest at six per cent., by Reitz as principal, and by the Appellants as Sureties for him; and Reitz also mortgaged his house and premises in Cape Town as a further security.

In April 1824, Reitz died, without having repaid the said Loan, and was succeeded in his office by Charles Augustus Fitzroy and Egbert Andries Buyskes, who were appointed joint Vendue Masters under the style of Joint Commissaries.

As they succeeded to the Office and the administration of the funds of the Office, the Government applied to them, in the first instance, to liquidate the debt, or a

portion of it, due from Reitz, allowing the Joint Commissaries the benefit of the security taken from Reitz.

The estate of Reitz was administered by the Orphan Chamber at the Cape, and no proceedings appeared to have been effectually taken, either by Government or the Commissaries, against that estate; though various communications and proceedings were had between the Government and the Commissaries, and between the latter and the Administrators of Reitz's estate: it appeared, however, that the Orphan Chamber ultimately distributed the estate, reserving a sum of 10,700 rix-dollars 21 stivers, (or £802 10s. 7d. sterling,) with a view, if necessary, of liquidating to that extent the claim made by the Commissaries, in case it was supported by proper vouchers, and acknowledged correct by the Administrator of the estate.

In 1835 the action in question was commenced.

[319] The Declaration stated:—

That Reitz by his writing obligatory, signed with his hand, acknowledged himself to be indebted to the Colonial Government in the sum of 150,000 guilders (rix-dollars 50,000), for monies advanced out of the Government Chest to him, in his capacity of Vendue Commissary, who renounced, therefore, the exception "*non numeratae pecuniae*," and promised to satisfy to the said Government their order, or the lawful holder, the said sum, with interest at six per cent. per annum, from the 13th of June 1817, until the whole of the principal was paid, which payment Reitz undertook to make three months after notice had been given to that effect, or if no notice was given, the said sum was to be paid or accounted for at the demise or removal of Reitz, or otherwise at the giving over of the Vendue Office to such person as the Government should appoint in the room of Reitz. That the Defendants did, by the said writing obligatory, bind themselves *in solidum*, as Sureties for, and co-principal debtors of, the said sum and interest, under express renunciation of the *beneficia ordinis divisionis et excussionis*: the Declaration then averred that Reitz died on the 4th of April 1824, without having paid the said sum, or any part thereof; that on the 13th of May 1826, Messrs. Fitzroy and Buyskes, who were appointed Joint Commissaries of Vendues at the death of Reitz, paid to the Colonial Government the sum of 30,000 rix-dollars, or 90,000 guilders, on account of the said Bond, with interest up to the 30th of May 1826, leaving a balance of 20,000 rix-dollars, or £1500 sterling, due upon the said Bond, which sum and interest was still due. Wherefore, the Plaintiff prayed that the Defendants might be condemned to pay to him the said sum of 20,000 rix-dollars, [320] or £1500, with interest thereon from the said 30th of May 1826, and all costs of suit.

The Defendants, by their pleas, admitted the passing of the Bond, and the death of Reitz, on the 4th of April 1824, but denied that any balance was due upon the said Bond, or that they were liable to pay or satisfy any balance, except a sum of 10,700 rix-dollars, 3 skillings, and 3 stivers, which the Executors to the estates of Reitz had tendered to the Colonial Government, but which had been refused, and the Defendants thereupon tendered the same again in Court. And they further pleaded, that the Bond, with the exception of the sum of 10,700 rix-dollars, 3 skillings, 3 stivers, was, at the demise of Reitz, or at the giving over of the said Vendue Office to his successors, paid or accounted for to them. And further, that subsequent to such accounting as aforesaid, the Colonial Government allowed Reitz's successors to remain indebted to the Government in the amount of the said Bond, and to take the amount thereof upon their own liability, and had also cancelled the said Bond, and had allowed the mortgage thereby given to be destroyed and annulled, and had allowed it to pass out of the estate of Reitz, and thereby made a novation of debt, and had foreclosed themselves from giving a due and legal act of cession to the Defendants upon the mortgage, specially pledged and mortgaged as aforesaid, whereby the Colonial Government had lost all right of action against the Defendants, upon the said Bond.

The Plaintiff, by his Replication, took issue upon the facts stated in the pleas, and on the 26th of May 1836 the cause was heard.

It appeared in evidence on the trial, that Reitz died [321] on the 4th of April 1824, and during his illness and consequent absence from his office, he applied to his deputy, Buyskes, for information as to the state of the finances of the department, and the extent of his liabilities for any deficiencies arising from the non-payment

by purchasers. On the 26th of March 1824, Reitz received a letter from Buyskes, enclosing a statement of account or balance-sheet, showing an actual deficiency of 2262 rix-dollars, 1 skilling, and 3 stivers only, after bringing into account and debiting Reitz with the capital borrowed of Government, and including a contingent deficiency of 8438 rix-dollars, 2 skillings, for two doubtful debts; and Reitz's utmost liability to the Vendue Office was stated to be 10,700 rix-dollars, 3 skillings, and 3 stivers (or £802 10s. 7d.). In the month of April 1824, (a few days after Reitz's death,) the Colonial Government appointed the deputy, Buyskes, and Colonel Fitzroy, to be his successors and Joint Commissaries of Vendues, who entered immediately upon the duties of the department, and took possession of all the effects, both cash and credits, enumerated in Buyskes' letter of the 26th of March 1824, and the balance-sheet inclosed therein, and there then was in cash and available property at the office belonging to Reitz, far more than sufficient to pay the Government the amount of the said Bond. Reitz died intestate, leaving five children minors, and in consequence thereof, the Orphan Chamber or Board of Orphan Masters, (whose duties are to administer intestates' estates, and to take charge of the properties of minors where there are no guardians,) by virtue of their office, took the administration of his estates, and, on the 15th of May 1824, inserted the usual public advertisement in the Colonial Gazette, re-[322]-quiring all persons having claims against Reitz's estate to forward their claims to the Orphan Chamber in three months from the date, on pain of deprivation of further right. Several claims were sent in and discharged, but no claim was made by the Colonial Government, or by the new Commissaries of Vendues, in respect of any debt due from Reitz to the Government. On the 16th of May 1827, the Secretary of the Orphan Chamber gave notice to the new Commissaries of Vendues, that they having neglected to furnish certain accounts required by the Orphan Chamber, by letter, dated the 25th of January 1826, which prevented the Board from doing their duty towards the heirs of the estate, the Board had given directions for making out, within six weeks from that date, the general liquidation account of the estate, with a view of settling the shares due to the respective heirs. The Orphan Chamber accordingly, on the 22nd of June 1827, proceeded to a sale of the house and premises mortgaged by the surety-bond of the 13th of June 1817, and, with the sanction of the Government, conveyed the same to Mr. Van Ryneveld in consideration of £2400 sterling (or 96,000 Cape guilders). On the 6th of November 1827, Buyskes wrote to the Orphan Chamber, desiring a postponement of the liquidation account, and promising to render the Vendue account up to the time of Reitz's death by the first ensuing meeting of the Orphan Chamber, to which an answer was given on the following day, stating that the liquidation account would be made up, charging Reitz's estate with the sum of rix-dollars 10,700. 2. 1. in favour of the Vendue Department, as the balance due by him, according to the account forwarded to him by Buyskes, but that the Board would receive the accounts [323] promised by Buyskes, if laid before them at their next meeting, which would be held on the Wednesday then next. No account or claim having been sent in by Buyskes, the Orphan Chamber, in the month of December 1827, proceeded to the liquidation of the intestate's estate, and divided the same amongst the parties entitled, reserving, however, the sum of rix-dollars 10,700. 3. 3., the amount stated by Buyskes, in his letter of 26th of March 1824, to be deficient and due by the estate of Reitz to the Vendue Department. By the statement of account sent by Buyskes to Reitz in March 1824, the debt to Government on account of capital is stated to be 80,000 rix-dollars, being 30,000 rix-dollars more than the loan for which the surety-bond was given; (this additional 30,000 rix-dollars being in fact a loan obtained by Reitz from the Colonial Government in January 1824, only a few months before his death); and in the month of May 1825, the Secretary to the Colonial Government applied to the new Vendue Commissaries, inquiring whether the 30,000 rix-dollars had been paid over to the Orphan Chamber as part of Reitz's estate, or retained by them as part of the balance of the Commissary of Vendues, in which latter case they were required to repay the amount to the Receiver-General. In reply to this application, the new Commissaries of Vendues, by letter, addressed to the Colonial Secretary, dated 20th of June 1825, stated, that no part of the intestate's estate had been accounted for to the Orphan Chamber, and that the two capitals or loans of 50,000 rix-dollars and 30,000 rix-dollars had been kept

in the treasury of the Commissaries of Vendues, for the purposes of that department ; and they requested that the Government would permit such capitals to remain [324] on loan to them, on the same terms as they were originally granted to their predecessor Reitz. The Colonial Secretary in reply, by letter, dated the 30th of June 1825, desired that the 30,000 rix-dollars should be forthwith repaid to the treasury by the new Commissaries of Vendues, and agreed that such part of the 50,000 rix-dollars as should be required by the new Commissaries for the purposes of the department might be retained by them, and directed the residue to be paid into the Colonial Treasury, and sufficient security was required of them as in the case of their predecessor.

On the 8th of July 1825, the new Commissaries of Vendues, in pursuance of this letter, paid into the Colonial Treasury the sum of 30,000 rix-dollars, the amount of the second loan to Reitz, and no further correspondence took place until May 1826, when a sum of 30,000 rix-dollars was paid on account of the loan of 50,000 rix-dollars, leaving 20,000 rix-dollars unpaid. The last payment was made on the application of the Colonial Secretary, by letter, dated 10th of May 1826, to the new Commissaries, whereby it appeared that the new Commissaries of Vendues had applied to the Colonial Government for a further loan, and in all the correspondence at this time, the new Commissaries were alone applied to by the Government for payment, and treated as the debtors.

On the 7th of December 1827, the office of Commissary of Vendues was abolished from the 1st of January 1828, and the new Commissaries of Vendues were required to account with the Colonial Government for the funds of their department, and certain securities were taken from them for the amount due to the Government. On the 19th of April 1830, [325] Buyskes, one of the late joint Vendue Commissaries, wrote to the Orphan Chamber, enclosing an account of the claims of that department (not of the Government) on the estate of the late Reitz, to the amount of £1570 18s. 6d., being 20,933 rix-dollars. Buyskes having in the mean time become insolvent, on the 25th of September 1830, the Respondent (the Honourable John Bell) and The Honourable Joachim Wilhelm Stoll, on behalf of the Colonial Government, commenced an action against Colonel Fitzroy, as one of the late Joint Commissaries of Vendues, and his surety, to recover (amongst other debts) the sum of 20,000 rix-dollars, balance of the loan of 50,000 rix-dollars originally made to Reitz: the Defendant Fitzroy pleaded specially, and (amongst other things) put in issue his liability to pay the said 20,000 rix-dollars; and it appeared that at the trial the plaintiffs abandoned their demand as to this sum. On the 22nd of June 1835, the attorneys to the Colonial Government applied to F. W. Reitz, one of the heirs of the late J. F. Reitz, for the payment of his proportion of the debt alleged to be due to the Colonial Government: and on the 11th of December 1835, the present action was commenced by the Respondent against the Appellants.

Mr. Pemberton, Q.C., and Mr. S. Martin, for the Appellants.—The amount of the debt for which the Appellants were sureties has been accounted for out of the estate of Reitz, the principal debtor, to his successors in office, with the knowledge and concurrence of the Colonial Government: this is manifest from the evidence in the case. The Colonial Government gave possession [326] of all the cash and effects in the office to his successors, thereby acknowledging the liability—it permitted the Orphan Chamber to administer and distribute the property of the deceased Vendue Master, and absolutely to make sale of the estate hypothecated by the Bond, and after lying by for eleven years, and when the office has been abolished, then for the first time makes this claim against the sureties. By the Roman Dutch Law, the surety is entitled to every benefit and exception that the principal debtor can claim (L. 4, C. de Fidejuss), and according to the principles of that Law, the dealings of the Colonial Government with Reitz's successors in office amounted to a transfer of the debt from his estate to their's (Voet. lib. 46, tit. 3, n. 16; L. 10, tit. 14, Part 6; Pothier Tr. des Oblig. n. 567; Toullier, liv. 3, tit. 3, n. 179). By these dealings, the Colonial Government also created a novation of the debt (Dig. lib. 46, tit. 2, l. 1; Poth. ad Pand. lib. 46, tit. 2, sec. 1, arb. 4, n. 1; Voet. lib. 46, tit. 2, n. 1, 2; L. 15, tit. 14, part 5), which is a discharge to the sureties as well as the principal (L. 16, tit. de novat; L. 12, l. 5, tit. qui potior; Pothier, Tr. des. Oblig. n. 599); and the delaying to bring forward their demand until after the

hypothecated property had been sold, and the assets of Reitz distributed by the Orphan Chamber, precludes them from making any claim against the sureties; at all events beyond the sum received by the Orphan Chamber (Voet. Com. ad Pandect. B. 20, tit. 1, n. 14, tit. 6, m. 6, L. B. v. tit. 17), which was tendered, both in the action and before it was commenced. By the Law of England, a surety is entitled to the benefit of every security which the creditor [327] has against his principal, *Mathew v. Crickett* (2 Swan. 191), *Copis v. Middleton* (1 Tur. and Russ. 224), *Craythorne v. Swinburne* (14 Ves. 160), *Hodgson v. Shaw* (3 Myl. and K. 183); and if the creditor deals with the property in such a manner as to deprive the surety of his remedy, his liability is gone, *Law v. East India Company* (4 Ves. 824), *Capel v. Butler* (2 Sim. and Stu. 457).

The Solicitor-General (Sir Thomas Wilde) and Mr. Wightman, for the Respondents.—There is no evidence of any dealing by the Colonial Government, either with the successors of Reitz or the administrators of his estate, which, by the English Law, or the Roman Dutch Law, could have the effect of releasing the sureties in the original Bond; or discharging the right of the Government to resort to the sureties in case of default or deficiency in payment of the money secured by the Bond. There is no privity between the successors to Reitz and the Appellants which would entitle the latter to be discharged by any act of the former—such privity is essential to create a discharge of the surety. Then, has there been a novation of the debt by the Government? There is no evidence of such dealing by the Government with Fitzroy and Buyskes as could constitute a novation—the Government make no loan to them—nor do they contract to pay anything to Government on account of the balance due at the time of their appointment: there is, therefore, no substitution or extinction of the old debt by a new one; this is essential to constitute a novation (L. 1, tit. de novat. et delegat. 1, 1, Inst. quib. mod. toll. obli.). With respect to the instrument called a [328] Bond, it is, in fact, a mortgage which continued on the estate, notwithstanding the sale and transfer of it—no act was done by the Government by which the estate was discharged, and the purchaser took it, liable to any rights the Government or the sureties might have (Voet. Lib. xx. tit. 6, No. 6; Gree-way. Tract. de legib. Abrog. B. 4, tit. 10, p. 122-3). It is said, however, that the Government have been guilty of laches, and cannot on that account recover. There is no foundation for such a defence; the successors of Reitz were continuing his account with the Government to the period of the abolition of the office; the original security remained in full force, though not pressed by the Government. The cases cited respecting the release of the surety do not apply: the rule in the Roman Dutch Law is totally distinct from that prevailing in our Courts (L. 4, c. de Fidejuss).

Mr. Baron Parke (Feb. 14, 1841).—In this case the question is, whether the Appellants are discharged from their liability on the writing obligatory entered into by them, by reason of any of the matters insisted upon in their pleas.

The action was brought by the Respondent on behalf of the Colonial Government, on a writing obligatory, executed by the Appellants, for the sum of 50,000 rix-dollars, as sureties for that amount advanced by the Colonial Government to the Vendue Master, Reitz: the payment to be made with interest, three months after notice; or if no notice, then on the demise or removal of Reitz, or otherwise at the giving up of the Vendue office to such person as the Govern-[329]-ment should appoint in his room. The declaration states, that Reitz died on the 4th of April 1824, and paid no part of the sum: but the succeeding Vendue Masters did, on the 30th of May, 1826, pay 30,000 rix-dollars on account, with interest, leaving, as was alleged, a balance of £1500, and interest, still due to the Government.

By the same instrument, Reitz himself was bound, and made a special hypothec of a house and estate particularly described, and a general hypothec of his person, and all his property, moveable and immoveable.

The Appellants, by their pleas, admitted the execution of the Bond, and that a sum of 10,700 rix-dollars, and upwards, which they tendered into Court, was due: but first, they denied that more was due; secondly, they asserted that the balance was paid or accounted for to the successors in office, on Reitz's death, or the giving over of the office to them; and thirdly, that the Government made a novation of the debt, by allowing the successors to take the amount on their own liability; and

lastly, that they allowed the hypothec to be discharged and annulled, and pass out of the estate of Reitz, and thereby foreclosed themselves from giving a legal and proper act of cession to the Defendants of that hypothec, and so lost all right of action against the Defendants on the writing obligatory.

The truth of these pleas was denied by the Replication, so far as they prejudiced the Plaintiff's claim, a form which seems to leave it open to the Plaintiffs below, to dispute the sufficiency in point of Law, if those facts were proved.

The cause was heard, and evidence given on both sides, and the Court below gave Judgment for the [330] Respondent, on the 13th of June 1836, for 20,000 rix-dollars, and interest from the 13th of May 1826.

The Appeal is against this Judgment.

There is no doubt that this amount is due, and the Respondent entitled to Judgment for it, unless one of the other grounds of defence is sufficient, namely, first the payment of the debt to the successors in the Vendue Office; secondly, its novation; or thirdly, the discharge of the sureties by reason of the loss of remedy on the hypothec.

As to the first, it seems, notwithstanding some ambiguity in the language of the instrument, that payment to the succeeding Vendue Masters of the amount due would have been a good discharge; but we think that this plea is not supported by the evidence, because there is no proof of any payment at all by Reitz, or his personal representatives, or any one else.

He died on the 24th of April 1824: a few days after, Joint Commissaries were appointed to conduct the same office, and it appeared that on the 26th of March previous, 91,120 rix-dollars in Bonds (which there was some evidence were afterwards paid) and cash were deposited in the office, but that Vendue Rolls to a larger amount were due from the Vendue Master to the vendors, and many due to him from the vendees.

It may be conceded that this evidence raises a fair presumption that there was cash, or its equivalent, remaining in the office, at the death of Reitz, more than sufficient to have paid the debt secured by the Appellants' obligation; and it might also be conceded that if a payment had been made by Reitz or his repre-[331]-sentatives, or any one on his account generally, the Roman Dutch Law would have appropriated that payment to this particular debt, in preference to others: but the difficulty in the way of this defence is, that there was no payment at all. Money was left in the office on Reitz's death, which he had not appropriated in any way in his life, nor did any person standing in the relation of his personal representative do so after his death: it remained the money of Reitz and his representatives, for which the succeeding officers were responsible to them. And if we were to draw any inference from the fact of the money being left in the office by Reitz, and not removed by his representatives, of an intention that it should be applied in any way by the successors, it would be, that it should be used by the Commissaries for the current business of the office. This ground of defence, therefore, fails.

The second question is, whether the Government made a novation of the debt, by accepting Messrs. Fitzroy and Buyskes, the Vendue Commissaries, as their debtors for the amount secured by the writing obligatory, or any part of it.

Their Lordships intimated their opinion, in the course of the argument, that the correspondence between the Government and their officers amounted only to an offer on the part of the former to permit the latter to become their debtors for some portion of the debt, not yet ascertained, and upon a condition which was not complied with: and this ground of defence was very properly given up by the learned counsel for the Appellants in his reply.

The third question is the only one which remains to be considered, viz., whether the neglect to enforce the hypothec before or when the estate was sold discharged [332] the sureties. It was on that part of the case only that their Lordships have felt any doubt. If, by the sale which took place by the Orphan Chamber, before the Commissioners of the Court of Justice, of the hypothecated estate, the Government did not lose the security of that estate, then no doubt the objection is unfounded. But if we suppose that they did, and that the reservation of the Government "rights," contained in the Deed of Transfer, does not apply to an hypothec made to the Government, but to dues and rights of a public nature belonging to the Crown, still

it is to be observed that the title to the hypothec is lost, if lost at all, not by the release of the Government, but merely by its omission to bring forward its claim before the sale took place. The conveyance is by the Commissioners of the Orphan Chamber, not by the Assistant Secretary to the Government, nor by the Commissioners of the Court of Justice, who are neither of them conveying parties, but execute the instrument, to denote that the transfer has been duly made before them.

If the title of the Crown, therefore, was lost, it was not by a positive act, but an omission; and the question, then, is reduced to this—whether, where the benefit of the hypothec is lost by the mere neglect of the creditor, the sureties are discharged? Upon this point we have no authorities cited, either from the Roman Dutch or Civil Law, to satisfy us that the sureties are exonerated, though many have been produced to show that the hypothec is gone. The foundation if this objection is, that the surety is deprived of that to which he is entitled by the Civil Law, the *beneficium cedendarum actionum*, both against the co-securities and the hypothec; and if the creditor deprives [333] the surety of that by a positive act, there is no doubt that he loses his right of action. But is he in the same predicament, by a mere neglect to enforce his remedies? In the Digest, Pothier's Ed., Lib. 46, Tit. 1, s. 5, Article 2, s. 47, that learned author expresses the rule of Civil Law thus: "*Per hanc exceptionem, (that is, the exceptio cedendarum actionum,) repellitur creditor, non solum si nolit cedere suas actiones adversus reum et confidejussores: sed et si culpa sua contigerit ut eas non possit cedere.*" What, then, is the meaning of the word *culpa*? Does it import some improper act, as a release of the debtor or pledge, or does it include a neglect, by which the remedy is gone? Pothier's *Traité des Obligations*, p. 3, c. 1, article 6, s. 2 (566), explains this. The words are: "*Lorsque par son fait il est mis hors d'état de pouvoir ceder ses actions:*" and he expressly says that, where the creditor allows the hypothec to be lost, the exception does not apply, unless some act is done.

In the absence of any authorities to the contrary from the Dutch Law, we think we ought to act upon that which has been referred to; and consequently we are all of opinion, that the Judgment of the Court below should be affirmed, but without costs; and we think it right to add, that the Appellants will be entitled to a cession of the rights of the Crown (if any), as they were at the time of the Judgment, against the hypothecated estate, and the estate of the deceased Mr. Reitz.

[Mews' Dig. tit. PRINCIPAL AND SURETY, B. DISCHARGE OF SURETY, 9. *Laches and Negligence*; cf. *Wheatley v. Bastow*, 1855, 7 De G. M. and G. 261; *Hardwick v. Wright*, 1865, 35 Beav. 133.]

[334] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

JOHN BROOKE.—*Appellant*: EDMUND KENT.—*Respondent* * [Dec. 21, 1840].

Obliterations and alterations made subsequent to the 1st of January 1838, in a Will of previous date, are within the provisions of 1 Vic. c. 26, and to be effectual must be executed with the solemnities required by that Statute [3 Moo. P.C. 348].

To render such obliterations or alterations a revocation of the Will, there must be an intention on the part of the Testator to revoke, which if not manifest from the due execution of the obliterations and alterations, can only be ascertained by the rules of evidence applied in similar cases under the Statute of Frauds [3 Moo. P.C. 350].

Probate of a Will so circumstanced, decreed in its original form, the obliterations and alterations not being executed in conformity with 1 Vic. c. 26, and it being apparent that the Testator intended only a substitution, and not a revocation of the bequests altered.

* Present: Lord Brougham, Lord Denman, Mr. Justice Bosanquet, and the Right Hon. Dr. Lushington.

The question in this case arose under the Act 1 Vic. c. 26, for the amendment of the laws in respect to Wills, as to the validity of certain alterations made by the Testator in his Will subsequently to the period when the above Act came into operation; namely, the 1st of January 1838.

The Testator, William Brooke, by his Will, bearing date the 15th day of July 1837, which was then duly executed and attested, amongst other things, empowered each of the several persons successively named, tenants for life of his manors and freehold hereditaments, thereby devised, to appoint, to the use of any woman with whom he might intermarry, for the life of such woman respectively, by way of jointure, an annual sum or rent-charge, not exceeding, in the whole, the sum of two hundred pounds, with a proviso that [335] his estates should not, under the power, be at any one time subject to the payment of more than the annual sum of four hundred pounds for jointures; so that if by the exercise of such powers, his estates should at any time be charged with a greater sum for jointures, in the whole, than the sum of four hundred pounds, the payment of the sums occasioning such excess should, during the period of such excess, be suspended.

The Testator afterwards altered the amount of the annual jointure so made chargeable on his estates, from Two hundred pounds to One hundred pounds, by erasing with a knife the word "Two" in his Will, and writing the word "One" in its place; and he also altered the amount of the sum to which the jointures, together, were to be limited, from "Four" hundred pounds to "Two" hundred pounds, by erasing, in like manner, part of the word "Four," and converting the same into the word "Two," in his Will; and, in reference to such alterations, he wrote and subscribed with his name, at the end of his Will, the following memorandum:—

"The erasure in the twenty-third line of the sixth sheet, the word 'Two' taken out, and the word 'One' put in its place; and, in the first line of the seventh sheet, the word 'Four' taken out, and the word 'Two' put in its place; and in the fifth line of the seventh sheet, the word 'Four' taken out, and the word 'Two' put in its place. By me,

"WM. BROOKE.

"June 26th, 1838."

The words in the Will for which the words "One" and "Two," respectively, were substituted, were too completely effaced to be legible.

[336] Under these circumstances, on the 21th of January 1840, an allegation, propounding the Will in its original state, was tendered, on the part of the present Appellant, one of the executors, in the Prerogative Court.

The allegation pleaded, that on the 26th of June 1838, the Testator, with a knife, erased the amount of annual jointure, and altered the same from £200 to £100, writing under the clause of attestation, at the end of the Will, a memorandum of what the alterations were, and signing the same: but that they were not written or signed in the presence of two witnesses—and by reason thereof were invalid and of no effect in law.

On the 13th of February 1840, the Judge (Sir Herbert Jenner) rejected the allegation, and refused Probate to the Will in that state, on the ground that the memorandum, being unattested, formed no part of the Will of the deceased; and that it could not be looked at to show what the words were which had been erased (reported *nom. In the goods of William Brooke*, deceased, 2 Curteis, Ecc. Rep. 343).

The rejection of this allegation was the ground of the present Appeal.

In order to raise the question at issue, namely, as to the form in which the Probate of the Will should pass, under the circumstances, an allegation was tendered, after the admission of the Appeal, on behalf of the Respondent, the other executor named in the Will of the Testator, propounding the Will in its present or altered state.

The Queen's Advocate (Sir John Dodson), and Sir William Follett, Q.C., for the Appellant.—There are two points for consideration:—*first*, [337] whether the statute 1 Vic. c. 26, applies at all; and, *secondly*, if it does apply, what effect it has upon the Will.

I. It is necessary to bear in mind the condition of the paper in question. It is

dated before the 1st of January 1838, and attested as required by the Statute of Frauds; the obliterations and alterations are subsequent to the passing of the late Act. By the 21st section it is provided, "that no obliteration, etc., shall be valid, except so far as the words or effect of the Will before such alteration shall not be apparent." Now in this case the words previous to the obliterations are apparent, in a legal sense, that is, they are capable of proof, and we tendered extrinsic proof in the Court below, to show what these words were. If an obliteration is made by accident, it is no revocation, nor is it in any case, unless made *animo revocandi*, that is the test. In *Onions v. Tyrer* (1 P. Will. 343), the intention of the Testator was not to revoke his first Will by cancelling, but to substitute a perfect Will in lieu thereof; Lord Cowper there held, that the cancellation of the first Will by mistake was no revocation. *Burtenshaw v. Gilbert* (1 Cowp. 52) recognized the principles laid down in *Onions v. Tyrer*, that the cancelling is in itself an equivocal act; that the mere act of cancelling a Will was no revocation, unless *animo revocandi*. Lord Mansfield says (ib. 52), "If a man were to throw the ink upon his Will instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling;—or suppose a man having two Wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter; such an [338] act would be no revocation of the last Will: or suppose a man having a Will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern in such case." Again, in *Short dem. Gastrell v. Smith* (1 East, 418), the circumstance of a Testator striking out the name of one Trustee and inserting two others, leaving the general purposes of the trust unaltered, without re-publishing his Will, was held to be no revocation; it appearing to be the Testator's intention only to substitute one Trustee for another; that such substitution did not operate as a revocation, but at most only as a revocation *pro tanto*. So if a party destroy, deface, or obliterate, a part of a Will, if it be done with the intent merely to substitute it, it is no revocation of the Will as it originally stood, *Winsor v. Pratt* (2 Brod. and Bing. 650. S.C. 5 Moore, 282). Mr. Justice Dallas there states the rule to be (ib. 655), "that where a Testator designs to revoke a former Will, by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking."

It is clear upon the face of the Will in question, that the Testator did not mean to die intestate: if so, we ought to be let in, by parol proof, to show what his intentions were. The learned Judge in the Court below rejected our allegation, though we pleaded by [339] one of the articles, that the Testator did not intend to revoke, cancel, or destroy this clause of the Will, but only to alter the sum, which alteration being incomplete, the Will stood as it was. The memorandum in the Testator's handwriting, signed by himself at the time, as well as any expressions used by him, would be evidence of his intention: even the draft, where the original words appear, might be looked at if the Will itself was lost, or so obliterated as to be illegible.

II. Then if no revocation, it is not within the operation of the new Act. The 34th section provides "that the Act shall not extend to any Will made before the 1st of January 1838, and that every Will, re-executed, re-published, or revived by Codicil, shall for the purposes of the Act be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived." Now in order to bring a case within this latter section, the revocation must be complete: that was held in *Hobbs v. Knight* (1 Curteis, Ecc. Rep. 768), where a party having duly executed a Will in 1835, after the 1st of January 1838 cut therefrom his signature: the learned Judge decided that the cutting out of the signature amounted to a revocation of the Will, under the terms "tearing or otherwise destroying the same," contained in the 20th section. Both the 20th and 21st sections proceed upon the assumption that the alteration is made *animo revocandi*; that is the test which alone can bring this Will within the operation of the Act. If there is no evidence

of the intention to revoke, there is no revocation, and a mere substitution we submit does not render [340] the Act applicable: and if the alterations, as we submit, are not valid within the true construction of the 21st section, the Will must be read without them.

Dr. Addams, and Mr. Toller, for the Respondent.—The grounds we rely upon in support of the Judgment of the Court below, are, *First*, that the Will being dated prior to the 1st of January 1838, is not within the operation of the new Act; and, *Secondly*, that if it be within its operation, the alterations made therein are valid, within the true construction of the 21st section.

Before the statute, a Will of personalty by a minor was good: suppose a Codicil made subsequent, is that a revocation or a re-publication of the Will? The recent Act absolutely prohibits Wills by infants. Again, previous to this statute, a gift to a witness was not void, though, if the Will was required to be proved *per testes*, the legatee must have released before he could be admitted to prove the Will. Would a Codicil made subsequently to the 1st of January 1838 make absolutely void a legacy given previously to one of the attesting witnesses? If so, any alteration made subsequent to 1838 would operate as a revocation of a previous Will, and if not attested as required, could not be construed to be a re-publication. The case of *Hobbs v. Knight* was one of the latter description: it was a revocation, and decided under the 20th section of the new Act.

But if it be within the operation of the Act, in what form is Probate to issue? In decreeing Probate, the Court exercises a discretion as to the form. *In the goods of John Livock* (1 Curteis, Ecc. Rep. 906), a testator, after the 1st of [341] January 1838, obliterated the word Three or Five, and substituted the word One, in a Will made in 1837: the alteration was not attested as required by the statute 1 Vic. c. 26. Probate was granted in blank (see *In the goods of James Beavan*, 2 Curteis, Ecc. Rep. 369; and see *In the goods of Sir Charles Ibbetson*, 2 Curteis, Ecc. Rep. 337). This case, we submit, governs the present; and Probate of the Will ought to be decreed in its original state: whether the substituted words shall be allowed, and have their proper effect, is a question for a Court of law or equity to determine.

The case stood over for consideration, when Judgment was delivered by

The Right Hon. Dr. Lushington (July 1, 1841).—Mr. Brooke executed his Will in the presence of three witnesses, whereby he disposed both of real and personal estate. The execution of the Will took place on the 15th of July 1837. The Testator died towards the end of 1839.

The Will, when found upon his death, was not in the same state as when executed. In the clause of the Will which enabled the tenants for life successively of several freehold estates to settle jointures upon their wives, there was a manifest alteration. Upon the face of the Will, upon inspection only, without reference to other documents or proofs, it appeared that the annual amount of jointure, whatever might have been originally inserted in the Will, was so obliterated that such amount could not be ascertained by inspection; but upon the sum obliterated was written "*One*," making the amount of jointure one hundred pounds per annum. In a [342] subsequent part of the same clause, which clause limited the amount of jointure to be charged on the estate, at one and the same time, there seems two erasures of the original amounts in two different places, and the word "*Two*" in each was written on the obliterated parts, and the obliterations were complete in both these cases, so that by inspection the original sums could not be discovered. By the words inserted, therefore, the amount to be charged by way of jointure could not exceed two hundred pounds per annum.

It was further pleaded that these alterations were made by the Testator on the 26th of June 1838, with his own hand. That the sums now altered to "*One*" and "*Two*," originally stood "*Two*" and "*Four*."

At the conclusion of the Will, after the signatures of the subscribing witnesses, was a memorandum to the following effect:—

"The erasures in the twenty-third line of the sixth sheet—the word '*Two*' taken out and the word '*One*' put in its place, and in the first line of the seventh sheet, the word '*Four*' taken out and the word '*Two*' put in its place, and in the fifth

line of the seventh sheet, the word '*Four*' taken out and the word '*Two*' put in its place.

"By me,

"WM. BROOKE,

"June the twenty-sixth, one thousand eight hundred and thirty-eight."

This memorandum was pleaded to be in the handwriting of the Testator. The draft of the Will was also pleaded, whereby the original amounts appeared to be as stated in the memorandum.

[343] These facts were pleaded in the Prerogative Court by John Brooke, one of the Executors, and he prayed Probate of the Will in its "original" state.

This was the only allegation given in, in the Court below. The Judge rejected that allegation, and also refused the prayer of Mr. Kent, the other Executor, that Probate should pass in the "altered" state. The Judge was of opinion that Probate ought to pass "in blank," where the sums had been obliterated and other sums written on the obliterations.

Mr. John Brooke having appealed the cause, Mr. Kent gave in an allegation; but that allegation only pleaded certain of the facts before pleaded, and that the law was not as alleged on behalf of Mr. Brooke: on the contrary, that allegation averred that the Will, having been originally executed prior to the 1st day of January 1838, the alterations were valid and effectual; meaning thereby that the Will, together with the alterations, was wholly without the Statute passed in 1837.

The Act for the amendment of the Law with respect to Wills passed on the 3rd of July in that year, but by the 34th section there is a provision as to its operation on Wills made before the 1st of January 1838, which must be considered hereafter.

It may be expedient to consider what the Court of Probate ought to have done, had this case occurred prior to the passing of this Statute; in what shape Probate would then have been decreed to pass. It must be recollected, that though the Will contains bequests of personalty as well as devises of land, yet that this clause, both as it stood originally and as altered, related to freehold exclusively; that the Court of Probate has no jurisdiction over devises of free-[344]-hold; and that the Probate is not evidence with respect thereto.

If the Court of Probate had applied to such circumstances the law as laid down in various cases, it would have restored the Will to its original state; for it is quite clear that the obliteration was made only with a view to give effect to the intended substitution, and such substitution failing for want of execution according to the Statute of Frauds, the obliterations and words substituted would not make a revocation, but the Will would operate as originally executed.

But it is said that there is no case in which the Court of Probate ever attempted so to deal with a devise of real estate. Indeed, it may be doubted whether any case similar to this ever was the subject of discussion. On the contrary, there can be little doubt but that had this case occurred before the new Statute, Probate would have passed of the Will as altered, together with the memorandum at the foot. Probably the Court of Probate before the Statute would have said, that it had no jurisdiction over real estates, and could not judge of devises thereof; that these alterations, coupled with the memorandum at the foot, would have been effectual had the property been personalty (as no doubt they would); and that its Probate must be governed by the rules governing Wills of personalty only, and Probate would have passed of the Will as altered, together with the memorandum.

Now, assuming that the new Statute does not at all extend to this Will, if the preceding observations are well founded, it would follow that the Judgment of the Court below must be reversed, and that the necessary facts being proved or admitted, Probate must pass of the Will as altered, together with the memo-[345]-randum. For in that case the rules applying to the Probate of Wills of personal estate prior to the Statute must take effect.

This leads to the consideration of the Statute.

It is desirable first to consider what were the objects of that Statute, and the leading principles on which it is framed. The second section repeals all former Statutes respecting Wills of real and personal estate. The Act then proceeds to prescribe the form in which all Wills of realty or personalty shall be executed. It

further provides for the revocation of Wills in whole and in part, and for the rules to be followed in making alterations, and then are those sections as to the construction.

The object of the Statute it seems was, by providing one uniform mode of executing all Wills, of whatever description the property might be, and one uniform mode of revocation and alteration, to do away all the anomalies and mischievous distinctions which had prevailed as to property of different kinds.

The Statute passed on the 3rd of July 1837, and would have come into immediate operation had it not been for the 34th section. That section is in these words:—

“That this Act shall not extend to any Will made before the 1st day of January 1838, and that every Will re-executed, or re-published, or revived by any Codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived; and that this Act shall not extend to any estate *pour autre vie* of any person who shall die before the 1st January 1838.”

In attempting to discover the true construction of this [346] section, it cannot be denied that there are difficulties in every view of the case. It is evident that some such provision was absolutely necessary; otherwise all Wills made prior to the passing of the Act would immediately have become subject to its operation, and a very large part would have become null and void. Again, it was necessary that some time should be suffered to elapse to give the people an opportunity of becoming acquainted with the enactments of a Statute which affected so very large a proportion of the nation. Again, it might be considered a hardship to compel persons who had already disposed of their property by Will according to the existing law, or who might do so within so short a period after the passing of the Statute as to be in excusable ignorance of its provisions, to incur the trouble of re-publishing their Wills according to the new law.

The reasonable time fixed by the Legislature is the 1st of January 1838; and the question is, whether all Wills and Codicils made before that date are altogether and for ever out of the operation of the Act, or if not wholly, only in part, and in what part, and for how long. Now it is clear that all Wills and Codicils made before the 1st of January 1838 were not altogether and for ever out of the operation of the Act, and to be governed by the old law, for if they were, they might be re-executed according to the old law, or re-published according to the old law, or revived or altered by a Codicil executed according to the old law: but this same 34th section provides for the contrary; for every Will or Codicil, though made before the 1st of January, if re-executed, re-published, or revived by Codicil, shall be deemed to bear date at the time it was so re-executed, re-published, or [347] revived by codicil. Now, if such re-execution, re-publication, or revival by Codicil, took place after the 1st of January 1838, the whole instrument bears date at such time; and, consequently, is out of the exception, and within the Act.

It seems obvious, therefore, that in these three most important particulars, Wills dated before the 1st day of January 1838 may come within the Act, if re-executed, re-published, or revived by Codicil, subsequent to the 1st of January, 1838. A further consequence is this, that after the 1st of January 1838, no Codicil can be made to a Will executed before, save according to the Statute bringing such Will within the Statute, for every Codicil to a Will of personalty is a re-publication, and consequently must be executed according to the Act.

If, then, for the purposes already mentioned, a Will dated before the 1st of January 1838 must be governed by the Statute, the next question is, as to alterations made by obliteration, or by the insertion of words in the body of the Will; but if such obliterations or alterations are not governed by the Statute, then this consequence would follow—that a Codicil (of slight importance as might be the case) would fall within the operation of the Statute, and be void, because not executed according to the Statute; but an alteration in the body of the Will by obliteration or the insertion of words, being governed by the old law, might take effect, though affecting or changing the most important dispositions in the Will. If such were really the state of the law, it would not be reconcilable with any sound principles, and its operation in the present case would be to render void the Codicil executed validly, according to the old law, and to leave these obliteration-[348]-tions and alterations to the law, as it stood prior to the passing of the Statute. It must always

be recollected, that with regard to personalty, the object to be effected by Codicil, obliteration, or the insertion of words, is the same, viz., to effect an alteration.

For these reasons, it appears that the obliterations and insertion of the words made in the body of the Will, fall under the Statute, and so far the Judgment of the Court below is well founded.

We have, then, arrived at this point—what does the Statute direct to be done in cases of obliteration, interlineation, or alteration? The two sections which require to be considered, are the 20th and the 21st. The 20th section declares “that no Will or Codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil, executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some person in his presence and by his direction, with the intention of revoking the same.” It is quite clear from these words, therefore, that an intention to revoke was absolutely necessary to effect a revocation by burning, tearing, or otherwise destroying. By construction, a similar effect was given to the Statute of Frauds, but the words, “with the intention of revoking the same,” are not to be found in that Statute.

The 21st section is in the following words:—

“That no obliteration, interlineation, or other alteration, made in any Will after the execution thereof, shall be valid, or have any effect, except so [349] far as the words or the effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner, as hereinbefore is required for the execution of the Will; but the Will, with such alteration, as part thereof, shall be deemed to be duly executed, if the signature of the Testator and the subscription of the witnesses be made in the margin, or on some other part of the Will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the Will.”

The first point for consideration as to this section is, whether “intention” must not accompany the acts mentioned in it, in the same way as intention must accompany the acts mentioned in the 20th section: unless this construction be given to the 21st section as must necessarily be applied to the 20th, some very absurd consequences would follow. Burning or tearing a Will without intention could not revoke the instrument, or any part; but obliteration without intention might render ineffectual the most important part of it: the legislature never could intend that intention should be indispensable to give effect to burning or tearing, and not to obliteration with ink, or something similar.

In all those cases under the Statute of Frauds and in this Act, intention is indispensable; under the former Statute, to burn, or to tear, or to obliterate a part of a Will, was altogether a nullity, if such act was done *sine animo revocandi*, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration [350] could not take effect, then the burning, tearing, or obliteration, in no degree revoked the Will, but it remained in full force, as if nothing had been done to it. Similar principles must be applied to cases arising under the present Statute—there is nothing in the Statute which tends to a contrary conclusion.

Then how is the intention of the Testator to be ascertained? Primarily by the same rules of evidence which have been applied whilst the Statute of Frauds was in force as to Wills. The same evidence that was received in *Bibb dem. Mole v. Thomas* (2 W. Black. 1043), and *Onions v. Tyrer* (1 P. W. 343).

In the present case there is abundance of proof assuming the facts stated in the allegation to be proved. The Testator did not intend to revoke absolutely—he meant to revoke by substituting different sums from those originally demised. The alteration cannot take effect because not executed according to the Statute: therefore, in conformity with old-established principles, and a long train of decisions, the revocation is ineffectual, and the Will must stand in its original state. The handwriting of the Testator, and the paper intended for a Codicil, establish all the necessary facts on which to found this conclusion.

Their Lordships are of opinion, therefore, to reverse the Decree of the Court below, and admit the allegation given in, in that Court; and as it has been intimated from the Bar that the facts pleaded in that allegation are admitted on both sides,

their Lordships will retain the cause, and decree Probate of the Will in its original state: the costs of all parties to be paid out of the estate.

[Mews' Dig. tit. WILL, V. REVOCATION, b. 4. S.C., below, *sub nom. Brooke*, *In the Goods of*, 2 Curt. 343. See *In the Goods of Nelson*, 1872, I.R. 6 Eq. 569; *Andrews v. Turner*, 1842, 3 Q. B. 177; *Croker v. Hertford (Marquis of)*, 1844, 3 Moo. P.C. at p. 356; *In the Goods of McCabe*, 1873, 3 P. and D. 96; *Ffinch v. Combe* (1894), P. 191; *In the Goods of Brasier* (1899), P. 36.]

[351] ON APPEAL FROM THE LIEUTENANT-GOVERNOR AND
CHANCELLOR OF THE ISLE OF MAN.

WILLIAM CHRISTIAN, and ELLINOR his Wife,—*Appellants*; THOMAS
CUMMINS GIBSON,—*Respondent* * [7 Jan. 1841].

Non-user for twenty-one years does not deprive the tenants or farmers of the Isle of Man of the right to dig for, and raise, limestone and other stones in the quarry of a tenant, provided the stones, etc., are for the use of the party obtaining them, or to be employed by him for the improvement of his own or neighbour's estate.

By the Supplemental Act of Settlement (6th June 1704) a discretionary power is vested in the Governor to allow the exercise of this right.

Previous to the year 1704, by the Common Law of the Isle of Man, every landed proprietor possessed of property, on which there was a quarry of common stone, was bound to permit any person to enter into such quarry, and to dig, raise, and carry away such stones as he might require for his own use; he making reasonable compensation to the proprietor of the soil for any damage occasioned thereby.

By an Act of Tynwald, passed A.D. 1703, and promul-[352]-gated A.D. 1704, called the Act of Settlement, intituled, "An Act for the perfect settling and confirmation of the Estates, Tenures, Fines, Rents, Suits, and Services of the Tenants of the Right Honourable James, Earl of Derby, within the Isle of Man," it was, among other things, enacted, "That all and every the said tenants of and within the said Isle, and members of the same, as well all tenants in possession as in reversion and remainder, particularly or generally named, mentioned, or intended to be parties to the said proposals," (for confirming and settling the tenure of lands, etc.), "and not thereby excluded, their and every of their respective heirs and assigns should and might, from henceforth for ever, quietly and peaceably have, hold, and enjoy all their several and respective messuages, lands, tenements, and hereditaments, with their and every of their appurtenances, to them and their heirs severally and respectively, as customary tenants of and within the said Isle, against the said James, Earl of Derby, his heirs and assigns, and against all and every other person or persons claiming, or to claim, from, by, or under him, them, or any of them, all and singular the tenants within the said Isle, and members of the same, their heirs and assigns, and all and every other person and persons claiming, or to claim, from, by, or under them, or any of them, respectively and severally yielding, paying, performing, and doing unto the said James, Earl of Derby, his heirs and assigns, and all and every other the Lords of the said Isle for the time being, such yearly rents, boons, suits, and services, as hereinbefore are mentioned, and which now are, or heretofore have been, usually paid and performed; and also paying unto the said James, Earl of Derby, his heirs and as-[353]-signs, such general and other fines certain, as in the said proposals are also for that purpose particularly mentioned and expressed; saving always unto the said James, Earl of Derby, his heirs and assigns, and unto all and every other person and persons that shall at any time hereafter become Lords of the said Isle, all such royalties, regalia, prerogatives, homages, fealties, escheats, forfeitures, seizures, mines and minerals of what kind and nature soever, quarries and delfs of flag, slate, or stone, franchises, liberties, privileges, and jurisdictions whatsoever, as now are, or at any time heretofore have been invested in

* Present: Lord Brougham, The Vice-Chancellor [Sir Lancelot Shadwell], Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

the said James, Earl of Derby, or in any of his ancestors, Lords of the said Isle; and saving nevertheless to all and every person and persons, bodies politic and corporate, their heirs and successors (other than the said James, Earl of Derby, his heirs and assigns), all such actions, estate, right, title, interest, use, trust, claim and demand, whatsoever, in law or in equity, as they or any of them, have, might, should, or ought to have, of, in, to, or out of the said Isle, or any part thereof (and in such sort and manner as if this Act had never been made); provided that such person or persons their heirs, executors, and administrators, do yield, pay, perform, and do unto the said James, Earl of Derby, his heirs and assigns, and to all and every other the Lords of the said Isle for the time being, the several yearly rents, boons, suits, and services, that have been accustomed and usually paid for the estates which they, or any of them, should or might make any claim or title; and do also pay unto the said Lord and Lords of the said Isle for the time being all such fines certain for the same and in such manner and form as in the said proposals are particularly mentioned and [354] agreed unto, and not otherwise: And it is further provided, That nothing in the said saving shall impeach, or be prejudicial to, or be construed or taken to impeach or be prejudicial to the settlement of the nature and quality of the estates, tenures, fines, rents, suits, and services, which thereby and by the said proposals are agreed upon and intended to be enacted, granted, and confirmed, anything in the said saving to the contrary notwithstanding."

By a Supplemental Act of Tynwald, promulgated on the same day, it is recited, enacted, and declared as follows:—

"And whereas in the saving part of the said Act of Settlement it is mentioned and declared, That all quarries and delfs of flag slate and stone are reserved to his Lordship and his heirs, as a royalty and prerogative belonging to them, within this Isle; which part of the said Act seems to restrain the farmers and tenants of the said Isle from digging and getting such sort of common stone as might be necessary for building and making of other improvements in their estates and tenements: Be it therefore enacted, ordained, and declared by the authority aforesaid, That notwithstanding the general words in the said Act of Settlement, every tenant and farmer shall nevertheless have free liberty of digging, raising, and disposing of all sort of stone and slates upon their respective tenements, and as has been *formerly accustomed*, so that they be employed only for their own use, and for the improvement of their own and neighbours' estates and tenements; and that they shall not dispose or make merchandise of the same otherwise, without the license or liberty of the Lord, or Governor, of the said Isle first had and obtained for the same; and if [355] any farmer or inhabitant, having a quarry or quarries of limestone, or other common stone, on his or their grounds, shall obstinately refuse or deny liberty to any other person or persons to dig or get such limestones, or other stones, for the improvement of his or their lands or tenements, or otherwise, without paying him a high and unreasonable consideration for the same, then, and in such cases, it shall and may be lawful for the Governor of this Isle, for the time being, to interpose, and order that such person or persons as stand in need of such limestones, or other stones, may dig, raise, and carry away as much as will be necessary for his or their use, paying unto the farmer or inhabitant, on whose lands the same shall be so gotten, such moderate and reasonable satisfaction as the Governor shall think fit to allow."

The Appellant, William Christian, was, in right of his wife, a customary tenant and proprietor of an estate called Cloughbane, situate near the town of Ramsey, and upon part of which there was a stone quarry, the stones of which were considered of superior quality.

It appeared, however, that no stones had been taken from this quarry since 1814, when an order was obtained by Norris Moore, one of the Deemsters of the Isle, from the then Lieutenant-Governor, authorizing him to raise and quarry what stones he had occasion for. From that period the quarry had been unused.

In 1838, the Respondent having purchased some property adjoining the town of Ramsey, and being desirous of erecting buildings thereon and making improvements, applied to the Appellant to be permitted to enter the quarry, offering to make reasonable compensation for any damage that might be occasioned. The

Appellant refused; whereupon the Respondent [356] presented a petition to that effect, and with a like offer, to the Lieutenant-Governor.

The Petition came on in March 1839, when Advocates were heard on both sides, and witnesses examined.

It appeared from the evidence that the quarry was an ancient quarry, though it had not been worked for upwards of twenty years; that the road to it had from that time been shut up, and trees planted thereon; and that no access could be obtained without injuring the trees. The Court, however, was of opinion, and ordered, that the Petitioner should be entitled to dig, quarry, raise, and carry away, such quantity of stones as he might have occasion for, and to carry and draw the stones on the road in the Petition mentioned; and the coroner of the district was ordered forthwith to remove all and every obstruction upon the road, the Court reserving the question of compensation for such damage as the Petitioner might commit, for further consideration.

The present Appeal was from this Judgment.

The Respondent produced at the hearing, and printed in his Appendix, two precedents of similar Orders, taken from the Exchequer Book of the Island, upon petitions similar to that presented by him in the Court below: the first being the Order already referred to, made in favour of Deemster Moore in 1814, and the second the record of the final judgment of the House of Keys, upon a similar application by Charles Scott, to quarry on the land of one Calcott Haywood.

The Attorney-General (Sir John Campbell), and Mr. J. Parker, for the Appellant.—The first question is, whether this is or not a quarry within the true meaning of the Act of 1703. By the [357] Act of Settlement of 1704 (Mills' Statute Law of the Isle of Man, 163), among the royalties and prerogatives reserved to the Lord and his heirs, are "all mines and minerals, quarries and delfs of flag, slate, or stone." By the subsequent Act of the same year, explanatory of the previous one, it is enacted (Mills' Stat. 176), that notwithstanding the reservation in the Act of Settlement, every tenant or farmer shall nevertheless have free liberty of digging, raising and disposing of all sort of stone upon their tenements, as they had been formerly accustomed, so that they be employed only for their own use, and for the improvement of their own and neighbours' estates, but that they shall not dispose or make merchandize of the same without the license of the Lord; and if any farmer or tenant should obstinately refuse, the Governor of the Isle for the time being may order him or them who stand in need of such stone to dig, raise and carry away such stone, paying for such a moderate satisfaction. Now some reasonable construction must be put upon this Act; it cannot be contended that any person may break a quarry or take stone from parts where no stone has been before taken, or dig or raise stone, unless there is an existing quarry, otherwise houses, streets, or churches might be pulled down on the petition of parties requiring to dig for stone, etc., and at the option of the Governor. This never could have been intended. But the expression in the Act is "obstinately refuse:" suppose, therefore, the Respondent to have the right insisted on, he must prove an obstinate resistance on the Appellants' part, whereas we are shown to refuse because the opening the quarry is impracticable. Again, by the construction put upon these acts by the Court below, no quarry can [358] ever be shut up. This we submit is repugnant and inconsistent to law, and with the due enjoyment of property intended to be provided for by these Acts; here what formerly constituted the quarry in the Cloughane estate had for more than twenty-one years ceased to be used as a quarry, and there is not at this time any quarry upon the land of the Appellants, within the meaning of the Act.

By the Common Law of the Isle, the longest period of limitation is twenty-one years, 35 Eliz. 1593 (Mills' Stat. 76); an undisturbed adverse possession of real estate for a period of twenty-one years gives to the party who has had such possession, a valid and indefeasible title. By the English law, there is no express enactment, when a right of common shall cease. But in *Hawke v. Bacon* (2 Taunt. 155), it was held that twenty years adverse possession of a waste enclosed, was a bar to the entry of a commoner; and in *Creach v. Wilmot* (2 Taunt. 160), Chief Justice Lee says, "There is no difference between the Lord of a Manor and a Commoner. The Lord could not have brought ejectment after twenty years' possession."

The result in this case, therefore, is, that there has been a quarry, but in 1814 it was shut up, and trees planted in the quarry ground, which have remained from that period undisturbed, and have now attained a considerable growth: are these trees to be cut down at the instance of the Respondent, who does not show in himself any sufficient title to dig stones in the alleged quarry? The law of the Isle of Man evinces great jealousy of foreigners, 9 Henry V. 1422 (Mills' Stat. 14); the Respondent is not a native of the [359] Island. The order itself too, if well founded, is bad in form,—no provision is made for the damage to be done by opening the quarry: the petition only extends to an offer to compensate for specified damage: that may be but a trivial part of the real loss sustained by the Appellant in re-opening this quarry. The precedents produced now for the first time by the Respondent do not vary the case; the decisions are of too recent date to be entitled to any weight as authorities, and not having been made on appeal, cannot be considered higher than as submissions of the parties to the claim of the Petitioners; they are rather in the nature of awards by the Lieutenant-Governor than judicial decisions.

Mr. Serjeant Merewether, and Mr. James Campbell, for the Respondent.—The tenure of the land in the Isle of Man is analogous to our customary, or copyhold tenure: the Act of Settlement defines the rights between the Lord and his tenants. The subsequent Act passed in the same year not only recognizes the public right to quarry stones, but directs the course to be pursued by the party requiring the stone, in case of a refusal by the owner of the quarry. This Act is declaratory: it is therefore reasonable to suppose it declaratory of the Common Law of the Isle, and is well adapted to simple people too poor to obtain stone, if at any expense, the object being to promote the buildings and improvements on the Island. The public right is however a qualified right; for according to the Act, the necessity must be such as the party requires for his own use, and the permission is at the discretion of the Governor; this condition gives sufficient security against [360] pulling down houses or streets: indeed, it is not reasonable to suppose that any tenant would take stone at the risk of paying for such extensive damages.

With regard to the limitation of the action, the Act of Elizabeth [35 Eliz. 1593, Mills' Stat. 76] does not apply. We submit that, subject to the power of the Governor of the Isle for the time being to refuse, the rule is, once a quarry always a quarry. The Act of limitation is founded on the presumption of law, that a party has a right, and does not enforce it; but this is not a right which can be waived by length of time, because the right only accrues from the time the necessity commences, the act so states it "for his own use," lapse of time and non-user, therefore, is no bar to the right of the tenant. The position assumed by the Appellant, that if a quarry is once shut up, it cannot be re-opened, is untenable. Put the case of a party using a quarry, and then shutting it up, is the party in possession to have the benefit of his act? For by placing a building over the road, he might succeed in shutting up the quarry altogether, and preventing the tenants of their Common Law right to raise the stone. The objection to the Respondent because not a native of the Island is also untenable: he is a tenant on the Rolls, and entitled as such to participate in the rights exercised by the tenants. There is no qualification in the statutes of the Isle as to residence; many foreigners are possessed of property, and in the enjoyment of all the rights of natives of the Island. The precedents taken from the Exchequer Book of 1813 and 1831 show this sort of claim to be of frequent occurrence, and the absence of any instance of the order of the Lieutenant-Governor being disputed, is a proof that such a right as that contended for by the Respondent exists.

[361] Lord Brougham.—Their Lordships are of opinion that the Appellants must be considered as persons having a quarry within the meaning and intentment of the Act of 1704, and we see no reason to suppose that an unsound discretion has been exercised by the Lieutenant-Governor in the order made upon the Respondents' Petition. The order of the Court below must, therefore, be affirmed, with costs.

[Mews' Dig. tit. ISLE OF MAN, 2. LEGISLATURE, LAWS AND CUSTOMS; also tit. LIMITATIONS (STATUTES OF), B. I. CONSTRUCTION.]

ON APPEAL FROM THE COLONY OF SIERRE LEONE.

MAGNUS SMITH,—*Appellant*; THE JUSTICES OF SIERRE LEONE.—*Respondents* * [Jan. 8, 1841].

An Order of the Recorder's Court in the Colony of Sierre Leone, disbarring and striking off from the Rolls a practitioner of that Court, for alleged contumelious conduct, on Appeal reversed and rescinded.

Semble. A fine imposed by a Court of Record for contempt of Court cannot be remitted by this Court on Appeal.

This was an Appeal against three several Orders made by the Judges of the Court of the Recorder of Freetown, in Sierre Leone, by which the Appellant, a practitioner duly admitted to practise in the Colony, had been fined, imprisoned, disbarred, and struck off the rolls of the Court, and ordered to pay certain costs under the following circumstances:—

In the year 1835, the Appellant, Mr. Smith, in his [362] character of Attorney and Advocate, was engaged on behalf of the Defendant in a suit wherein Henry Edward Harper was Plaintiff, and Philip Hillier Defendant. The action was brought, among other things, to recover the amount of certain goods, and was tried in the Recorder's Court of Freetown, on the 21st of October 1835, before Mr. Rankin, the then Chief Judge, and Mr. Salter, one of the Assistant Judges of the colony, and a jury empanelled in the customary manner.

During the trial, objections were taken by the Appellant to the admission of certain evidence tendered by the Plaintiff as being inadmissible, which, after argument, were allowed. The Judge, however, in summing up, left the evidence objected to, to the jury, in consequence of which the jury gave a verdict against the Appellant's client for a larger amount than they would otherwise have done.

On the 14th of November 1835, the Appellant, according to the practice of the Court of the Recorder of Sierre Leone, served the Chief and Assistant Judge, and the opposite party's Attorney and Advocate, with notice of motion for a new trial, upon the ground of misdirection by the Judge on the points objected to at the trial.

On the 18th of November, the Appellant moved and obtained a rule *Nisi*, to show cause why a new trial should not be had. This rule was granted by the same Judges who had presided at the trial.

The rule came on for argument on the 23rd of December 1835, before the Court of the Recorder of Freetown, which consisted of the Chief Justice, Mr. Rankin, and the two Respondents, Major Blenkarne and Mr. Lewis, the Assistant Judges, when the Appel-[363]-lant urged the grounds of his application, but being interrogated by the Chief Judge as to the particular words he used in directing the jury, and required to give his answer in a particular form, which he respectfully declined, he was ordered to be fined in the sum of £20, and committed to the custody of the Sheriff till the fine was paid. Under this order the Appellant remained in confinement in the common gaol of the Court for a fortnight.

No decision was at this time made upon the application for a new trial; but on Wednesday, the 30th of December, the Court, in the absence of the Appellant, (he being in prison,) discharged the rule, with costs, which were ordered to be paid by him personally, unless an exculpatory affidavit was filed by him before the next sittings of the Court.

On the same day, the Court made an Order, directing the Appellant to file an affidavit before the next Saturday. This order was served upon him in prison, and at nine o'clock on Saturday evening, the day on which he was limited to make his defence, he transmitted to the Clerk of the Court an affidavit in reply, with a note, informing the officer of the Court of his inability to swear to the affidavit, by reason of his being in close custody, and requesting that the Chief Justice would be pleased to appoint the clerk, or some other person, a commissioner, for the purpose of enabling him to be sworn to such affidavit.

* Present: Lord Brougham, the Vice-Chancellor [Sir Lancelot Shadwell], Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

No notice was taken of this application, or of the receipt of the affidavit by the Clerk of the Court until Monday afternoon, when the Appellant was informed, by a letter from that officer, that the Court had refused his application respecting the swearing of his affidavit, but that an application to the Court the following [364] morning might perhaps be attended to. The Appellant accordingly addressed a letter on the following day to the Clerk of the Court, requesting to be informed whether he was at liberty to attend the Court for the purpose of being sworn to his affidavit. No notice was taken of this second application, nor was he then sworn to the contents of the affidavit, but on the same day he was served with a rule to show cause why he should not be struck off the roll of the practitioners of the Court. The rule was subsequently amended by the Court of its own accord, directing certain further words to be inserted, and the time therein enlarged.

On the 7th of January 1836, the Appellant obtained his discharge from prison by payment of the fine inflicted on him by the order of the 23rd of December 1835, and immediately procured the affidavit which had been previously made by him, and tendered to the Court before the Order *Nisi* for striking him off the rolls had been made, and also a further affidavit, in opposition to that rule, to be sworn.

The Appellant appeared at the next sitting of the Court, on Monday, the 11th of January 1836, the Court being then composed of the Chief Justice, Mr. Rankin, and the Respondents, Major Blenkarne and Mr. Lewis, as Assistant Judges, and showed cause against making the rule absolute. The Court, however, on the 15th of January, made an order, directing the Appellant to be struck off the rolls of the practitioners of the Court.

Against this order the Appellant presented a Petition of Appeal to Her Majesty in Council. The Petition being against a personal grievance, was presented through the Secretary of State, and, after con-[365]-siderable delay, by an Order in Council of the 5th of March 1840, it was referred to the Judicial Committee of the Privy Council.

Mr. Rankin, the Chief Justice, died some time in August 1839. The other Respondents, Major Blenkarne and Mr. Lewis, put in printed Cases, purporting to be answers to the Appellant's Petition, but which were not upon oath, or verified by any evidence.

The allegations of the Petition, as above stated, were supported by affidavits of the Petitioner, and copies of the notices of motion, and minutes of the proceedings, and orders made in the Court of Sierre Leone, were produced by the Appellant.

On the 23rd of May 1840,* the Petition came on for hearing, but was postponed on the application of the Respondents' solicitor, and ordered to stand over, to enable them to obtain certain evidence, alleged to be important to their defence, and which it was stated could not be obtained previously.

This evidence consisted of the affidavits of the solicitor of the Plaintiff in the cause of *Harper v. Hillier*, and of Lieutenant-Colonel Campbell, a former Governor of the colony. The first admitted the general facts and circumstances of the case as stated in the Appellant's petition, but gave, as it appeared, an exaggerated account of the Appellant's manner and address to the Chief Justice, on moving for a new trial, and which constituted the offence for which he was fined, imprisoned, and disbarred.

The second was an affidavit by the late Lieutenant-Governor, without pretending to specify any particular [366] act or offence, was only inculpatory of the Appellant, and did not affect the merits, of which the Appellant was necessarily ignorant.

The Appellant filed affidavits sworn by himself in answer to the allegations contained in the affidavit of the Plaintiff's solicitor, and produced also the affidavits of Lieutenant-Colonel Alexander Findlay, a former Governor, and Commander of the Forces at Sierre Leone; of Lieutenant-Colonel Alexander Fraser, formerly Commander of the Forces, and for many years a resident in the colony; Captain Alexander Findlay and Captain William Lardner, both of Her Majesty's service, and for some time residents in Sierre Leone, in refutation of the statements con-

* Present; Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir Herbert Jenner.

tained in the affidavit of Lieutenant-Colonel Campbell, and in respect of the character and bearing of the Appellant.

No affidavits were filed by the Respondent in reply, and upon this evidence the case came on for hearing.

Sir William Follett, Q.C., and Mr. Edmund F. Moore, for the Appellant, contended that the course taken by the Appellant in objecting to the evidence given at the trial of the cause of *Harper v. Hillier*, and moving the Court of the Recorder for a new trial, on the grounds stated in his notice of motion, was in strict accordance with the law and practice of her Majesty's Courts, as administered in this country and in the colony of Sierra Leone; and cited *Dixon v. Yates* (7 Barn. and Add. 313), and *Tatham v. Wright* (2 Russ. and Myl. 145), and after examining the proceedings and evidence, and commenting on the affidavits, they insisted that the treatment of the Appellant by the Court, in fining, [367] imprisoning, and imposing upon him the payment of costs, and subsequently striking him off the roll of practitioners of the Court, was unjust, illegal, and oppressive, wholly unwarranted by the circumstances of the case, and not only entailing a grievous and irreparable injury upon him, but calculated to impair and bring into disrepute the due administration of justice in the colony.

Mr. Hoggins, for the Respondents, insisted that the orders and proceedings against the Petitioner were legal and proper, and ought not to be rescinded: and, on behalf of the Respondent Lewis, he contended that having taken no part in the previous proceedings complained of, though present, and constituting part of the Court, at the time the order was made for striking the Petitioner off the rolls of the practitioners, he was improperly implicated and named in the Appellant's Petition: and he contended that the same ought to be dismissed, with costs. He cited *Exp. Elsam*. (3 Barn. and Cress. 597).

Lord Brougham.—Their Lordships have fully considered the whole of the evidence before them in this case, and have attended also to everything that has been urged by counsel on both sides with great anxiety, in consideration of the nature and circumstances of the case. They are clearly of opinion that the order for striking Mr. Smith off the rolls was without any foundation whatever, ought not to have been made, and must be rescinded. They are however of opinion that they can make no order respecting the fine imposed by the [368] Court below upon Mr. Smith, but their Lordships are clearly of opinion, upon the whole of the evidence in this cause, that there is nothing whatever to affect, in any respect, the character of Mr. Smith. Upon the costs here they can make no order.

Mr. Moore.—Your Lordships' Judgment will reinstate Mr. Smith in his practice in Sierra Leone, with an unimpeached character, which is all we are anxious for.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an appeal lies generally*, 3. *Leave to appeal*. Considered in *M'Dermott v. British Guiana (Judges of)*, 1868, L.R. 2 P.C. 363, 364, 5 Moo. P.C. (N.S.) 466; and see *Smith v. Sierra Leone (Justices of)*, 1848, 7 Moo. P.C. 175; *Rainy v. Sierra Leone (JJ)*, 1852-53, 8 Moo. P.C. 47; and note to *Antiqua (Justices of)*, *In re*, 1830, 1 Knapp, 269.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

EDWARD COBB MORGAN, CHARLES AUGUSTUS WEST, JAMES PATCH, JOHN PASCAL LARKINS, EDWARD ARMITAGE, AND HENRY ALDERSON WOODHOUSE.—*Appellants*; GEORGE WILLIAM LEECH,—*Respondent* * [Feb. 12 and Dec. 3, 1841].

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Heard Exparte.

The Supreme Court of Judicature at Bombay has no power to admit persons as Attornies and Solicitors to practise in the Courts there, except such as are qualified in the manner pointed out by the Bombay Charter and Letters Patent of 1823, establishing the Court—viz., those who have been admitted Attornies or Solicitors in one of the Courts at Westminster, or were practising in the Recorder's Court at Bombay, at the time of the publication of that Charter [3 Moo. P.C. 380].

Semble. Where a matter has been referred by Her Majesty to the Judicial Committee, which is not strictly an appealable grievance, their Lordships may, under the reservations contained in the 3rd and 4th Wm. IV., c. 41, advise Her Majesty to grant the Petitioner leave to appeal [3 Moo. P.C. 374-5].

This was an Appeal respecting the admission of parties to practise as Attornies or Solicitors in the Supreme Court of Bombay, and involved the authority [369] of the Judges of that Court to make an Order for their admission after having served for three years with an Attorney in India, without any previous service in England.

By the Charter and Letters Patent constituting the Supreme Court at Bombay made by his late Majesty George IV., under the authority of Geo. IV., c. 71, the Judges of the Supreme Court were authorized and empowered to prove, admit and enrol as Advocates and Attornies, such and so many persons as might be *bona fide* practising as such in the Court of the Recorder at Bombay, at the time of the publication of the Charter; and also as Advocates, such and so many persons, having been admitted Barristers-at-law, in England or Ireland; and as Attornies, such and so many persons, having been admitted Attornies or Solicitors in one of His Majesty's Courts at Westminster, as might to the said Court appear fit, according to such rules and qualifications as the said Court should for that purpose make and declare; to act as well in the character of Advocate as of Attornies in the said Court; and it was also expressly declared, that no other person or persons whosoever should be admitted to appear and plead, or act in the Supreme Court for and on behalf of any suitors: and it was further provided that no person, other than the persons *bona fide* practising as Advocates or Attornies in the Court of the Recorder at Bombay at the time of the publica-[370]-tion of the Charter, should be capable of being admitted or enrolled, or of practising in the said Court, without the license of the East India Company for that purpose first had and obtained.

On the 13th of November 1834, the Supreme Court of Judicature at Bombay made and published the following Order:—

"Any person desiring to be admitted as an Attorney, Solicitor or Proctor, shall produce a certificate of his having been admitted an Attorney or Solicitor in one of his Majesty's Courts at Westminster, or of his having served a regular clerkship of three years to an Attorney or Solicitor of one of the Supreme Courts in India, and also a certificate of his good character and ability, signed, in the first case, by the master with whom he shall have served his clerkship in England, and also by one of the principal officers of His Majesty's said Courts; and in the second case, by the master with whom he shall have served his clerkship in India, and also by one of the principal officers of the Supreme Court at the Presidency where such clerkship shall have been served."

This Order was similar to one made by the supreme Court of Madras, which had been approved by the Chief Justice at Calcutta.

The Appellants, who were Attornies and Solicitors, duly admitted and enrolled in the Supreme Court at Bombay, and practising there, each of them having been previously admitted an Attorney of one of the Superior Courts at Westminster, presented a Memorial to His late Majesty against the above Order, as being in contravention of, and against the express terms of the Charter. The Memorial was referred to the Board of Control, and some correspondence took [371] place between the Government and the Judges of the Supreme Court, but no proceedings were taken upon it: nor was any opinion given by the law-officers of the Crown or by the Privy Council upon its validity. The Judges of the Supreme

Court were, however, directed by the Home authorities to address themselves, should they deem it advisable on the subject, to the Legislative Council of India.

On the 30th of November 1837, the Respondent (who had not been admitted an Attorney or Solicitor in either of the Courts at Westminster) presented a petition to the Supreme Court at Bombay, praying to be admitted an Attorney, Solicitor and Proctor of that Court. The petition was accompanied by a certificate of the registry of his articles of clerkship for three years with Henry Collins, a Solicitor of the Supreme Court of Bombay, and a certificate of service under those articles, and one of good character and ability from his late master; and also from Henry Roper, clerk of the Crown at Bombay, and from Daniel Bowden Smith, Prothonotary and Registrar of the Supreme Court.

On the 21st of December 1837, an order was made by the Chief Justice (Sir Herbert A. D. Compton), in vacation, for the admission of the Respondent to practise as an Attorney, Solicitor, and Proctor of the said Court.

On the 23rd of February 1838, a motion was made in the Supreme Court, on the affidavit of the Appellants, for a rule to show cause why the said order should not be discharged, and why the name of the Respondent should not be struck off the rolls of the said Court; the motion was supported by an affidavit of the facts above stated, and cause was shown on behalf of the Respondent in the first instance, and the [372] Court having taken time to consider, on the 28th of February 1838 refused the motion.

The Appellants petitioned for, and obtained leave from the Supreme Court, to appeal against the above order and admission of the Respondent, to Her Majesty in Council, the Prothonotary of the Court being ordered to transmit with the proceedings the original memorial presented by the Appellants against the order of the Judges of the supreme Court of the 13th of November 1834, with the following minutes of the Judges of the Supreme Court annexed to the memorial, and to which they referred as the answer of the Court to the present appeal. The minutes were as follows:—"The jurisdiction of the Supreme Courts in India having been declared by the legislature to be equal, and a rule respecting the future admission of Barristers and Attornies having been made and published by the Supreme Court at Madras, after having been approved of by the Chief Justice at Calcutta, it was deemed expedient to frame and publish a rule precisely similar for the admission of Barristers and Attornies in the Supreme Court at Bombay.

"The rule, so far as it is applicable to Attornies, has been complained of by seven of the members practising at Bombay, in a petition which is about to be transmitted to His Majesty in Council, and I deem it necessary to submit these observations, that they may accompany the rule to the authorities in England.

"Considering the different branches of jurisdiction that the Court is required to exercise, that most of the suitors at Bombay are either natives of the island, or persons who cannot speak or understand the English language, and that Hindoos and Mahomedans, in matters of contract and inheritance, are respectively [373] entitled to have their own laws administered, it may, I conceive, be expected that persons who, during three years, may learn the practice of the Court in its different jurisdiction, who may require a knowledge of the language of the natives of Bombay, and who may thereby and otherwise become acquainted with their character, laws, and usages, will, if in other respects duly qualified in conformity with the rule, and if admitted as Attornies, be enabled to communicate directly with the native suitors, to comprehend and to explain to them their rights and liabilities, to prevent unnecessary or vexatious proceedings in Court, and to conduct such as may be necessary or unavoidable in the quickest and least expensive manner: such persons by sympathizing with the interests, acquire the confidence of the native community, and therefore tend to arrest the progress of that dilatory and ruinous litigation which has been long complained of at Bombay.

"In forming my opinion respecting the expediency of adopting and of adhering to the part of the rule complained of, I have been in some degree influenced by the experience which I have derived from long practice at the bars of Calcutta and Madras. I believe that two-thirds of the Attornies who have practised in the Supreme Court of Calcutta during the last fifteen or twenty years, and many of them the most efficient and respectable, had never been admitted as Attornies in the Courts of Westminster or Dublin. A similar observation, although not to the like

extent, may be applied to many persons who have been admitted to practise at Madras.

“H. A. D. Compton, C. J.

“Bombay, 18th July 1835.”

[374] “I concur in the opinion that the rule adopted by the Supreme Court at Madras is a fit guide for this Court. I think uniformity highly expedient, unless difference of circumstances demands that the rule should be barred. I think that great evil arises from the want of direct intercourse between Attorney and client, and as to the residue of the above observations, I am prevented from expressing an actual concurrence, not by dissent, but by not possessing the experience in which they originate.

J. W. ANDREY, P.J.*

“Bombay, 20th July 1835.”

The appeal was referred in the usual form by Her Majesty in Council to the Judicial Committee; but upon its coming on its order to be heard (Feb. 12, 1841), their Lordships † were of opinion that it not being in the nature of a judgment or determination, it was not an appealable grievance within the Charter, but that under the general powers of the 3rd and 4th Wm. IV., c. 41, and the [375] terms of the reference, it was competent to them to advise Her Majesty to grant the Appellants leave to appeal, which was accordingly done; the appeal, therefore, now came on for final hearing.

Mr. Serjeant Spankie and Mr. W. H. Watson for the Appellants.—The Charter of 1823 prescribed the persons to be admitted Attornies, Solicitors and Proctors, to be such as had previously practised in the Recorder's Court, or had been admitted in one of the Supreme Courts of Westminster, and declares that no other person or persons shall be admitted; the Supreme Court have, therefore, no authority to make an order superseding the provisions of the Charter. If an Act of Parliament, or that which is equivalent to an Act of Parliament, enacts a particular mode of doing a thing, there is involved in that the negative of any other: a power, therefore, to the Supreme Court to admit Attornies certified and enrolled in the Courts of Westminster, is an absolute negative against the admission of any persons who do not come within that description. Vin. Abr., 510, tit. Statute, E. 6, pl. 7. Where there is an affirmative that a particular mode is to be followed, as where an Act of Parliament introduces a punishment for a new offence, and says, the party shall be punished in a particular manner, the negative against any other mode is implied, and the party can only be indicted under that particular Statute. The principle is, that where there is an affirmative, that a particular mode is to be followed that is pregnant with a negative, that no other mode shall be followed (Dwarris on Statutes, 641. Siderfin, 56). In *Strading v. Morgan* (Plowden, 206), there is this passage: “Wherefore, every Statute that [376] limits a thing to be done in a particular form, although it be spoken in the affirmative, includes in itself a negative, viz., that it shall not be done otherwise.” The Judges of the Supreme Court seem to think, that as it was the object of the legislature to equalize the Courts in India in point of jurisdiction, that therefore it was the intention of the

* As this appeal was heard *ex parte*, no counsel appearing for the Respondent, it is deemed right towards the Judges of the Supreme Court to set out these minutes. It was submitted, however, on the papers, that the reasoning of the learned Judges was founded rather on the expediency and propriety of the rule than on its legality, or the power of the Supreme Court, under the provisions of the Charter, to make such an order. And it was observed that the Letters Patent constituting the Supreme Court at Madras, from whence the rule was copied, authorize and empower that Court to “admit and enrol such and so many persons having been admitted Attornies or Solicitors in one of our Courts at Westminster, or being otherwise capable”; and those constituting the Supreme Court at Calcutta, “empower the Judges to admit as many advocates and attornies-at-law as to them may seem meet”; while those constituting the Supreme Court at Bombay contain no provisions similar.

† Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

legislature to enable all the Courts to do the same things, and that as the Statute 4 Geo. IV., c. 71 (under which the Supreme Court was established), directed that the present Supreme Court "should," upon its being established, "do, execute, perform and fulfil all such acts, authorities, duties, matters and things whatsoever, as the said Supreme Court of Fort William is or may be lawfully authorized, empowered, or directed to do, execute, perform and fulfil within Fort William aforesaid," and that as the Supreme Court of Fort William were not limited in their power as to the admission of persons to practise as Attornies or Solicitors, other than those already admitted into the Courts of Westminster, that therefore they were to have equal power and discretion as to the admission of Attornies or Solicitors into their Courts of Bombay. But we submit, that the Statute merely makes the general jurisdiction of the Court, for the purposes of justice, similar to the powers and authorities exercised by the Courts at Fort William. But where the Charter gives a special qualification for Attornies or Solicitors, no general words in an Act of Parliament can overrule the express words of the Charter. The 3rd and 4th Will. IV., c. 85, sec. 115, does not alter the law in this respect, but rather confirms it, for there it takes away the necessity of obtaining the license of the Company, but gives no general power to the Court to admit. The 115th section provides, "Be it enacted, [377] that it shall be lawful for any Court of Justice established by His Majesty's Charter in the said territories, to approve, admit, and enrol persons as barristers, advocates and attornies in such Court, without any license from the said Company." It is unnecessary to speculate upon the reasons of the Government in having made a difference in the Bombay Charter and that of Madras (perhaps it was to prevent a great influx of Solicitors), but we must take the Charter as it is, and unaffected by any subsequent Acts of Parliament; and we submit, that the construction of it is plain and obvious, and that no implied authority from the words of the Act, by virtue of which this Charter was granted, can control that plain and obvious construction. There is another objection to the admission of the Respondent, viz., that it was made by a single Judge at chambers, and in vacation, whereas it ought to have been an order of the whole Court, and made in term time. It appears also, from the papers, that the Respondent had, during his clerkship, acted as notary public, and also as common assignee to the Insolvent Court at Bombay; but it is not necessary to press these disqualifications: the Court had no power, as we contend, to admit him at all.

The Right Honourable Dr. Lushington (Feb. 19, 1842).—This is an appeal from Bombay, and the circumstances which gave rise to it are the following:—

On the 13th day of November 1834, the Supreme Court of Judicature promulgated a rule as to the admission of Attornies to practise in that Court: that rule was in the terms set forth in the printed papers (*ante* [3 Moo. P.C.], p. 370).

On the 30th of November 1837, the Respondent, on [378] the faith of this rule, petitioned the Court to be admitted as an Attorney to practise in that capacity, and he produced a certificate of registry of his articles of clerkship for three years, with a Solicitor of the Court, and also a certificate of service under those articles, and also of good character and ability from the same Solicitor, from the Clerk of the Crown in the Court, and from the Prothonotary and Registrar.

On the 21st of December 1837, the Chief Justice made an order for the admission of the Respondent to practise as an Attorney.

If the rule of Court of the 13th of November 1834 be a valid and legal rule, the Respondent was well admitted and entitled to practise.

Several of the Attornies already admitted and practising in the Court, however, entertained a contrary opinion; and conceiving that the admission of the Respondent was not warranted by law, and injurious to their own interests, on the 23rd of February 1838 moved the Court for a rule to show cause why the order of admission should not be discharged, and the Respondent struck off the Rolls; the Respondent immediately showed cause; the Court took time to consider, and on the 28th of February refused the motion. In other words, they held that the Respondent was duly admitted an Attorney of the Court.

The Appellants petitioned the Supreme Court for liberty to appeal against the order and admission, which was granted. At the hearing of the appeal here, the

Respondent did not appear, and their Lordships have now to decide, whether the Appellants have stated sufficient grounds in law, to entitle them to a reversal of the orders appealed against.

Various applications have been set forth in the [379] papers, to the Government at home, and other proceedings, the greater part of which cannot possibly enter into the consideration of their Lordships in the decision of this case; for the sole question to which they can direct their attention is, was the admission of the Respondent as an Attorney authorized by law or not?

In determining this question, our first consideration must be applied to the Charter, whereby the Court is constituted, and its proceedings regulated. That Charter is for those purposes equivalent to an Act of Parliament, and must be construed on the same principles.

The clause applicable to the general question is in these words (the learned Judge here read the clause).

Now this clause does three things: 1st, it provides for the admission into the Court, as newly constituted, of all persons howsoever qualified, who were practising at the time of the publication of the Charter: 2nd, it directs affirmatively who shall be admitted, and describes the qualifications they must possess: 3rd, it declares negatively that no person not possessing the stated qualification shall be admitted.

It seems difficult to understand how any doubt could be raised as to the meaning of a clause so clearly expressed; but from the papers in the Appendix [see Printed Cases, Appendix, No. 13 and No. 24], though the point has not been argued on the part of the Respondent, it appears that the Court at Bombay entertained the opinion, that the authority incident to a Court of Justice to regulate the appointment of its own practitioners was not restricted by this Charter. It is not said that the Charter could not restrict such power, whatever it may be, for that would be a propo-[380]-sition utterly untenable, but that the Charter duly construed produces no such effect. This at once brings back the whole question to the interpretation of the Charter. Now one of the first rules of construction is, that effect shall if possible be given to every part of the instrument; but if the proposition contended for by the Supreme Court at Bombay could be maintained, the consequence would be, that the negative part of the clause would be wholly inoperative. It is clearly impracticable to adopt a construction so wholly repugnant to the first principle of interpretation, and so repugnant to the plain meaning of the words. There is no room for argument that this Charter is merely directory of what shall be done, and therefore open to the possible construction, that what was permitted before, was still allowed; for it is not merely directory of what shall be done, but it is expressly declaratory of what shall not be done.

The meaning of the Charter being ascertained, the whole case is disposed of; for no question of convenience or inconvenience can in a clear case be allowed to have any weight.

It is needless to notice some other arguments which seem to have been advanced, viz., the reference which was made to another clause in this Charter, whereby a general power was given to make rules with regard to the general practice of the Court; because the general power contained in this Charter is clearly applicable to another and a different matter, and cannot be considered as overriding the express directions given in a clause peculiarly and exclusively applicable to the appointment of Solicitors in the Court. Again, a still further observation seems to have arisen with reference to the conclusion of the clause, which states, "And we [381] do further ordain and declare, that no person from and after the date of these our letters patent, other than the said persons, being *bona fide* practising as Advocates or Attornies in the said Court of the Recorder of Bombay at the time of the publication of this our Charter, shall be capable of being admitted or enrolled, or of practising in the said Court, without the licence of the said United Company for that purpose first had and obtained." Now by a subsequent Statute (see 3 and 4 Wm. IV., c. 85, s. 115) it appears that this clause was repealed and rescinded: but the whole effect of that subsequent Statute is to repeal this clause, leaving the remainder of the provisions with respect to the appointment of Advocates and Attornies in full and undiminished force.

It appears, therefore, to their Lordships that the Respondent not being qualified

to be admitted according to the Charter, the Supreme Court had no power to exercise any further discretion in the matter, and that the appeal must be pronounced for, and the rule admitting him, and the rule refusing to strike him off the Rolls, rescinded.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*; also tit. INDIA, 3. LEGAL DECISIONS. S.C. 2 Moo. Ind. App. 428. On point as to grant of special leave to appeal where grievance is not appealable under Charter, cited in *Ex parte Robertson*, 1857-58, 11 Moo. P.C. 293; 8 St. Tr. (N.S.), 1070. The Charter establishing the Supreme Court of Bombay under 4 Geo. IV. c. 71, is set out in Morley's Dig. ii. p. 638. The Charters of Calcutta and Madras, referred to in the case, will be found *ad loc. cit.* pp. 549, 588. For the present powers of the Indian High Courts in regard to the admission of attorneys, see, as regards (i.) *Bombay*, letters patent, Dec. 28, 1865, arts. 9, 10 (Stat. R. and O. Rev. iv. p. 112); (ii.) *Calcutta*, letters patent of 28th Dec. 1865, arts. 9, 10 (*ib.* p. 87); (iii.) *Madras*, letters patent of 28th Dec. 1865, arts. 9, 10 (*ib.* p. 100); (iv.) *North-Western Provinces*, letters patent of March 17, 1866, arts. 7 and 8 (*ib.* p. 124).]

[382] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF ST. LUCIA.

PATRICK FRANCIS GAHAN, DUNCAN FERGUSON, and CHARLES HENRY COX,—*Appellants*: MARIE GABRIEL LAFITTE,—*Respondent* * [Feb. 12, 15, 1841; July 6, 1842].

Action for trespass and false imprisonment maintained against persons exercising the office of Judges of the Royal Court of St. Lucia, under Commissions from the Governor, not issued conformably to the Orders in Council of 20th of June 1831, and the instructions to the Governor.

This was an Appeal from the judgment of the Royal Court of St. Lucia, condemning the Appellants in damages to the amount of £3000 to be paid to the Respondent, for trespass and false imprisonment, by them, under the circumstances hereinafter mentioned; and the question raised by the proceedings in the Court below, and upon this Appeal, was whether the Appellants constituted a Court according to the law of St. Lucia. The Court below decided that they did not; that it had, therefore, cognizance of the acts of which the Respondent complained by his suit; and that the Appellants could not justify those acts as having been ordered by, and committed under the authority of a competent Court.

The Island of St. Lucia is governed by the ancient Law of France, the *Coutume* of Paris, except so far as that Law has been superseded by the Orders in Council which, since the Island became a British possession, have been promulgated from time to time for the government of the Crown Colonies.

[383] By an Order in Council of the 20th June 1831, for the administration of justice in St. Lucia, the manner in which the royal court should be constituted, the number of the judges of whom it should consist, and the powers and functions of the court, are established.

“By the 4th clause it is ordered that the royal court of St. Lucia shall henceforth be holden by and before three judges, and no more; and that the first, or presiding judge of the said court, shall be called and bear the style and title of Chief Justice of St. Lucia; and that the second and third of such judges shall be called and bear the respective styles and titles of First Puisne Judge and Second Puisne Judge of St. Lucia.”

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

"By the 5th clause it is ordered, that whenever and so often as the office of any chief justice or puisne judge of any of the said colonies shall become vacant by the death, absence, incapacity, resignation, suspension, or removal of any such chief justice or judge, the governor of such colony for the time being, shall be, and is hereby authorized, to supply and fill up such vacancy, by the appointment of some proper person, by a commission under the public seal of such colony, which commission shall be made to continue in force only until His Majesty's pleasure shall be known."

"And by the 8th clause it is further ordered, that in each of the said courts respectively, the said three judges of the said respective colonies, shall in all civil cases, have, possess, exercise, and enjoy such and the same jurisdiction, powers, and authority, in every respect, as the judges of the said courts have heretofore lawfully possessed, exercised, or enjoyed; and that the decision of the majority of such three judges shall in all civil cases, at any time depending in the [384] said respective courts, be taken and adjudged to be, and shall be recorded as, the judgment of the whole of such Court."

"And it is further ordered, that upon the trial of any person or persons in any of the said courts respectively, for any crime or offence, three assessors shall be associated to the said three judges, in the manner hereinafter provided for; which assessors shall be entitled to deliberate and vote with such Judges upon the final judgment to be pronounced in every such criminal case, or no person shall be convicted of any crime or offence, or adjudged to suffer any punishment by any judgment or sentence of any of the said courts, unless a majority of the total number of such judges and assessors shall in open court vote in favour of such judgment or sentence."

"And it is further ordered, that in each of the said courts, the said three judges and assessors shall in all criminal causes have, possess, exercise, and enjoy, such and the same jurisdiction, powers, and authority in every respect, as the judges of the said courts respectively have heretofore lawfully possessed, exercised, and enjoyed; and that the decision of the majority of the total number of such judges and assessors shall in all criminal cases at any time depending in any of the said courts, be taken and adjudged to be, and shall be recorded as, the judgment of the whole Court."

"And it is hereby further ordered that the assessors of the said royal Court of St. Lucia shall be chosen and appointed in such and the same manner as the members of that Court, other than the first president hath heretofore been chosen and appointed."

The first or presiding Judge of the Court, who is [385] named the Chief Justice, has a salary. The second and third Judges have no salaries.

In the month of December 1837, Dr. Reddie was the Chief Justice, the Respondent was the first, and one Mr. Cotton the second Puisne Judge. At the time in question the business of the Court was much delayed in consequence of the absence of Mr. Cotton the second Puisne Judge, he being resident at a distance; the Chief Justice therefore requested him to send in his resignation to the Governor, which he accordingly did on the 28th of November 1837.

On the 14th of December following the Governor, Colonel Bunbury, issued a special commission appointing Mr. Agostini, the then Attorney General of St. Lucia, to the vacant judgeship; but the commission was only a provisional and qualified appointment, for the purpose of forming a Court to take and receive certain securities therein mentioned, for prosecuting an appeal then pending; and also for the purpose of bringing to sale certain estates therein mentioned, but for no other purpose whatsoever. The reason alleged by the Appellants, of the Governor issuing this limited commission was, that at the time he contemplated several reforms in the rules and practice of the Royal Court, and was in communication with the government at home upon the subject, and that he was unwilling to fill up the vacancy until instructions should have been received from home, but that having been informed that certain appeals had been lodged from sentences of the Royal Court which would, under the terms of the Order in Council, have fallen to the ground for the want of a Court to effectuate them, and that certain judicial sales were in suspense for the same reason, to the injury of indi-[386]viduals, the Governor appointed Mr. Agostini for those special matters.

The usual oaths were administered to Mr. Agostini by the Chief Justice in open

Court, but he took them with the qualification, that he did so conformably and according to the special purposes mentioned in his commission, a qualification which was remonstrated against both by the Chief Justice and the Respondent. Mr. Agostini sat and heard one of the causes mentioned in his commission, but upon one not in his commission being called on, he left the bench and would not hear it, notwithstanding the remonstrance of the Chief Justice, who stated to him that the Court could not proceed with its ordinary business unless he remained, and referred to the Minutes of Council above set forth, insisting that the Chief Justice and the First Puisne Judge could not be contingent on, or restrained or limited by the terms of the commission of any Second Puisne Judge, that the Governor or officer administering the government might suspend the Judges, but that he could not alter the Order in Council or the constitution of the Court: and that they were bound to administer equal justice, and could not select some causes for decision and reject others.

Mr. Agostini nevertheless left the Bench and refused to sit upon any cases not mentioned in his commission, whereupon the Court had to be adjourned.

On the next day, the 28th December 1837, the Governor wrote a letter to the Chief Justice, requiring an explanation of his conduct, and an explanation of his having refused to proceed under the limited commission of Mr. Agostini. On the following day the Chief Justice and the Respondent, Lafitte, the First Puisne Judge, returned a joint answer to the [387] Governor to the following effect: that they had not rejected Mr. Agostini's commission, but had sworn him into office as Second Puisne Judge: that the court then consisting of three judges, was properly constituted, and that the law and constitution of the Court could not be altered by any form of a commission which the Governor might think proper to issue: and that such commission could not derogate from the warrant under the sign manual of the sovereign, and the commission which issued accordingly to the Chief Justice, or from the commission under which the First Puisne Judge held his office: and that they could not select certain causes for priority of hearing, to the exclusion of others on the rolls of the Court.

On the same day the Governor suspended Dr. Reddie from his office of Chief Justice.

On the 2nd of January 1838, the Governor appointed Mr. Gahan, one of the appellants, to be Chief Justice, in the place of Dr. Reddie: and on the same day Mr. Gahan took the oaths of office before the Governor, and gave notice of his appointment to the Respondent, who was still First Puisne Judge, and informed him at the same time that the Court would meet on the 4th of January at 12 o'clock, for the purpose of swearing him, Gahan, in, and for the dispatch of other business.

The Respondent, in answer to such communication, referred Mr. Gahan to the Governor for his reply. The Respondent did not attend for the purpose of swearing in Mr. Gahan, and the Registrar on that day, by the direction of Mr. Gahan, addressed another letter to him, requiring an immediate answer whether he meant to execute the duties of first Puisne Judge or [388] not in conjunction with him; and if he did, requesting his attendance in Court that day, for the purpose of swearing in Mr. Gahan as provisional Chief Justice. The Respondent sent no answer to that letter, and did not attend Court to swear in Mr. Gahan.

On the same day, the 4th of January, the Governor appointed the Appellant, Duncan Ferguson, to be provisional Second Puisne Judge. Mr. Agostini having resigned, when he also took the oaths of office before the Governor.

On the 6th of January, the Colonial Secretary, by the Governor's orders, addressed a letter to Mr. Lafitte complaining of his conduct, and concluded by stating, that the Governor was bound to think that his silence and his correspondence were tantamount to a resignation and abandonment of his functions as a Judge, and that the Governor accepted the same accordingly. The Respondent, by a letter of the same date, in answer to that addressed by the Colonial Secretary, denied that he had resigned his office of Judge, or that his refusal to do an illegal act could be construed into an abandonment of his duty, and denied that a Governor could lawfully suspend any Judge from his functions on the ground of the Judge's refusal to do a wrong, or an immoral, or a criminal act, and one for which the Judge might be impeached, as he contended would have been the case if they had proceeded to administer the

law under the special commission to Mr. Agostini. That letter contained amongst others, the following passages:—"This being the case, it necessarily follows, inasmuch as his Honour Dr. Reddie has been suspended from his office of Chief Justice by your Excellency, for the sole reason that he (in conjunction with myself) would not consent to administer [389] justice only to those whom it was your Excellency's pleasure to select,—only to those in whose favour you would issue a special commission, holding as we did, and as we shall ever hold, that justice in the Queen's Courts was, and is, for all without distinction, selection, or favour—I say it necessarily follows, that your Excellency has at length found a Chief Justice of an opposite opinion, and of a different mould,—a Chief Justice who will be guided, not by the law, but by your special commission and directions,—who will open the door of the Royal Court for those whom it may please you to favour; and, hold it shut at your bidding on the community at large." "Your Excellency has judged that I can form no part of such Court. I can neither recognize the legality of such a tribunal nor its Judges." "Your Excellency's pretended acceptance of a resignation which was never made, will avail you nothing. You first imagine a simulated resignation, and then feign to accept it. I will leave others to qualify this mode of treating Judges. Nothing is, nothing has been, nothing can be further from my purpose than to tender any resignation of the high, the honourable, the sacred trust confided to me by my sovereign. I am still First Puisne Judge of the Royal Court of St. Lucia, as it existed on the 21st of December last, and all your Excellency can do, until the sovereign's pleasure shall be signified, can make me nothing else. Nor will the fact that at the very hour that the letter to which I am replying was this day put into my hands, a pretended First Puisne Judge presented himself, having a commission from your Excellency to take illegal possession of my office, be misunderstood in the highest quarter."

[390] Upon the same day, the Governor appointed the Appellant, Mr. Cox, to be provisional First Puisne Judge in the place of the Respondent; and the following minute was entered on the rolls of the Court. "5th January 1838.—His Excellency Col. Thomas Bunbury, administering the government, having been pleased to appoint P. F. Gahan, Esq., provisional Chief Justice of St. Lucia, vice John Reddie, Esq., suspended, C. H. Cox, Esq., provisional First Puisne Judge, vice M. J. Lafitte, Esq., whose resignation has been accepted, and Duncan Ferguson, Esq., provisional Second Judge, vice the Hon. Edward Cotton, their Honours took their seats upon the Bench this day; and the Registrar having read their respective commissions in open Court, their Honours took the usual oath of office, having been previously sworn in by his Excellency the Governor."

On the 8th of January, the Court being so constituted, issued a summons for the Respondent personally to appear before them on the 10th, to answer for a contempt against the authority of the Court, by openly denying and opposing the rights and powers of the said Court to administer justice: and to answer for a breach of the peace, in having published a certain scandalous and wicked libel (meaning the above letter to the Governor) on the Court and his Excellency the Governor.

The Respondent did not attend upon the summons, and upon the 10th the Court issued a warrant for his arrest. Upon Mr. Lafitte being brought into Court, he stated that he did not recognize the legality of the Court, and that consequently he could not be in contempt. The Chief Justice thereupon struck his name from off the roll of notaries royal, a member of [391] which he was, and the Court declared him convicted of a gross contempt against the authority of the Court, and sentenced him to be imprisoned until such contempt should be purged.

The Respondent remained in prison under that commitment until the 25th of March 1838, when Dr. Reddie having been restored to his office of Chief Justice, in pursuance of directions conveyed to the Governor by Lord Glenelg, discharged him under a writ of *habeas corpus*, and he was reinstated in his judicial office by the direction also of Lord Glenelg.

On the 11th of June 1838, the Respondent filed his petition of complaint in the Royal Court against the Appellants, setting forth the circumstances above stated, and prayed that they might be condemned jointly and severally to pay him, by way of damages for their illegal arrest and imprisonment of him, the sum of £5000.

The Appellants appeared to this action, and took a peremptory exception, contending, that as their commission was legal, being under the hand and seal of the Governor, they were Judges *de facto* at least, and that the imprisonment of the Respondent, for a contempt of Court, was a lawful exercise of their authority: and also citing an Order of Council in force in St. Lucia, dated 21st of October 1833, which was in the following words: "That the Judges of the Royal Court shall not be liable to any action or proceeding whatever, civil or criminal, in respect of any judicial act or acts done or to be done by them, or any of them, otherwise than the Judges of the superior Courts of record in England are liable, any law, ordinance, or usage to the contrary notwithstanding."—[392] That there was no law which required the taking of the oaths before one of the Judges, as a condition precedent to their exercising their functions of Judges, and that at all events it was not competent for the Respondent to avail himself of this in order to claim damages against the Appellants, as it was his own wrongful refusal to attend the Court, which prevented the oaths being administered in that manner.

The Appellants did not lay before the Court any evidence to reduce the damages claimed by the Respondent; and the Court having heard the case, condemned the Appellants in £3000 damages. The three Judges, Dr. Reddie, and the two provisional Judges being of opinion that the Court, as consisting of the Defendants, Gahan, Cox, and Ferguson, was not properly constituted under the 4th and 5th articles of the Order in Council of the 20th of June 1821; that Gahan, not having been sworn in by one of the Judges of the Court, was not competent to sit as a Judge, or to swear in Cox and Ferguson; that the office of the First Puisne Judge was not vacant, the Plaintiff, Lafitte's conduct not being tantamount to a resignation; and that therefore the appointment of Cox as First Puisne Judge was illegal, and irregular, Lafitte not having been suspended by the Governor.

From this judgment the Appellants brought the present Appeal, relying upon the following reasons:—

I. Because the authority which imposed the imprisonment was that of a court of law, or of judges, whose acts are not, and cannot in their nature, be a trespass.

II. Because the respective Commissions of the Appellants were legal; the oaths were duly taken; [393] the Court was properly constituted; and the imprisonment of the Respondent for contempt, was a lawful exercise of the Appellant's judicial authority.

III. Because it was unnecessary to take the oaths before the Respondent, and even if it were, the necessity was dispensed with, by the act of the Respondent himself.

IV. Because the damages are disproportionate and excessive.

The Respondent, on the other hand, submitted that the judgment of the Court below was in all respects well founded for the following reasons:—

I. Because in order to invest the Chief Justice with the competent power to execute his office, it is required by the law of St. Lucia, that he should take his oath of office before a judge of the court, and that his commission should thereupon be registered in the court. The Appellant Gahan did not take the oath of office before any judge of that Court; there did not therefore exist in St. Lucia a court constituted according to law.

II. Because the Chief Justice not having invested himself with the requisite powers and authorities of a Judge, was not competent to administer to the Appellants, Ferguson and Cox, their oaths of office; and therefore they had not taken their oaths of office according to law; and not being invested with the powers of first and second puisne judges, they could not, and did not, as members, confer on the Court a legal existence.

III. Because the Respondent's office of first puisne judge not having become vacant either by death, incapacity, absence, resignation, suspension, or removal, [394] there existed no authority in the colony to appoint the Appellant Cox first puisne judge of the Royal Court. His appointment, therefore, was a nullity; he did not, therefore, sustain the character of a first puisne judge; and the Court wanting, therefore, a first puisne judge, was not constituted according to law, and had no legal existence.

IV. Because as there was not any legally constituted court, there could not be, and there was not, any legal registration of the commissions of the Appellant Gahan, or of the other Appellants.

V. Because at the time the several orders were made, and proceedings taken by the said Appellants as before mentioned, and particularly at the time the said order for imprisoning the Respondent was made by them, they did not constitute a court, and had none of the powers and authorities of a court, and had no legal authority to make such orders and take such proceedings; and all such orders and proceedings, and particularly the said order of imprisonment, were therefore illegal.

VI. Because even assuming the said Appellants, when they committed the Respondent to prison, were legally constituted judges of the said Court, yet the said committal was wholly illegal, inasmuch as the Court had no power to take cognizance of the alleged ground for that committal, and the same took place without any trial had, and was made for no offence known to or recognised by the laws of the said colony.

VII. Because the said Appellants had no authority to deprive the Respondent of the power to act as public notary.

VIII. Because if it were competent for the Appel-[395]-lants on this Appeal to question the amount of damages awarded to the Respondent, which the Respondent submits it is not, that amount is not more than sufficient to compensate him for the loss and injuries he has sustained by such imprisonment and the said acts of the said Appellants in respect of which the said damages were awarded.

IX. Because the sentence pronounced by the Court below is fully warranted by the pleadings and process in this suit; and no other sentence but that which has been given, unless for damages of a greater amount than three thousand pounds, could have been given, consistently with those pleadings and proofs, with the law of the colony, and the justice due to the Respondent.

Pending the Appeal and after the cause had been set down for hearing, two Orders in Council were issued, declaring valid the proceedings and judicial acts of the Court presided over by the Appellant Gahan, and indemnifying all persons acting or who had acted under the authority of such Court and the Judges thereof.

The Respondent presented a Petition to Her Majesty in Council, setting forth the circumstances of his having commenced his action and obtained judgment previous to the promulgation of the above orders, and praying that the same might not be held to have a retrospective effect, or to prevent his obtaining the fruits of his verdict.

The Petition was referred by Her Majesty to the Judicial Committee, and their Lordships directed it to come on for hearing with the original Appeal, but made no order thereon.

[396] Mr. Pemberton, Q.C., Sir William Follett, Q.C., and Mr. S. Martin, for the Appellants.

Mr. Burge, Q.C. and Mr. Blunt, for the Respondent, in support of the judgment.

The following authorities were referred to: *Reg. v. Mayor of Canterbury* (1 Strange, 474). *Dighton's Case* (1 Ventris, 82, citing Warren's Case, Crokes', James, 540). *Reg. v. The Bailiff of Ipswich* (Lord Raymond, 1232, s. c.; Salk. 434; 1 Vent. 143). Comyns Dig. Officer, K. 2, p. 151. Comyns Dig. Mandamus, D. 3. *The Margate Pier Company v. Hannan* (3 B. and Ald. 266). *Dicas v. Lord Brougham* (6 Carr. and Pay. 249). *Garnett v. Ferrand* (6 Barn. and Cress. 611), and *Garnett v. Tanner* (6 Barn. and Cress. 624). *Donegani v. Donegani* (3 Knapp, P.C. Cases, 63).

A reference was also made by the Court to the Royal Instructions accompanying the Orders in Council of June 1831, directed to Major-General Farquharson, the then Governor of the colony. These instructions contained the following directions respecting the exercise of the power of suspension by the Governor:—

“And whereas we have by our said Commission authorized you, upon sufficient causes to you appearing, to suspend from the exercise of his office, within our said island, any person exercising the same under and by virtue of any commission or warrant granted or to be granted by us, in our name or under our authority, and we have by the said Commission strictly required and enjoined you in proceeding to such suspension to observe the directions in that behalf given to you in and by your general instructions.

[397] “Now we do charge and require you, that before proceeding to any such suspension, you do signify by a statement in writing to the person so to be suspended,

the grounds of such your intended proceeding against him, and that you do call on such person to communicate to you, in writing, a statement of the grounds upon which, and the evidence by which, he may be desirous to exculpate himself, and that you transmit both of the said statements to us through one of our principal Secretaries of State, by the earliest conveyance."

The Appeal stood over for judgment. But on the 20th of June 1842 their Lordships directed the Appeal to be re-argued by one counsel on each side.

Mr. Pemberton, Q.C., argued the case on behalf of the Appellants, and

Mr. Burge, Q.C., was heard for the Respondents (6 July 1842 *).

Lord Brougham.—Their Lordships are of opinion, that the action in the case lay, that it was well brought, and that the Respondent, the Plaintiff below, was entitled to a verdict; the sentence of the Court below therefore must stand; but their Lordships think the damages given, £3000, excessive, and that they ought to be reduced to £1500. We therefore affirm the judgment, with damages to that extent, and as we have reduced the damages, such affirmance will be without costs.

[See *Inglis v. De Barnard*, 1841, 3 Moo. P.C. 425. On point (i.) as to consolidation of petition with the original appeal (3 Moo. P.C. 395), cf. authorities enumerated in note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125; (ii) as to judicial responsibility, see notes to *Calder v. Halket*, 1839, 3 Moo. P.C. at p. 79; and *Hill v. Bigge*, 1841, 3 Moo. P.C. 483; (iii) as to re-arguing appeals (3 Moo. P.C. 397), see note to *Frankland v. McGusty*, 1830, 1 Knapp, at p. 310; (iv) as to reversal or modification of verdict, cf. *Le Breton v. Ennis*, 1844, 4 Moo. P.C. 323; *Mudhoosoodun Sunkial v. Surroop Chunder Sirkar Chowdry*, 1849, 4 Moo. Ind. App. 433; *Soonder Koomarce Debbhee v. Gudhadur Pershad Tewarree*, 1858, 7 Moo. Ind. App. 63.]

[398] ON APPEAL FROM THE COURT OF APPEALS OF LOWER CANADA.

AUGUSTIN GADIOUX ST. LOUIS, and PIERRE BENJAMIN DUMOULIN,—*Appellants*; ANTOINE GADIOUX ST. LOUIS, FREDERICK BETTEZ and Dame MARIE GADIOUX ST. LOUIS his Wife, ANTOINE GADIOUX ST. LOUIS and JOSEPHTE GADIOUX ST. LOUIS,—*Respondents* † [Feb. 18, 1841].

The rights of the *Seigneur* in Lower Canada to the water of an unnavigable river flowing through his *Fief* does not entitle one of several *co-seigneurs* to divert the waters for his exclusive use, which had been accustomed for eleven years to supply the mills of another of his *co-seigneurs*.

The question at issue in this Appeal respected the right to the use of the river Yamachiche, a river not navigable, in the district of Three Rivers, in the Province of Lower Canada.

By the laws of Lower Canada, the *seigneur* of a *Fief* is the proprietor of rivers not navigable, as far as they flow through the *seigniory*.

The Appellant, Pierre Benjamin Dumoulin, was one of the *co-seigneurs* of the *Fief Gros Bois*, through which the river flows. The Respondents were also *co-seigneurs* of the *Fief*.

In the year 1820, the Respondent, Gadioux St. Louis, erected a grist-mill; and in the year 1821 he also erected a carding and fulling mill near the grist mill, upon his own land within the *Fief*, and in order to accumulate a sufficient supply of water

* Present: Lord Wynford, Lord Brougham, Lord Campbell, Mr. Justice Erskine, Sir Herbert Jenner Fust, and the Right Honourable Dr. Lushington.

† Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Honourable Dr. Lushington.

to work [399] them, he caused a dam to be thrown across the river at a point above the mills.

In 1831, the Appellant, Augustin Gadioux St. Louis, erected a saw-mill upon the same river, at a point higher up than the Respondents' mills; and for the purpose of working this mill he caused a channel, or canal, to be made from a point on the river above the Respondents' dam, to a point below such dam, whereby a portion of the water was diverted from its natural course, and from flowing over the Respondents' land, which impeded, and at times actually stopped, the working of the Respondents' mills.

In consequence of this encroachment upon their rights, the Respondents, on the 22nd of September 1832, instituted an action in the Court of King's Bench for the district of Three Rivers, against the Appellant, Augustin Gadioux St. Louis, for the purpose of having the canal made by him stopped up, and for a prohibition against any future diversion of the water, with damages and costs for the injury already done.

The Appellant, Pierre Benjamin Dumoulin, intervened in the cause; as a person in whose name and right, in his character of *seigneur primitif*, the canal and mill mentioned in the declaration had been made.

The Appellants then filed their peremptory *exception perpetuelle en droit et defence au fonds en fait*, by which they insisted that the Appellant, Dumoulin, was *seigneur* of the greater part of the *fief*, *Gros Bois*, through which the river Yamachiche flows, and that the saw-mill and canal in question were constructed in the *fief*, which was the undivided property of the Appellant, Dumoulin, and others, of whom the Respondents perhaps formed a part, but at the most a very small undi-[400]-vided part. That the river not being a navigable river, the Appellant Dumoulin had the sole right to the use and enjoyment of the water within his *seigneurie*, and to make, or cause to be made, the mill and canal in question; and they insisted that the Respondents had not even had the right of *banalité* further back than the year 1820; that the mill could never have been considered *banal* by the *censitaires* of the *fief*, and still less by the *co-seigneurs*, to whom this undivided right appertained, because, since the year 1820, and several years before, there existed another grist-mill within the *seigneurie*, and that even should the Respondents have acquired the right of *banalité* in the *fief*, and the right to work their mill by means of the waters (which the Appellants denied), they could not have any right to more than would be necessary to work their own mill, whereas, there was more than sufficient to work the Respondents as well as the Appellants' mills all the year round. The Appellants, moreover, denied that they had ever exercised their right but with the greatest care, and had only taken the surplus water which the Respondents had no need of, and had cut their canal on a level with the Respondents' dam, without making, as they were entitled, a dam-head for themselves.

To this exception the Respondents filed special answers, insisting that the grist-mill was erected by Antoine Gadioux St. Louis, *seigneur*, as mentioned in their declaration, at the instance and request of the tenants *censitaires* of the *fief*, *Gros Bois*, by reason of the neglect and refusal of all the other *co-seigneurs* to erect and provide a good and sufficient mill in the said *fief*, as appeared by several protests from the tenants, copies of which were appended thereto.

[401] The Respondents also produced various documents to prove their co-partnership of the *seigneurie*, and their several rights therein.

Witnesses were examined on both sides, to prove the relative situations of the mills, and to show in what respect the Respondents were injured by the Appellants' use of the water.

The cause was fully heard in the King's Bench, and the following Judgment pronounced:—

“The Court having heard the parties on the merits, as well on the principal demand as on the demand in intervention; having examined the process and the proofs, and, after having deliberated thereon, considering that Antoine Gadioux, surnamed St. Louis, one of the Plaintiffs, and through whose rights the others act in this cause, has, and could transmit to the other Plaintiffs, only a right of co-partnership in the great river Yamachiche; considering that in erecting a mill on the said river, the said Antoine Gadioux could only acquire, at the most, the right of *banalité*.

but not at all, either the possession or the exclusive proprietorship of the said river Yamachiche, which is *seigneurial* and not navigable; considering, lastly, that the intervening party, Pierre Benjamin Dumoulin, being a *co-seigneur* of the *seigneurie* of Yamachiche or Gros Bois, of the said river which runs through it, has the right to use and enjoy the said river, according to his share and portion in it,—the Court has dismissed, and now dismisses, the Plaintiff's action with costs to the Defendant, and the intervening party respectively, saving to the Plaintiff and to the said intervening party their legal resource to regulate and determine for what parts, and in what manner, they shall use, jointly or severally, the said river for the future."

[402] From this Judgment the Respondents appealed to the Court of Appeals for the Province of Lower Canada, and the Appeal having been heard, the following Judgment was afterwards given:

"It is considered and adjudged that the Judgment of the Court of King's Bench for the district of Three Rivers in this cause, be, and the same is hereby reversed, with costs to the Appellants, as well in this Court as in the Court below, against the said Augustin St. Louis; and this Court proceeding thereupon, doth adjudge, condemn and order the said Augustin St. Louis, Defendant in this cause in the Court below, and one of the Respondents in this Court, within fifteen days from and after service, and signification of a copy of this Judgment, to fill up and close the canal mentioned in the declaration in this cause filed, and to restore the land through which the said canal has been cut to the same situation and condition in which it was before the said canal was commenced, so that the waters of the river Yamachiche may run in the natural course and channel of the said river; and this Court doth hereby enjoin the said Augustin St. Louis not to molest in future the said Antoine Gadioux St. Louis in his lawful usufruct and enjoyment of the water of the said river of Yamachiche, and doth condemn the said Augustin St. Louis to pay to the said Appellants all such damages as they the said Appellants have sustained, or may sustain, by reason of the cutting and making of the said canal, when and so soon as the amount of such damages shall have been liquidated in due course of law;—and lastly, it is by this Court considered and adjudged, that the intervention of the said Pierre Benjamin Dumoulin in this cause, filed on the 10th day of January 1833, be, and the same is hereby dismissed, [403] with costs to the Appellants against him the said Pierre Benjamin Dumoulin, as well in this Court as in the Court below."

The Appellants then brought the present Appeal, submitting that the Decree ought to be reversed for the following reasons:—

I. Because by the law of Lower Canada, the *co-seigneurs* of a *fief* are entitled to use the waters of unnavigable rivers flowing through their *fief*, and one *co-seigneur* has no right to monopolize the same.

II. Because the Appellant, Pierre Benjamin Dumoulin, was one of the *co-seigneurs* of the *fief*, *Gros Bois*, through which the unnavigable river Yamachiche flows, and the mill complained of was erected on the waters of the river within the *fief* aforesaid.

III. Because the Appellant had a legal right to erect the saw-mill in the place where it is situate, and to use the waters of the river for the working thereof, the Appellants not claiming any exclusive right to such waters.

IV. Because it was proved by the evidence adduced in the cause, that the Appellants' mill might be worked without inconvenience or injury to the mills of the Respondents, by a proper use of the waters of the said river.

V. Because the Appellants had always been willing, and had proposed to the Respondents to adopt such regulations with respect to the use of the waters as might enable both the Appellants and Respondents to enjoy the use of the waters for working their mills, without inconvenience or injury to either.

VI. Because the Respondents had refused to assent to any such arrangement, though easy and practicable.

[404] VII. Because the grist-mill, in respect of which the Respondents claim, was not entitled to the privileges of *banalité*, and another grist-mill, situate higher up the river, existed within the *fief* long previous to the erection of the Respondents' grist-mill, and still continued to exist.

The Respondents, however, contended that the decision appealed from was just and proper, for the following reasons:—

I. Because the maxim "*sic utere tuo ut alienum non laedas*" is not only founded upon principles of natural justice, but was consonant to the laws of the Province.

II. Because, by the cutting and use of the Appellants' canal, the waters of the river Yamachiche were to a considerable extent diverted from their natural course, which is over or by the Respondents' land, and by such diversion the Respondents were prevented from having the full use and enjoyment of the waters of the river in the manner in which they and their predecessors, owners of the land in respect of which the Respondents' action was brought, were accustomed to use and enjoy the same previously to the cutting and use of the canal, and by such diversion of the water the Respondents had sustained considerable damage in respect of their aforesaid mills and lands on the said river.

III. Because the Respondents' grist-mill was a *banal* mill, grinding the corn of that part of the *fief*, *Gros Bois*, in which such mill is situate, and the Respondents were entitled to the full use of the waters of the river, for the purpose of working the same mill.

IV. Because, for a period of ten years and upwards, before the commencement of the Appellants' canal, the Respondents had had the uninterrupted enjoyment [405] of their said mill, with the full flow of the water of the said river for the working thereof.

V. Because, according to the evidence in the action, and the law of the land, no other than the Judgment now appealed from could have been given, or would have been proper.

Mr. Burge, Q.C., for the Appellants, and

Mr. Kindersley, Q.C., and Mr. Renshaw, in support of the Judgment of the Court below.

In the course of the argument, the following authorities were referred to: Merlin's Rep. Jurisp. tit. Cours d'Eau; 3 Partida, L. 15 and 16, tit. 32; Dig. lib. 39, tit. i. l. 3; Code Civil, Art. 644; Denisart's Coll. 4 vol. 294; 2 Bl. Com. 90.

The Right Honourable Dr. Lushington (July 28).—The present Appeal relates to the right of the contending parties to the use of the waters of the river Yamachiche, a river not navigable, and flowing through the Seigneurie of Gros Bois, in Lower Canada; of that Seigneurie, Dumoulin, one of the Appellants, and the Respondents, are *co-seigneurs*.

In the year 1820, Antoine Gadioux St. Louis, with the consent of all the proprietors, as well as tenants, and at the instance of at least some of them, erected a grist-mill on his own land; in 1821, a carding and fulling mill, and a dam, was thrown across the river, for the purpose of supplying the mills with a sufficient quantity of water; until the month of November 1831, these mills continued to be worked without any obstruction or diminution of the ordinary supply of water. At that period, Augustin Gadioux St. Louis, [406] erected a saw-mill on a point higher up the river, and, for the purpose of supplying such mill with water, caused a canal to be made.

The Respondents, conceiving that such canal intercepted the accustomed flow of water to their mills, thereby preventing them from being worked so beneficially and conveniently as before, in September 1832 brought an action in the Court of King's Bench of the Three Rivers, against Augustin Gadioux St. Louis. The object of this action was to have the canal stopped up, and all things restored to their former state, and to recover damages for the losses sustained.

Dumoulin intervened in this suit, alleging himself to be a partner with the Appellant, St. Louis, in the saw-mill, and also interested and entitled, as one of the *co-seigneurs* of the *fief*.

The Respondents in their pleadings alleged, among other things, that the corn-mill by them erected in 1820 was a *banal* mill, and entitled to all the privileges of a mill of such character. This averment was denied by the Appellants, who further stated, that if it were true, the Respondents were only entitled to a sufficiency of water to work it, and that if the waters of the river were properly managed, there would be an overplus of water, to which the Appellants would be entitled for the use of their mill.

Evidence, both written and parol, was produced on behalf of both the litigating

parties, and the cause was first heard before the Court of King's Bench, which Court, on the 30th of September 1833, dismissed the action, on the ground that Dumoulin was entitled to enjoy the river according to his share as a *co-seigneur*, and that the Plaintiffs had claimed an exclusive use; the Court also reserved to the Plaintiffs, and to Dumoulin, the [407] intervening party, liberty to resort to the Court for the arrangement of their rights.

An Appeal having been presented to the Provincial Court, that tribunal, on the 30th of April 1834, reversed the Decree of the Court of King's Bench, and pronounced according to the prayer of the present Respondents in their declaration.

Their Lordships have now to determine, whether they see any sufficient cause for reversing this last Judgment; and first they would observe, that they are satisfied by the evidence, that the Respondents have suffered some damage by the diverting the waters through the means of the canal for the use of the mills erected in 1831. To what extent that damage has proceeded, they are not called upon to determine in this Appeal.

The question then is, has the Appellant Dumoulin shown that he has any right so to use these waters, notwithstanding the loss to the Respondents? Has he proved that the loss occasioned is *damnum absque injuria*? At the time of the erection of these mills in 1820 and 1821, he had no right or interest in the waters of the river at all; the mills were erected and worked with the consent of all interested, for some years before Dumoulin acquired any title to the use of the waters.

The defence of Dumoulin may be shortly stated to consist—First, of a denial that the mill of the Respondents is a *banal* mill;—Second, a justification of his carrying off a part of the supply of water from the Respondents' mills, on the ground that he is a *co-seigneur* of the *fief*, and as such entitled to share in the use of the waters, even to the extent of depriving the Respondents, his *co-seigneurs*, of the use of a part of their accustomed supply.

[408] Now, leaving out of consideration the question of *banal* mill or not, and what was the privilege of *banaliti*, it is evident, that if the Appellant cannot support his latter justification, he must fail altogether. The position he must maintain is this, that as *co-seigneur* he has a right to divert the waters, accustomed for eleven years to supply the mills of one of his *co-seigneurs*, for the purpose of working his own newly-erected mill, and this to an extent to which it is not easy to fix a limit. The proposition carries with it some extraordinary consequences: for if the law be as stated, another *co-seigneur*, having property higher up the river, might build a new mill, and divert the waters from all the existing mills; he is in turn to suffer the same loss, if there should be any *co-seigneur* having land situate still higher up the stream.

We are of opinion that the Appellants have failed to show that the law prevailing in Lower Canada supports any such proposition, and that, therefore, the Decree of the Court of Appeals must be affirmed.

It may be that the Appellants have, by the law of Canada, some claim to have the use of the waters regulated by the Courts of that country, so that all the *co-seigneurs* may have the most beneficial use of the same. If this be so, our Judgment will not deprive the Appellants of any right they may possess to resort to the tribunals of their country, for such purpose. All we affirm is, that the Appellants had no right to take the law into their own hands, inflicting a loss and injury on the Respondents. Decree affirmed with costs.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America*.]

[409]

FROM THE ISLAND OF JERSEY.

In the Matter of the Appeal of ABRAHAM AMES and Others* [May 11, 1841].

On Petition of Her Majesty's Attorney-General for Jersey.

Leave granted on an *ex parte* application to appeal from a criminal proceeding in Jersey; rescinded on Special Petition of the Attorney-General of the Island. The Court being of opinion that the original leave ought not to have been given.

By an Act of the States of the Island of Jersey, dated the 22nd of May 1834, and confirmed by an Order in Council, of the 2nd of July 1834, it was provided that the Committee of Harbours might place in reserve, for such time as they might deem fit, the oyster-beds, or part thereof, belonging to the Island, and all persons were prohibited from dredging at any time on the oyster-beds so reserved, on pain of 300 livres and confiscation of the oysters there dredged.

This Act having been repeatedly violated, the States, on the 11th of April 1838, passed a resolution directing the constables of St. Martins and Grouville to cause the above Act to be carried into execution, and to repress the disorderly proceedings arising from the violation of the Act.

In obedience to the directions contained in the foregoing resolution, the constables of St. Martins and Grouville arrested the Appellant, Ames, a master of a fishing smack, and ninety-six other masters of fishing-smacks. The parties were brought before the Royal Court, and the Appellant, Ames, was sentenced, with [410] the other masters, to pay a fine of 300 livres (equal to £17 6s. 2d.) and costs.

The several parties appealed from this sentence to the full Court, which affirmed the decision of the inferior Court, and condemned them in costs. From this decision Ames, on behalf of himself and others of the Defendants, prayed leave to appeal to Her Majesty in Council, but the Royal Court, considering that by several Charters and Orders in Council, and by the custom and common law of the Island, and the practice observed and followed in like matters, it had the privilege and authority to give judgment in the second and final instance, in all cases which originated in the Island for crimes and misdemeanours punishable by penalties or fines, refused to grant such Appeal. Whereupon Ames, with sixteen others of the Defendants, presented a petition in the nature of a Doleance to Her Majesty in Council, praying for leave to appeal, and that all proceedings consequent upon the above sentences should be stayed in the meantime.

The Petition was heard *ex parte* on the 7th of July, 1838, Counsel appearing in support thereof, and their Lordships † were of opinion that leave to appeal ought to be given, and having reported to Her Majesty to that effect, an Order in Council was made on the 18th of the same month, allowing the said Petition, and suspending all proceedings against the Petitioners until the hearing thereof.

The Appellant Ames procured the Order to be registered on the Records of the Royal Court, but took no further steps to bring the Appeal to a hearing.

[411] In the year 1841 the Attorney-General of Jersey presented a Petition to the Queen in Council, complaining that the Order of the 18th of July 1828 was obtained by surprise, and praying that it might be rescinded, and the pretended Doleance dismissed with costs.

The Attorney-General (Sir John Campbell) and Mr. Busk in support of the Petition to dismiss the Appeal.—

The Order in Council of the 18th of July 1838 cannot be sustained. It is contrary to, and a violation of, the law and practice in Jersey. The law of the Island allows of no Appeal from the Royal Court of Jersey in criminal cases. This is manifest by the second article of the Ordinances of the Royal Commissioners under

* Present: Mr. Baron Parke, Sir Herbert Jenner, The Right Hon. Dr. Lushington, and Mr. Justice Littledale.

† Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Erskine, and Sir Herbert Jenner.

Queen Elizabeth, of the 3rd of April 1591. That Ordinance declares that "The said jurats, time out of mind, have had, and ought to have, the final determination in the second and last instance of all matters whatsoever which concern criminal causes, delicts or misdemeanours." This is confirmed by a report of the Royal Court, bearing date the 5th of April 1788, which states the law on this subject in these terms: "No Appeal is admissible in criminal cases, transgression of ordinances, or mixed cases, having a manifest tendency to disturb the public peace." It is expressly laid down in the Code, that there shall be no Appeal except in moveable matters with 300 livres at least, and immovable with at least 5 livres a-year. There is no Appeal here in criminal matters, Hayle's System, 150. Neither can this Court entertain the matter as a Doleance; it is not a Doleance in the meaning of the 163rd article of the Jersey Code [412] of 1771. "*Les doléances étant en elles-mêmes odieuses, parce qu'elles sont particulièrement dirigées contre le Juge, dont l'honneur doit être maintenu à cause de la justice.*" Here there is no complaint against the Judge. This is a proceeding upon a penal statute to recover a penalty for a breach, and no Appeal lies here from the finding of the full Court. The same rule is recognized in Scotland: no Appeal is given in criminal proceedings, to the House of Lords, from the Court of Justiciary. We, therefore, submit that this Court had no power to make the Order, and that it must be rescinded, with costs.

Sir Frederick Pollock, Q.C., for Ames and the other Appellants—Submitted that the proceedings in the Court below by the Attorney-General of Jersey being the infliction of a penalty, was the subject of an Appeal to Her Majesty in Council, and that the Order of the 18th of July 1838, could not be impeached or disturbed, as it was granted under the general jurisdiction exercised by this Court, to let in an Appeal, upon a special application for that purpose, which was otherwise precluded. *Re Tupper* (2 Knapp, P.C. Cases, 201).

Mr. Baron Parke.—Their Lordships are of opinion that the application to dismiss this Appeal must be granted: had their Lordships' attention been directed to the law of the Isle of Jersey respecting criminal proceedings at the time of granting the Order for leave to Appeal, they would never have allowed it. The pre-[413]sent application is strictly regular, for it is quite clear that where special leave to appeal has been granted, on an *ex parte* Petition, it is competent for the Respondent to come here on Petition to dismiss the Order giving such leave, upon the ground that it has been improperly granted, and the practice is to present a Counter-petition for that purpose. We are disposed to say that we ought not to have recommended Her Majesty to have allowed the Appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of Justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former Petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant Appeals in matters of criminal prosecutions; and under the circumstances of this case, we think that the Order of the 18th of June 1838 ought not to have been granted, and must be rescinded, but without costs on either side.

[On point (i.) as to the caution with which special leave to appeal will be granted in criminal cases adopted in *Reg. v. Bertrand*, 1867, L.R. 1 P.C. 530, 4 Moo. P.C. (N.S.) 460; and cf. *Reg. v. Joykissen Mookerjee* (1862), 1 Moo. P.C. (N.S.) 272; *Falkland Islands Co. v. Reg.*, 1863, *ib.* 312; *Levien v. Reg.*, 1867, L.R. 1 P.C. 536, 4 Moo. P.C. (N.S.) 483; *Riel v. Reg.*, 1885, 10 A.C. 675; *In re Dillet*, 1887, 12 A.C. 459; *Dinizulu v. A.-G. of Zululand*, 1890, 61 L.T. 740; *Ex parte Deeming* (1892), A.C. 422; *In re MacCrea* (1893), A.C. 346; *Kops v. Reg.* (1894), A.C. 650; *In re Carew* (1897), A.C. 719; *Sprigg v. Sigcau* (*ib.* 238); *Gangadhar Tilak v. Queen Empress*, 1897, L.R. 25 Ind. App. 1; *In re Rajendro Nath Mukerji*, 1899, L.R. 26 Ind. App. 242; and see also note to *Antigua (Justices of)*, 1830, 1 Knapp, at p. 269: (ii.) criminal appeals from Jersey, see *Esnouf v. A.-G. for Jersey*, 1883, 8 A.C. 308. See also *Reg. v. Eduljee Byramjee*, 1846, 5 Moo. P.C. 282; *Belson v. Belson*, 1849-50, 7 Moo. P.C. 34.]

[414] ON APPEAL FROM THE SUPREME COURT OF CIVIL JUSTICE OF
BRITISH GUIANA.

In the Matter of an Appeal of JOHN DOWNIE, against an Order of the Supreme Court bearing date the 6th of February 1840; and in the matter of an Appeal of WILLIAM ARRINDELL, against an Order of the same Court, on the 6th and 8th days of February 1840 * [June 21, 1841].

Appeals from two Orders of the Supreme Court of British Guiana, suspending from practice, for six months, two Counsel, on Special Petition allowed, and under the circumstances, such orders reversed [3 Moo. P.C. 420].

Practice as to the number of Counsel entitled to be heard where there are two distinct Appeals against the same Respondent whose defence to each Appeal is in substance the same [3 Moo. P.C. 419].

The first of these Appeals was against an Order made by the Hon. Jeffery Hart Bent, Chief Justice; Thomas Norton, First Puisne Judge; and Samuel Firebrace, Second Puisne Judge, of the Supreme Court of Civil Justice in Demerara and Essequibo, on the 6th of February 1840, suspending the Appellant, John Downie, an advocate, from practising in that Court for the space of six months, for contempt of Court.

The Second Appeal was also against an Order of the same Court, of the 6th and 8th of February 1840, whereby the Appellant, William Arrindell, a barrister practising in the colony, was likewise suspended from practising for the same period. These orders were made under the following circumstances.

[415] On the 18th of January 1840, the Hon. Thomas Norton, the First Puisne Judge, commenced an action against John Emery, an inhabitant of Demerara, as the editor and proprietor of a newspaper called the *Berbice Advertiser*, for a libel published in that journal, in which it was alleged, that the First Puisne Judge had been guilty of delays, in postponing the sittings of the Roll Court, and keeping that Court shut at his pleasure, to the injury and prejudice of Her Majesty's subjects in the Colony.

The citation was in common form, calling upon the Defendant to appear on the 3rd of February following, at the Roll Court. The claim and demand set forth the particulars of the Plaintiff's complaint, and according to the Dutch Roman law, claimed the *amende honorable et profitable*, the former importing an apology to be made by the Defendant, the latter payment of damages in money. A copy of this claim and demand was served on the Defendant.

On the 31st of January, three days before the Defendant was cited to appear before the Roll Court, Mr. Norton was served with a copy of a Petition to Her Majesty in Council, dated the 30th of that month, and purporting to be from John Emery, the Defendant to the action. This Petition, after stating the nature of the action, contained a suggestion that Mr. Norton was about to preside in the Roll Court at the trial of the action so commenced by him, and prayed that Her Majesty would interdict him from proceeding in any manner, directly or indirectly, in the said action, and that the summons and citation issued therein might be cancelled and withdrawn, free of costs, with further interdiction and injunction not to do or attempt the [416] like in future. The Petition also prayed for payment of the Petitioner's costs in that matter, by the said Judge.

The Petition was served on the Judge by the Provost Marshal, the sworn officer of the Court, whose duty it was to serve and execute mandaments, executions, and provisions of Justice issued by the Court. The service of such Petition not being in the nature of any proceedings of the Court, was no part of his official duty, and the employment of him for that purpose was deemed a studied insult to the Judge, and through him to the Court. The Provost Marshal and his deputy were accordingly summoned, and in the presence of the Registrar required to give information, on oath, respecting the parties who had employed and instructed them.

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

Upon the examination of these officers, it appeared that the Provost Marshal was instructed by the Appellants, and that the Appellant, Downie, required him to make a return of the service, and drew up the form of such return himself: that the Appellant, Arrindell, though he had not signed the written instrument for that purpose, was present in the office of the Provost Marshal at the time the instructions respecting the service and return of the Petition were given, and, as well as Downie, was retained and acted as Counsel for the Defendant Emery.

The First Puisne Judge, on the 6th of February 1840, brought the circumstance of the service of the Petition and its contents, as well as the part taken by the Appellants, before the full Court. The Appellant, Downie, was present; but the other Appellant, Arrindell, was absent, as it was alleged, without leave, and in disobedience to a standing rule of the Court, which [417] required all persons practising as advocates, to be present at the sittings of the Court.

The Court having commented on the impropriety of the proceeding, observed, that the Defendant, Emery, had an undoubted right to petition the Queen in Council, for any purpose, if he thought fit, but that the service of such a Petition on one of the Judges, and by the officer of the Court, could only be considered as a studied insult to the Court, and called upon Downie to explain his conduct in respect thereof; to which he replied, "that he considered he was acting in the line of his duty; that he had no intention whatever of insulting the Judge, and that he had no apology to make."

After deliberating on the proper course to be pursued, the Chief Justice pronounced the following Judgment: "That it is considered by the Court, that the conduct of John Downie is insulting to the Judge, and an insult and contempt of the Court; and it is ordered that the said John Downie, for such insult and contempt by him committed, be suspended from all practice and privilege of an Advocate admitted to practise before this Court, for the space of six calendar months."

At the same time, the Court made an order for the attendance of the Appellant, Arrindell, on the 8th instant, and in the mean time suspended him from practising, and all other privileges of a Barrister. At the sitting of the Court on the 8th instant, the Appellant, Arrindell, appeared, when he was called upon by the Chief Justice to give an explanation of his conduct, when the Appellant read a written protest against the jurisdiction of the Court, and requested time to prepare a defence. This the Court refused, and the [418] Appellant declining to give any further explanation, the Chief Justice pronounced him to have been guilty of a contempt of Court, and ordered him to be suspended from all practice for the space of six months.

Both Appellants then presented Petitions for leave to appeal to Her Majesty in Council; but the Court, considering such orders not to be appealable matters within their jurisdiction, and not having discovered any precedent for such an Appeal, refused to allow the same.

On the 30th of June 1840,* two separate *ex parte* motions were made on Petitions, before their Lordships, by

Mr. Pemberton, Q.C., for Downie, and Sir William Follett, Q.C., for Arrindell, for leave to Appeal against the above orders of suspension to Her Majesty in Council, were which granted in the terms prayed.

The Judges were served with notice of the allowance of these Appeals, and transmitted an answer to Her Majesty in Council, and, on the 14th of May 1841,†

Mr. Edmund Moore, on behalf of the Judges, applied on Petition for permission to consolidate and lodge one case in answer to both Appeals, as the orders of suspension against both Appellants involved the same considerations, and that the Appeals might be heard together, which was ordered accordingly.

[419] Both Appeals now came on for hearing. The Respondents' Counsel urged that the Appellants should be restricted to two Counsel, one on each Appeal, but the Court declined restricting them,—

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and The Right Hon. Dr. Lushington.

† Present: Mr. Baron Parke, Sir Herbert Jenner, The Right Hon. Dr. Lushington and Mr. Justice Littledale.

Lord Brougham observing, that "if there are several parties in one Appeal who say they are in different interests, then if it is quite clear to the Court that they really are in different interests, the practice is to hear them by separate Counsel. But that if they are in the same interest, then the Court makes them arrange together so as to be heard by one Counsel. But that there being in this case two Appeals, each Appellant had a right to be represented by two Counsel, and their Lordships could not limit them to one, though the facts and arguments used might be the same in both cases.

Mr. Pemberton, Q.C., and Mr. Burge, Q.C., for the Appellant, Downie, again: and

Mr. Serjeant Stephens, and Mr. Edmund Moore, for the Judges of the Supreme Court, in support of the orders in both Appeals.

Sir William Follett, Q.C., and Mr. S. Sharpe, for the Appellant, Arrindell, in the second Appeal, were not called upon.

The following authorities were referred to:—

As to the power of Colonial Courts to suspend Practitioners at their Bar for contempt, *Re Justices of Antigua* (1 Knapp, P.C. Cases, 267), *Smith v. Justices of Sierra Leone* (*ante*, [3 Moo. P.C.] 361).

[420] That the Appellants had been guilty of contempt, and the orders of suspension were fully justified, Lechaere Charlton's case (2 Myl. and Cr. 316), Long Wellesley's case (2 Russ. and Myl. 639).

And to show the right Mr. Norton had, if he had chosen to exercise it, to have tried the action in which he was Plaintiff, *Wood v. The Mayor of London* (1 Salk. 397).

Lord Brougham.—Their Lordships are of opinion, that the orders of suspension ought not to have been made: and they will advise Her Majesty to reverse them. They make no order whatever as to the erasing—that would be clearly advising Her Majesty to pronounce a censure, if not a stigma, upon the proceedings of the Court. Nor do their Lordships intend to intimate any opinion upon the course that the learned Counsel advised his client to take, either approving or disapproving of it; they are of opinion that the orders ought not to have been made; that it was not such a contempt as to warrant the orders made upon it, which we, therefore, simply reverse.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 60. *Other Matters*. On point (i.) as to appeals from orders of committal and suspension by Colonial Courts, see *Antigua (Justices of)*, 1830, 1 Knapp, 253, and note thereto at p. 269; see also note to *In re Ames*, 1841, 3 Moo. P.C. 413; and *Smith v. Sierra Leone (Justices of)*, 1848, 7 Moo. P.C. 174: (ii.) as to consolidation of appeals, 3 Moo. P.C. 418, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125: (iii.) as to notice to Court below of grant of special leave, cf. *In re Dillet*, 1887, 12 App. Cas. 467.]

[421] ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLAND OF JAMAICA.

GEORGE THOMPSON,—Appellant: MARY CARTWRIGHT. —Respondent.*

[June 22, 1841.]

(Heard *ex parte*.)

In an administration suit in the Court of Chancery in Jamaica, it was referred to the Master to inquire and report what was due and owing to the respective parties to the suit. The Master made his report, and no exceptions were

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

taken to it, but a Petition was subsequently presented to the Court, by a party claiming a sum of money for advances to an infant, a party in the cause, and objecting to the finding of the Master, in not allowing for such advances. The Court, without pronouncing an opinion on the merits of the Petition, simply referred it to the Master to inquire whether any, and what sum, ought to be paid for the advances. Held on Appeal, by the Judicial Committee, that the order or Petition was irregular, and ought to be reversed with costs in the Court below; but as the same relief might have been obtained on a re-hearing of the Petition in the Court below, no costs of the Appeal here were allowed.

The facts of this case, and the questions raised in the argument upon Appeal, are fully set forth in the Judgment.

Mr. Burge, Q.C., for the Appellant.

Lord Brougham (July 28). This was an Appeal against an Order of the Chancellor of Jamaica, made in February 1839, upon a Petition of the Respondent, Mary Cartwright, in a suit of *White v. Robertson*, then depending before that Court.

The suit had been instituted by the devisee, under the Will of Andrew White, the father of the Respondent's children, and of the Appellant's wife, one of those children. The suit was to ascertain the debts and incumbrances of Andrew White's estate, and the legacies under his Will. The Will gave annuities to the Respondent and her children, among others, to Jane White, the deceased wife of the Appellant, George Thompson; and it directed the executors to see that the annuities to the children were paid yearly. A receiver had been appointed, and an Order made referring it to the Master to inquire and report what was due to the Respondent and each of her children, including Mrs. Thompson, in respect of their annuities, and how much of the arrears should be paid for their support out of the rents and profits.

The Master had reported that £3869 1s. 10½d. was due to the children; and two Orders were made, directing the payment of a moiety of this sum to the annuitants, and also all arrears.

It does not appear that there were exceptions to the report, or any re-hearing of the Orders; but in 1838, a year after the second of the Orders, the Respondent filed her Petition, in which she objected to the amount reported due to Mrs. Thompson, and stated, that there were due to her at the time of her decease, in 1835, only £408 0s. 1d., and alleging that she, the Respondent, had advanced more than £400 for her support and education, before she intermarried with the Appellant: she prayed to have the amount of the arrears of annuity under the Will due to Mrs. Thompson, and now claimed by her surviving husband, who had taken out administration to her, paid over to her, the Respondent, in respect of her alleged advances, and interest on the same. It is to be observed, that the Respondent did not even state the amount of her alleged advances, nor out of what fund they had been paid.

[423] The Appellant, in his affidavit in answer to the Petition, entered into a detailed statement of the sums which he alleged had been received by the Respondent, of money belonging to his late wife, and out of which her maintenance might have been provided, and which made her a debtor to his late wife's estate, of which he was administrator. He also swore to declarations of the Respondent, previous to his marriage with her daughter, that he would be entitled to the annuity, and that she hoped it would soon be paid.

The Petition came on to be heard before the Chancellor, when His Excellency made an Order, referring it to the Master to ascertain and report whether any, and what, sum ought to be paid to the Respondent on account of her alleged advances to Jane White, afterwards wife of the Appellant, previous to her marriage. This Order forms the subject of the present Appeal; and we have no doubt that it was wholly irregular, and must be discharged.

Supposing that it was not inconsistent with the Master's report, which was not excepted to, and the Orders made upon that report, which stand unaffected, still it was incompetent in the suit instituted for administering Andrew White's estate,

to make an Order which went in part, at least, to the administration of Jane White's (Mrs. Thompson's) estate, to which her husband, the Appellant, had administered. It is not pretended that any money was advanced by the Respondent, or anything done towards the Appellant's late wife, by the direction of the Court or under its authority: she only alleges that she advanced money for her maintenance, and that of A. White's other children, or rather of her own children, of whom A. White was the putative father, there being nothing in his Will [424] with respect to their maintenance. If she had any claim at all, therefore, upon the estate of A. White, she could not make it available by stopping the annuities of the children under his Will. But her claim, if any, rather is against the estate of Jane White, and must be prosecuted in the usual way against the representatives of that estate.

The Order in question is also wrong in referring the whole question to the Master, in truth referring the decision to him of the point, whether the Petitioner (Respondent) was entitled to any sum at all, or not, in respect of the alleged advances; and there are other objections to the Order, arising from the merits, as they appear in the Petition, and on the Appellant's affidavit. Particularly it is to be observed, that nothing is stated specifically of the fund out of which the Respondent made her alleged advances, nor is their amount specified, nor is it alleged that she had no monies belonging to Jane White, out of which the advances might be made. The Petition ought clearly to have been dismissed with costs, and that must now be the Order upon the Appeal.

Then with regard to the costs here, could not the Petition have been reheard? There was no occasion for coming here; he could have moved to discharge the Order. The Order upon the Petition is dismissed, with costs alone, no costs of Appeal here.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 22. *West Indies*. See note to *Bertram v. Godfray*, 1830, 1 Knapp, at p. 387, on point as to costs.]

[425] BY APPEAL FROM THE ROYAL COURT OF ST. LUCIA.

JOHN BELLINGHAM INGLIS,—*Appellant*; CHARLES DE BARNARD and Others,—*Respondents* * [June 20, 1841].

Appeal allowed though the security for prosecuting the same had not been perfected in due time, such omission being occasioned by the suspension and removal of the Judges in the Colony, and the imperfect constitution of the Court in consequence thereof [3 Moo. P.C. 427-8].

The third article of the ordinance for regulating the form and manner of registering deeds and other instruments in St. Lucia, made pursuant to the Order in Council of the 15th of January 1829, orders that the registry should set forth "the date and nature of the title, or original judgment, etc., by which the mortgage, lien, or charge was established, together with the date and nature of all subsequent instruments by which such lien, mortgage, or charge has passed into the hands of the present creditor, and become a charge of the actual debtor." The registration of a mortgage and assignment of part of an estate charged and apportioned by a previous act of liquidation, is not such a compliance with the terms of the ordinance as to give the party claiming under it a right to come in, *pari passu*, with the parties whose title is registered under the original act of liquidation [3 Moo. P.C. 435 *et seq.*].

An ordinance passed in pursuance of an Order in Council, and not altered or disapproved by Her Majesty in Council, though seemingly more extensive than contemplated by the Order, is not void for the excess, but will be considered as duly authorized by the Order, and taken in conjunction with it [3 Moo. P.C. 438 *et seq.*].

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

In this case an application was made on the part of John Bellingham Inglis, for liberty to prosecute an Appeal from a Judgment of the Royal Court of St. Lucia, which had been refused by the same Court, upon the ground that the securities required to be entered into had not been perfected within the three months limited by the 11th Rule of the Order in Council, of [426] the 20th of June 1831, for the administration of Justice in St. Lucia (see Clark's Col. Law, 267, 282).

On the 10th of October 1837, the Royal Court of St. Lucia, by their Order, confirmed the report of the notary to whom it had been referred, to take an account of the claims of the creditors upon the Ballambouche estate, whereby the claim of the Appellant was postponed to subsequent creditors, on the ground that he had registered his debt upon an assignment, which bore date posterior to the judgment of the creditors preferred, though the Judgment itself was long anterior to their's

Against this decision the Appellant appealed, and presented his Petition on the 16th of October 1837. In consequence of the resignation of one of the Puisne Judges, a few days afterwards, no Court existed till the 13th of December, when a new Judge was appointed; and on the 19th the Court met for the first time, when the new Judge, entertaining doubts of his jurisdiction over past suits, the Court immediately adjourned, and on the 21st of the same month the Court was virtually abolished, by the suspension of the Chief Justice and the Third Puisne Judge (see *Gahan v. Lafitte*, ante [3 Moo. P.C.], p. 382).

A Provisional Court having been appointed, Inglis presented his Petition at their first sitting, on the 5th of January 1838, for leave to Appeal, tendering securities, and praying that a special Court might be held on the 10th (when the time limited by the Order in Council would expire), which was accordingly allowed—and summonses were issued by the Provost Marshal to the said parties, to appear. The Provisional Court, on the 10th of January, allowed the appeal and secu-[427]-rity, which was perfected on the 17th, within the three calendar months limited by the Order of Council.

On the 15th of April 1838, the Judges having been restored, a Petition was presented by the Respondent to the Royal Court, to dismiss the Appeal, on the ground that the time limited for appealing had expired, without the Petitioner perfecting his securities.

This Petition came on to be heard on the 20th of April, when the Court, after observing upon the proceedings and repudiating the jurisdiction of the Provisional Court and the legality of the Warrants of the Provost Marshal, dismissed the Appeal.

The Appellant then presented a Petition to Her Majesty in Council, setting forth the circumstances above stated, and praying for leave to prosecute his Appeal

The statement of the proceedings in the Court below was supported by the affidavit of one of the clerks in the office of the Petitioner's solicitor, the Court below having refused copies of such proceedings under seal (see ante, vol. i. pp. 2, 4, and 146).

Mr. Burge, Q.C., and Mr. Rennals, for the Petitioner, cited *Craig v. Shand* (1 Knapp, P.C. Cases, 253), *St. Louis v. St. Louis* (1 Moore, P.C. Cases, 143).

Their Lordships (Nov. 29,* 1838) allowed the Appeal, and, by an Order of Council of the 12th of December 1838, liberty was given to the Appellant to prosecute his said Appeal; and it was further ordered that all proceedings [428] against him in consequence of the said judgment should be stayed until the hearing of the Appeal or further order to the contrary, without prejudice to the power of the opposite party to contest the right of Inglis to his Appeal at a future stage of the proceedings.

Upon the Appeal coming on for hearing, a preliminary objection was taken by the Respondents on the ground of irregularity in not perfecting the security in the Court below, and the consequent absence of any security as required by the Order in Council of June 1831.

Their Lordships, however, overruled the objection, and directed the Appeal to be proceeded with, the Appellant undertaking to give security for costs to the amount of £300.

The facts of the case are fully stated in the Judgment.

* Present: Lord Brougham, The Master of the Rolls [Lord Langdale], Mr. Baron Parke, Mr. Justice Erskine, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

Mr. Burge, Q.C., and Mr. Rennals, for the Appellant.

Mr. Knight Bruce, Q.C., and Mr. Beales, for the Respondent.

The Right Honourable Dr. Lushington (July 28, 1841).—The Decree appealed from, bears date the 10th day of October 1837, and by that Decree the Royal Court confirmed an Order, dated the 14th of March in the same year, which Order was made by Paret, a Royal Notary to whom it had been officially referred to report upon the claims preferred against the estate of Ballambouche: his duty being to ascertain the validity of those claims, and to report his opinion as to the order in which they should be liquidated. He was of opinion that the present Respondents were en [429]—titled to priority of payment, postponing the claim of the Appellant, and a Madame Geneteau, who stood in nearly the same condition. The principal ground on which the Notary so reported, and the Court sustained the report, was the alleged deficiency of the registration of their mortgage title by the Appellant and Madame Geneteau, and their Lordships think that their own judgment must be governed by the opinion they may form on that question. The point for decision cannot, however, be distinctly understood without stating some of the most material facts of the case: what has been done, what has been omitted: and then considering the legal effect of such acts and omissions.

All the parties derive their title from the same source. The Ballambouche estate was formerly the property of Louis Felix Martin, and he, in 1789, ceded it to his only daughter, at that time married to a second husband of the name of Turgis; her first husband was Pierre Duval. By both marriages she had several children. Madame Turgis, formerly Martin, died in May 1803, leaving her second husband her surviving, and also children, the issue of the first and second marriages. On the 10th of October 1803, according to the law and usage of St. Lucia, an act of liquidation was made of the rights of all the children, and a sale by *Licitation* of the estate was made on the 26th of October in the same year. The eldest son and the husband were adjudged purchasers of the estate, which remained subject to the charges in favour of the other children.

The Appellant claims by assignment from Augustin Dugard Turgis, one of the sons, such deed, bearing date the 31st of January 1819. The claims of the [430] Respondent, and also of Madame Geneteau, a party in the Court below, are founded upon the rights of other children. All the parties to this suit, therefore, were originally in *eadem conditione*, and no right existed in any one to priority of payment.

St. Rose Duval, one of the children, having shortly afterwards died, a new act of liquidation, for the purpose of distributing his succession, took place on the 3rd of August 1805.

In 1811 Turgis the husband died. On the 10th of April 1811 another act of liquidation, in consequence of his death, took place. On the 13th December 1813, Louis Marie Duval, by judicial auction, became the sole purchaser of the estate subject to the charges.

There was an *addition de liquidation* on the 17th day of October 1814, but nothing as to the present question arises therefrom. In June 1816, Duval sold one half of the plantation to Lacaze. Duval died in 1817, but the plantation was retained by his widow, in partnership with Lacaze. In December 1835, Lacaze sold his moiety to Drivon, who by marriage with one of the Duvals became, with his wife, sole proprietors of the plantation. Whilst in their possession the estate was attached by process of *saisie réelle* at the suit of Brown, a creditor of the Drivons; it was sold on the 18th of February 1836, and the Court directed a reference to M. Paret, a Royal Notary, for him to report what claims existed against the proceeds, and the Order in which they were entitled to be discharged. He made his report, giving the priority to the Respondents, that report was confirmed by the Court, and thence arises this Appeal.

The ground on which the Appellant's claim is not ranked *pari passu* with the demand of the Respondents [431] is the defective registration of his title. This was the reason assigned by the Royal Notary and adopted by the Court.

In the course of these proceedings there are very many other circumstances detailed with respect to the claim of the Appellant, especially as to the mode in which

the right became vested in him, and also as to the different origin of another part of his demand; but for the purpose of deciding the present Appeal, it does not seem necessary to enter into these considerations: their Lordships conceive that enough has been stated to lead to the main question, viz., that of Registration.

The law of St. Lucia, with respect to Registration, consists of an Order in Council bearing date the 15th of January 1829, and an Ordinance made by the Governor dated July 3rd, 1829, framed for the purpose of carrying into effect the Order in Council, and in pursuance of the power conferred by such Order.* There [432] has

* The following is a copy of the Order in Council, and the Ordinance referred to, which not being to be found in any legal work in this country, it is thought advisable to append.

Order in Council of the 15th of January 1829.

Whereas, on the 25th day of July 1822, an Order was made by His Majesty in Council, for the Registry of Deeds and Instruments in the Island of St. Lucia, and it is expedient to repeal the same, and instead thereof to substitute the provisions hereinafter made. His Majesty, by and with the advice of his Privy Council, is therefore pleased to order, and it is hereby ordered, that an Order of His Majesty in Council, bearing date the 25th day of July 1822, for the Registry of Deeds and Instruments in the Island of St. Lucia, shall be, and the same is hereby repealed.

And it is further ordered, that all persons who at the time of the promulgation of this present Order, within the said Island, shall have or claim to have any mortgage, lien, charge or incumbrance, upon any immoveable property or slaves situate or being in the said Island, shall, in manner hereinafter mentioned, enroll an abstract thereof at the office of the Registrar of the Royal Court of the said Island, within eighteen calendar months, next after the promulgation within the said Island, of this present Order. And that, from and after the expiration of the said term of eighteen months, no mortgage, lien, charge or incumbrance (which at the promulgation of this present Order in the said Island, shall be subsisting or in force upon or against any immoveable property or slaves, situate or being in the said Island) shall have force, effect, or any virtue in the law (except as against persons being actually or virtually parties to the same, or the heirs and executors of such persons), until the same be first registered in manner aforesaid. Provided always that at any time after the expiration of the said term of eighteen months, it shall and may be lawful for any person who at such promulgation as aforesaid of this present Order, shall have or claim to have any such mortgage, lien, charge or incumbrance, to register the same, and the same, when so registered, shall be valid and effectual in the law, not only against the parties to the same, their heirs and executors, but also against all other persons who, subsequently to such registration, shall acquire any title to, or mortgage, lien, charge or incumbrance upon, any such immoveable property or slaves.

And it is further ordered that from and after the promulgation of this Order within the said Island, no person shall, by any deed, conveyance, or other instrument, or by any contract, acquire any legal or equitable title to, or any valid mortgage, lien, charge or incumbrance upon, any immoveable property or slaves within the said Island, until such deed, conveyance, or other instrument, contract, mortgage, lien, charge or incumbrance shall be first registered at the office of the Registrar of the Royal Court of the said Island, in manner hereinafter mentioned; but all such unregistered deeds, conveyances, instruments, contracts, mortgages, liens, charges and incumbrances, shall be absolutely null and void, and of no effect, so far as respects any immoveable property or slaves, situate and being within the said Island.

And whereas it is necessary for carrying this Order into effect that divers rules should be made respecting the mode of registering such several instruments and conveyances as aforesaid, and respecting the duties of the Registrar of the said Royal Court in that behalf, It is hereby further ordered, that it shall and may be lawful for the Governor or Officer administering the Government of the said Island, with the advice of the Council of Government thereof, by ordinances to be by them for that purpose from time to time made, as occasion shall require, to make, ordain, and prescribe all necessary and proper rules and regulations for the manner of keeping the before-mentioned Registry: and for the form and manner of Registering all such deeds, conveyances, instruments, contracts, mortgages, liens, charges and incum-

been some discussion at the Bar whether the Ordinance does not go beyond the Order in Council, and it has been contended that the Ordinance would be inoperative and void, *quod* such excess; but [433] we are of opinion that the Ordinance having been passed in pursuance of authority conferred by the Order in Council, a copy of such Ordinance having of course been transmitted to the Government at home, [434] and no disapproval or alteration having taken place, such Ordinance must be considered as duly authorized by the Order, and that the two instruments must be taken together as composing the Law of the Island.

[435] The second article of the Ordinance in question directs an abstract of the claim intended to be registered, to be deposited with the Registrar, and the third article, which is the most important as to this case, [436] directs that every abstract shall set forth "the date and nature of the Title or original Judgment Act, or branches therein, and for keeping proper indexes of all such books of registry, and for the more easy and convenient making of searches therein, and for the government of the said Registrar in the discharge of such his duty, and respecting the fees to be demanded and received by him for any matters and things to be by him done and performed in the execution thereof, with all such other rules and regulations as may be necessary for giving full effect to this present Order, all such rules and regulations being nevertheless subject to be disallowed by His Majesty, in whole or in part, as to His Majesty shall seem meet.

And it is further ordered and declared, that nothing herein contained, extends, or shall be construed to extend, to require the registry of any last Will or any Codicil thereto.

And the Right Honourable Sir George Murray, one of His Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.

C. GREVILLE.

An Ordinance

Regulating the form and manner of registering Deeds and other Instruments intended to take effect on immoveable property and slaves, and the form in which Deeds intended for registry are in future to be drawn up, and regulating the duties and establishing the fees of the Registrar of the Royal Court in respect of such Registries.

St. Lucia	}	By His Excellency David Stewart, Companion of the most Honourable Order of the Bath, Major-General, Commanding His Majesty's Forces, Governor and Commander in Chief in and over the Island of Saint Lucia, Vice-Admiral of the same, etc. etc. etc.
L. S.		
David Stewart,		
Major-General, Governor.		

Whereas His Majesty, by his Order in Council, etc.

His Excellency David Stewart, C.B., Major-General, Governor and Commander in Chief, having submitted the said Order to the said Council of Government within the said Island, has been pleased to order, by and with the advice of the said Privy Council of the said Island, that the following Regulation, prepared by the First President of the Royal Court, shall be in future duly observed.

1.

That all securities on immoveable property or slaves for debts due to vacant successions, or to the administration of absentee properties, shall be registered by the guardian of such successions and administrator of such properties; and all securities on the part of parishes against churchwardens or other persons appointed by them to receive the public money shall be registered on an application from the law officers of the Crown, and all securities for debts due to parishes or to any Public Institutions by individuals on an application from said law officers or the churchwarden or treasurer of such institution.

And all remaining liens, mortgages, charges and incumbrances, past and future, including the liquidated rights of married women, but exclusively of all other rights of married women, and of the rights of minors and persons interdicted, may be registered by the holders of such claims or any other persons holding written authority in their behalf.

2.

And it is further ordered, that all such past claims shall be registered in the manner following:—

The party applying to register shall present to the Registrar two copies of the

Abstract by which the mortgage, lien or charge was established, and the names of the parties thereto, together with the date and nature of all subsequent instruments by which such lien, mortgage, or charge has passed into the hands of the present creditor, and become a charge of the actual debtor.

abstract of the claim intended to be registered, one of which shall remain deposited with the Registrar, and the other being signed and certified by the Registrar shall be returned to the party. Every abstract is to set forth—

(1.) The name and surname of the creditor and the domicile chosen by him in the Colony.

(2.) The name and surname of the present debtor; his domicile, profession, or occupation, if he has any known domicile, profession, or occupation, or such a specific designation as will enable the Registrar at all times distinctly to make out the individual. But when the registry is intended to take effect against an undivided succession the registry need only designate or point out clearly and distinctly the person deceased.

(3.) The date and nature of the title or original judgment, act, or abstract by which the mortgage, lien, or charge was established, and names of the parties thereto, together with the date and nature of all subsequent instruments by which such lien, mortgage, or charge has passed into the hands of the present creditor and become a charge or the actual debtor.

(4.) The amount of all determinate claims, and an express estimate which the creditor is bound to make when the debt is conditional in its existence or indeterminate as to its value, and the amount of interests or incidents and the period of payment.

3.

And it is ordered that when the creditor claims any special lien or right, as of "Bailleur de Fonds" or "Acheteur à titre de réméré," or otherwise on any specific property; such lien or right shall also be distinctly stated in the abstract, or otherwise, such creditor shall be presumed to have renounced thereto and shall merely retain an ordinary general mortgage against the debtor's property with priority according to law.

And it is further ordered that any abstract in which shall be omitted the name of the creditor, or the name and a sufficient designation of the actual debtor, or the nature and date of the title from which the lien or mortgage is said to arise, or a specification of the amount of the sum claimed, shall be void.

Provided that as regards errors in the amount set forth of the sum claimed, if the sum claimed be less than is actually due, the claim shall be reduced to the sum so mentioned; but if the sum mentioned be larger, the registry shall be reduced to the actual amount of the debt, without prejudice to the debtor's right of action for damages.

If the creditor shall omit to choose a domicile either in his abstract or subsequently by some authentic document to be deposited with the Registrar, he is to be summoned for all matters concerning such registry at the Registrar's office; but creditors may at any time change the domicile chosen on notifying the same by a legal signification to the Registrar.

And it is ordered that any omission in any of the remaining points above required to be set forth in the abstracts shall render the parties making the registry liable to all damages arising from such omission, but shall not invalidate the registry.

And it is further ordered that any error or omission whatever in any point above required to be set forth may be amended at any time by a new registry; but that in all such cases the lien or mortgage in as much as relates to such amendment shall only be considered as having taken place from the day of such new registration.

Given under my hand and the Seal of Government this 3rd day of July in the 10th year of His Majesty's reign, and in the year of our Lord 1829.

By His Excellency's Command,

JOHN TENCH, Government Secretary.

[437] Mr. Inglis's claim is registered in October 1830, by what is termed a primitive and supplementary registration: the earliest title in that registration is dated the 17th of February 1817. That deed created a mortgage in favour of Inglis, Ellice, and Co., Pierre Duval and Lacaze being at that time co-proprietors, but no question appears to arise as to that deed. The next deed in date registered, is the deed of the 31st January 1819, and it is by virtue of that deed that Inglis claims the right of the succession, personal and impersonal, of Augustin Dugard Turgis, provisionally secured on the estate.

The claims of the Respondents are also registered, commencing with the deed of October 1803.

Now the first question is, whether the registration made on behalf of Inglis is in conformity with the Order in Council and Ordinance, or whether the omission of the titles prior to February 1817 is not a failure to comply with the conditions prescribed. What constituted the original Judgment or act by which the charge was established? Certainly not the deeds of 1817 or 1819; the deed of 1819 transferred a right not only long pre-existing, but long since fixed and settled by the deeds of 1803 and 1805. The deeds of 1803 and 1805 did not indeed absolutely create the right, but they liquidated the succession: they reduced that which was before an uncertain demand against the property to a fixed sum, and ascertained all other demands of a similar nature against it. The Ordinance plainly marks the distinction, for by the 2nd article, in case of an unliquidated succession, it is only necessary clearly to point out the deceased whose succession is claimed: evidently showing that more must be done in cases of liquidated successions, and what is requisite [438] must be the act of liquidation. In no consideration, therefore, of the Ordinance, can we consider the deed of 1819, which is a transfer of rights long before constituted, to be the original Judgment or Act by which the charge was established. We agree, therefore, with the Court below in their opinion that the Ordinance of 1829 has not been duly complied with.

The first point for consideration is the effect of the non-compliance with the Ordinance upon the claim of Mr. Inglis under all the existing circumstances. The Order in Council directs that no mortgage or charge subsisting at the date of the Order shall after the expiration of eighteen months have any force unless registered in manner aforesaid; that is, according to the Ordinance to be made. The claims of Mr. Inglis, therefore, *prima facie* at least, cannot be sustained, for the charge on which he founds his demand is void. The Ordinance itself too would produce the same effect, for by the 3rd article the omission of the date of the title by which the charge was created would render the registration void.

The Counsel for the Appellant has urged upon the Court that this case falls within the exception contained in the Order in Council, respecting mortgages and charges subsisting at the date of the Order, that exception being as relates to persons actually or virtually parties to the mortgage or charge, or their heirs and executors. Now assuming this clause to preserve the charge not only against the class of persons mentioned as a personal demand, but also so far as relates to those against the estate; we proceed to consider its application to the present case.

It is true that all those claims had one common origin. It is true that all the children of Rose Martin [439] were, by themselves or guardians, parties to the act of liquidation of October 1803, whereby their claims *inter se* and against the estate were settled, but we entertain considerable doubt whether they were actually or virtually parties to the deed according to the true meaning of the exception already quoted: perhaps the sounder construction might be, that the clause applied only to those who took the estate subject to the charge, and not to those who had charges arising from the same origin fixed upon the property by the same instrument. With respect to those who were the assignees or grantees of the charges, we think the clause of exception could not apply, for if it did, the great object of registration might be wholly defeated, for the assignee or grantee of the charge belonging to one next of kin might be wholly ignorant that there were other charges of the same kind, and entitled to equal payment, then subsisting, unless the deed which constituted those charges was registered. Subsequent deeds might, or might not, afford the information according to circumstances, but the evident object of requiring the original deed to be registered, is at once to inform those who require infor-

mation as to the charges upon the estate, that no person registering a claim can obtain for it priority beyond the date of the deed appearing on the register, so that persons purchasing or becoming entitled to charges, having a prior origin upon the registry, deal with them in perfect security, that they will not be defeated by latent instruments. With regard, therefore, to those who claim as assignees under De Barnard, we are of opinion that the exception in the Ordinance does not extend to them, so as to prevent them from [440] availing themselves of the advantage resulting by the neglect of the Appellant duly to register.

The only point now to be disposed of, is the alleged claim on behalf of the Appellant to be put on a footing with the claim of Charles de Barnard himself, so far as he, exclusive of his assignees, has a claim against those proceeds, and this claim is founded on the exception already adverted to in the Order in Council. Now we have some difficulty in ascertaining how the Court below dealt, if it dealt at all, with these distinctions between De Barnard and his assignees. Both the report and the decree of the Court below have not treated the registration, made on behalf of Inglis, as absolute nullities, but they have postponed payment of his demand, which arose under the deed of 1803, to the claims of De Barnard and his assignees. In substance the Court has said to Inglis, your title by your own registration commences in 1817. You shall not compete with a mortgagee registered upon a prior title. Upon the whole we see no reason to disturb the Judgment of the Court below upon this question also—whatever might be the case as to the operation of the clause of exception where there was no registration. Registration once taken place must govern all the priorities; it is the rule which the Court must adopt in the ranking of all claims, and, therefore, the Appellant must stand as a mortgagee, or entitled to a charge created in 1817 and 1819, and not before. Decree affirmed, but without costs. The costs of the Court below to come out of the corpus of the estate.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES. 7. *Miscellaneous*. As to conditions of appeal from St. Lucia, see O. in C. of March 3, 1859 (Stat. R. and O. Rev. iv. 396, 398, 400), and 52 and 53 Vict. c. 33.]

[441]

ON PETITION FROM BRITISH GUIANA.

In re GROSVENOR BUTTS * [June 25, 1841.]

Order made by the Judicial Committee on Petition for a *mandament* of substantial relief, *restitutio in integrum* and *Committimus* to the Judge of the Supreme Court of British Guiana.

This was a Petition for a *mandament* of substantial relief, to release and restore the Petitioner, Grosvenor Butts, *in integrum* from a contract of purchase and sale executed by him on the 4th of May 1839 with one Robertson, deceased, for a sugar estate or plantation called Alness, situate on the Correntine coast of Berbice, for the sum of £28,000 sterling. The Petitioner according to the terms of the contract had paid part of the consideration money, and delivered Bills of Exchange for the remainder. But no transport of the estate had been executed by the vendor, who having died intestate, the Orphan Board took possession of his estate, including the property in question, and the Bills of Exchange given by the Petitioner in part payment of the purchase-money. Soon after Robertson's decease, the Petitioner discovered that in his lifetime he had parted with an undivided third part of the estate for a valuable consideration, of which the Petitioner had no notice, in consequence whereof he presented a petition to the Supreme Court of British Guiana for a *mandament Pecuni* (injunction) to restrain the Orphan Board from parting with the estate, or negotiating the Bills of Exchange, until sentence in the action instituted by [442] him, and therein mentioned, for recovery of the estate, should be in-

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

plemented, and he prayed that the Board of Orphans and the Recorder thereof might be ordered to pass and execute to the Petitioner a legal transport or conveyance of the estate in question. The Supreme Court granted the injunction in the terms prayed, and upon the Petition being heard on the merits, directed the Orphan Board to execute to the Petitioner a legal transport of the estate. No transport was however made, for the reason, as was alleged, that no legal title could be made to the estate.

The Petitioner being advised that under the circumstances he was entitled to be released entirely from the contract for the estate and the consequences thereof, presented a Petition to Her Majesty in Council, praying for a mandament of substantial relief, *restitutio in integrum*, with *committimus* to the Supreme Court of British Guiana.

This Petition was referred by Her Majesty to the Judicial Committee of the Privy Council.

Mr. Burge, Q.C., in support of the application.—The Supreme Court of British Guiana has done all it could do, by the Dutch Roman Law, by granting its interdict: the writ of *restitutio in integrum* of substantial relief is the prerogative writ vested in the Crown, and must be granted by Her Majesty in the first instance. Vanderlinden 467. All that is asked for here is for a *committimus* to enable the Court in the Colony to exercise this prerogative, and this has always been granted even in cases where the contract may ultimately be declared null and void. The practice in applications of this nature is clearly laid down in Vanderlinden 466-7, and *Tractatus de Legibus abrogates*: Grovenewegen 447.

[443] Sir Herbert Jenner.—We are of opinion that we must be governed by the course pursued in a similar application in the Petition of Dawson and Ralph in the year 1832,* and that the order must be made in the same form as settled there. The course there taken was to refer the Petition to [444] the law officers of the

* ON PETITION FROM BERBICE.

Re DAWSON AND RALFE [October 12, 1832].

This was the Petition of Simon Dawson and George Ralfe, inhabitants of Berbice, presented to His Majesty in Council, praying for a *mandament* of substantial relief, to be restored *in integrum*, and that a day might be given for hearing, etc. The Petition set forth certain powers of attorney from one Obermuller, a party not resident in the Colony, under which the Petitioners had acted from the 10th of April 1826 to the 20th of November 1827, when they caused an Act of renunciation to be executed; and deposited the Books and papers belonging to Obermuller in the custody of the Secretary to the colony; and that thereupon new powers of attorney had been transmitted by Obermuller to other parties in the colony, who had refused to act under them. That Obermuller arrived in the colony in May 1830, and demanded the delivery of the papers, etc., from the Petitioners, which they consented to procure, on payment of their costs, etc.; that Obermuller made an application, during the non-session of the Court, to the President, for *autorisatie de facto* (*authorization de facto*), which was refused; that the Court of Civil Justice, by an order in July 1830, reviewed the decision of the President, with costs, and granted the *mandament de facto*. The Petitioners then set forth the law and practice prevailing in the colony respecting the *mandament de facto*, and stated that upon the order made as above, they presented their Petition to the Lieutenant-Governor, praying for an order of interdict to suspend the execution of the *mandament de facto*, and decree a *restitutio in integrum*, referring to the Code, Lib. 2, tit. 54, s. 1; Lib. 49, tit. 8, sec. 1 and 3, for authority thereon; but that the Lieutenant-Governor declined granting such application, being of opinion that he had no authority so to do, but that such application must be made to the King in Council, whereupon the present petition was presented.

Their Lordships, after hearing Counsel, referred the Petition to His Majesty's Advocate-General and the Solicitor-General, to prepare instructions to the Lieutenant-Governor in accordance with the law and practice of the colony, and the prayer of the petition; which was accordingly done, and an order made of the

Crown, and they drew up a memorial of instructions to the Lieutenant Governor, and we think that the form there used must be adopted in this Petition: the Order therefore will be in the same form.

On the 20th of June 1841, Her Majesty, by an order in Council directed to the Governor, Lieutenant-Governor, President, and Court of Civil Justice of the Colony of British Guiana, after reciting the above petition and proceedings thereon, was pleased to grant the prayer of the aforesaid Petition, and to charge and command the authorities aforesaid to cite the parties or their attorneys to appear before the said Court of Civil Justice, and afford unto the Petitioner in that in which he sought by his said Petition all such judicial remedy, and if necessary, grace and favour as the subject matter might require, and in equity and good conscience might appear to appertain and belong. For which purpose Her Majesty in Council was pleased to give and grant unto the authorities aforesaid, full power, authority, and command. Provided that the said Petitioner presented those letters to the aforesaid Court of Civil Justice, etc., and requested compensation thereof at the next session of the said Court, to be holden after the receipt thereof, in the said Colony, and further to proceed therein according to Law.

[See *In re Butts*, 1841, 4 Moo. P.C. 92.]

[445] ON APPEAL FROM THE COURT OF CHANCERY OF THE
ISLAND OF JAMAICA.

RICHARD STEELE.—*Appellant*; SAMUEL MURPHY,—*Respondent* *

[June 25, 1841].

Supplies advanced for a plantation, in Jamaica, by a Factor of the Attorney and agent of the plantation, is not sufficient to constitute a privity between the creditor and the owner of the estate.

A Deed entered into by the owner of an estate with trustees for the payment of certain creditors therein enumerated, but who are no parties thereto, is voluntary, and as it may be revoked at any time, creates no lien on the estate of the debtor in favour of the creditors named therein.

This was an Appeal from a Decree of the Court of Chancery of Jamaica, made in a cause wherein John Pennock, since deceased, in his capacity of executor of George Kinghorn, was the complainant, and the Appellant, John Steele, and others, were Defendants.

The complainant sought by his Bill to recover the amount of a balance which had become due to his testator, George Kinghorn, as the factor for certain plantations and estates in the Island, which formerly belonged to one William Paterson, deceased. The object of the Bill was to have it declared, by the Decree of the Court, that the balance was a lien upon the plantations and estates, in respect of which the same had become due to George Kinghorn, and to have it also decreed that the complainant, as the personal representative of George Kinghorn, was further entitled, for recovering payment of such balance, to the benefit of an indenture of the 7th of April 1819.

The Appellant was one of the creditors of the estate, [446] and assignee of a mortgage thereon, of prior date to the Respondent's claim.

The Bill stated, *inter alia*, a power of attorney, dated the 9th of February 1816, executed by all the parties who at the time had estates in the several plantations, to one William Tait, authorizing him to enter upon and take possession of the plantations, late the estates of William Paterson, deceased, and to take upon himself the

above date, the form of which was the same as that adopted in the case above reported.

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

management, direction, and cultivation of the same, and to make consignments, or otherwise to sell and dispose of the produce thereof to Harriet Paterson, the widow of the said William Paterson, or her order, and generally to pay and receive all monies, goods, etc., on account thereof, and if need be to compound and compromise all differences to arise in any manner in respect thereof. That George Kinghorn had, previous to the execution of the above-mentioned power of attorney, been the factor of the estates, and continued so to be, and that as such he had made advances and furnished supplies, amounting, on the 31st of December 1817, to the sum of £3986 16s. 3d. currency; that all such advances were made under the authority, and with the sanction of the several parties having interest in the plantations, and were necessary for their cultivation and support. The Bill then set forth a Deed of Trust, of the 7th of April 1819, executed by William Thomas Patterson, the eldest son and heir of William Patterson, the original owner of the estate, by which the estates were conveyed to trustees, for the payment of certain debts therein declared, among which was the sum of £2817 14s 7d. to the said George Kinghorn, the balance then due to him, as factor to the estates in [447] question; and after stating certain transactions between Tait and the Appellant, in respect of advances made by the latter for the benefit of the estate, the amount of which was ultimately secured by an assignment, on the 30th of April 1822, of a previous mortgage of the 21st of June 1806, upon the plantation, estate, and houses, it prayed that the same might be declared a lien and charge upon all and every the plantations, independent of the specific lien created by the last-mentioned deed of the 7th of April 1819, and for payment of the balance thereof, with the usual accounts.

The Defendants, by their answers, admitted the power of attorney, and trust deed of the 7th of April 1819, and that Kinghorn, as factor, had made advances on account of the plantation, and submitted that Kinghorn's demand was a mere personal claim against Tait, and denied the specific lien claimed by the complainant, or that he had any right of priority.

No witnesses were examined, and, on the 1st of February 1836, the cause was heard before His Excellency the Governor and Chancellor of the Island, who, by his Decree, declared the demand of Kinghorn to be a prior lien on the estate, and decreed an account to be taken thereof accordingly.

From this Decree the Appellant appealed to Her Majesty in Council.

Mr. Burge, Q.C., and Mr. Wigram, Q.C. for the Appellant.

The Respondent's testator was the creditor of Tait personally, or of the person by whom he was appointed factor, on account of the supplies and advances made by him for the plantations. No privity existed between him and the Appellant, and when a principal does not know the persons whom the agent employs, there is no privity between them and him. It has been expressly decided by this Court, in *Pennant v. Simpson* (1 Knapp, P.C. Cases, 399), that a factor in Jamaica making advances, or furnishing supplies for estates, upon the employment of the agent of the proprietors of those estates resident in England, does not thereby acquire a demand against such proprietors, but is the mere personal creditor of the agent by whom he was employed. Even if Kinghorn had become the creditor of the constituents, either of Tait or of the other agent by whom Kinghorn had been employed as factor, he could only be considered as a personal creditor, and could acquire no lien on the plantation. *Worrall v. Harford* (8 Ves. 4), *Garrard v. Lord Lauderdale* (3 Sim. 1), *Acton v. Woodgate* (2 M. and K. 493), *Walwyn v. Coutts* (3 Mer. 707; 3 Sim. 14). A factor does not, by any law or usage of Jamaica, or from the nature of his business, acquire a lien on the plantations for whose use he may furnish supplies, or make advances.

Mr. G. Richards, Q.C., and Mr. Rennalls, for the Respondents.

It is clear that Kinghorn was entitled to a lien on the plantation and slaves, inasmuch as the debt due to him arose from advances made, and supplies necessary for the plantations furnished by him, by the order and direction of Tait, the attorney, duly constituted, and in the possession and management of the plantations. *Whitfield v. Sayers* (1 Knapp, P.C. Cases, 133), *Scott v. Nesbit* (14 Ves. 438), [449] *Farquharson v. Balfour* (8 Sim. 210), *Simon v. Hibbert* (1 Russ. and M. 719). And this relation subsisted after the execution of the Deed of Trust of the 7th of April 1819: the previous course of dealing with Kinghorn was continued, and never dis-

avowed by the parties interested in the plantations; he was allowed to continue his advances and supplies after the admission by the trust deed, that his previous advances as a factor were a charge on the plantation, whereby forbearance was obtained, and the debt due to Kinghorn, as factor, was increased; we therefore submit that Kinghorn, from the nature of his demand, was entitled to priority and preference over the other claims on the plantation, and that neither the mortgagee, nor the Appellant, who claims under him, can be allowed to set up the mortgage as entitled to priority and preference in payment, over the balance due to the estate of Kinghorn.

Lord Brougham.—Their Lordships are of opinion that this Decree cannot be supported.

It is quite unnecessary to consider what would be the case if there had been, as assumed, a lien constituted by the owner of the estate in behalf of Kinghorn, acting as the factor, or in any other way furnishing supplies to the estate, because this is not that case. We have no such case before us, but we have the case of Tait acting as attorney under a power of attorney from the owner of the estate, which estate had been previously mortgaged to Stephenson; and that it appears by intermediate conveyances to others; Steele, the Defendant below, took that mortgage. [450] That mortgage existing, a power of attorney was given to Tait, and Tait, acting under that power of attorney in the management of the estates, employs Kinghorn as factor, and under that employment it is said Kinghorn acted: whether there is evidence or not in the cause that Kinghorn was so employed, and, being so employed, so acted, and, so acting, furnished supplies to a certain extent, it is wholly unnecessary to inquire. There seems to be very indifferent evidence of it—in fact, the whole of the evidence of it is that which amounts to inference only—not of the fact, but of the party himself, the owner of the estate, Paterson, having in the deed of the 7th of April 1819, stated that—for it is really no more. But be it so that he was employed, still that constitutes no privity between Kinghorn and the owner of the estate, or between Kinghorn and the estate itself.

The cases which have been referred to, particularly the case decided here, of *Pennant v. Simpson* [1 Knapp, 399], must indeed be overruled in order to constitute any lien in these circumstances. With respect to the case of *Simond v. Hibbert*, (1 Russ. and Myl. 719,) before Lord Lyndhurst, that does not in the least degree touch or even approach the present case, for in that case there was a dealing, not merely implied from the circumstances, but a distinct dealing between the owner of the estate and the person furnishing the supplies.

With respect to the other point as to the deed of the 7th of April 1819, it appears to us to be a feebler ground, if possible, upon which to support the decree, than the lien, for this ground cannot be maintained without entirely overruling those cases of *Walwyn v. Coutts* [3 Mer. 707; 3 Sim. 14], and *Garrard v. Lord Lauderdale* [3 Sim. 1], together with other cases in which the same doctrine has been [451] recognized, particularly in a case of *Gibbs v. Gibbon* (not reported [5 Jur. 378; S.C. *Gibbs v. Glamis*, 11 Simons, 584]), before the present Lord Chancellor when he was at the Rolls, and the case of *Acton v. Woodgate*, (2 Myl. and Keen. 493,) before Sir John Leach, also at the Rolls: and it is to be observed that those are both cases expressly of a party holding as trustee for creditors under an authority from the owner of the estate, which he might revoke at any time, if he should see fit; and this deed of April 1819, when it comes to be looked at, is most eminently an arrangement by the party himself for the payment of his own debts. He is a trustee for the payment of his own creditors, and it was upon that ground that *Walwyn v. Coutts* and *Garrard v. Lord Lauderdale* went—that they were private arrangements revocable by the party himself, and of which, therefore, no person not a party to it can take advantage, or compel him to give effect to; and in *Walwyn v. Coutts* the matter comes on, not upon bill and answer, but on motion for an injunction, and the Court held that the injunction could not be granted, and held so upon the ground that no such lien was constituted.

Their Lordships, therefore, are of opinion that this Decree cannot stand; the Decree must, therefore, be reversed, and Mr. Stephenson, or his representative,

cannot have the benefit he prays by his bill, to have a priority and account in favour of his own mortgage, but the bill must be dismissed with costs.

The ground of our Judgment goes to dismiss the bill absolutely, for it goes upon the foot of Kinghorn having no lien, and consequently he had a right to come into Court against the estate, or the owner of the estate, whatever right he might have against Tait or his representative.

[Mews' Dig. tit. BANKRUPTCY, II. 1. m.; also tit. COLONY, II. PARTICULAR COLONIES, 22. *West Indies*. On point as to revocable trust-deeds, see *Johns v. James*, 1878, 8 Ch. D. 744; *Henderson v. Rothschild*, 1886, 33 Ch. D. 469; *In re Ashby; ex parte, Wreford* (1892), 1 Q.B. 872; *New Prance and Garrard's Trustee v. Hunting* (1897), 1 Q.B. 607; 2 Q.B. (C.A.), 19; *Priestley v. Ellis* (1897), 1 Ch. 489.]

[452] ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

JAMES HILL ALBOUY,—*Appellant*; M. T. RETEMEYER and Others,—*Respondents* * [July 1, 1841].

Abatement upon a demand for rent for the hire of slaves allowed in respect of three, manumitted under the Slave Abolition Act, but refused for the loss occasioned by the diminution of the hours of work of the apprenticed labourers, the compensation for the lessee's loss of such labour being the proper subject of a counter-claim before the Commissioners of Compensation.

The question raised by this Appeal was whether the Appellant was entitled to a remission of rent as an indemnity for the loss of the services of certain slaves, occasioned by the operation of the Slave Abolition Act.

The Appellant was the lessee of a plantation called La Repentie, with the slaves thereon, for a term extending to the 1st of March 1837. The Respondents were the owners of the plantation and the slaves so leased to the Appellant.

On the 1st of August 1834, the Act for the Abolition of Slavery [3 and 4 Will. IV. c. 73] came into operation, under the provisions of which the slaves were converted into apprenticed labourers, and their labour limited to forty-five hours in the week instead of fifty-four, being a diminution of one hour and a half per day, and equivalent, as was alleged by the Appellant, to a sixth part of their effective labour. In the month of January 1836, the Respondents having discovered that three negro women [453] attached to the plantation La Repentie were of Indian origin, and they could not lawfully be continued apprentices by virtue of the powers conferred by the Act, discharged them from their apprenticeship, and thereby deprived the Appellant of their services for the remainder of his term. The Respondents made their claim for compensation for the slaves on the plantation, and obtained by the award of the Commissioners the sum of £6780 9s. 3d. The Appellant made no counter-claim in respect of his interest in the slaves, or for the loss sustained by reason of the manumission of the three negro women, but he applied for a diminution of rent on account of such loss, and was referred by the Respondents to his remedy in the Supreme Court.

Accordingly he presented a petition to the Acting Chief Judge of the colony, setting forth his title and the loss sustained by him, and claiming a diminution of rent in consequence thereof; at the same time offering to refer the matters in dispute to arbitration.

The Acting Chief Justice proposed to allow the prayer of the petition as respected the reference to arbitration, but the Respondents refused their assent, and commenced an action against the Appellant in the Supreme Court of Civil Justice for the arrears of rent, and made and submitted their claim and demand in such action for balance of capital and interest thereon.

* Present: Lord Brougham, Mr. Baron Parke, Sir Herbert Jenner, and The Right Hon. Dr. Lushington.

The Appellant filed his conclusion, offer and answer to the Respondents' claim, setting forth the grounds of defence contained in his petition as above stated: to which the Respondents filed their conclusion of replique and the Appellant his conclusion of duplique.

Evidence was taken on both sides, and witnesses ex-[454] amined, and the cause was heard on the 23rd of February 1839, when a definitive sentence was pronounced, whereby the Court condemned the Appellant (with the rejection of his conclusion of presentation, offer and answer) to pay the Respondents the full amount claimed, without any abatement or allowance in respect of the loss sustained by the manumission of the three negro women, and the diminution of the labour of the slaves on La Repentie plantation. From this definitive sentence the Appellant appealed to Her Majesty in Council.

Mr. Burge, Q.C., and Mr. Dickinson, for the Appellant.—This question must be decided by the principles of the civil law, which govern the contract of *locatio conductio*, and we submit that, according to those principles, the Appellant, the hirer of the slaves, is entitled to a remission or abatement of the rent, when, without any default on his part, he ceased to be able to retain the entire enjoyment or use of the subject hired to him. Vanderlinden 238; Voet. lib. 19, tit. 2, n. 1, 14; Pothier Tr. de Louage, 141. The act for the abolition of slavery came into operation on the 1st of August 1834, from which period, by reason of the diminution of the hours of labour, the Appellant was deprived of the services of the apprenticed labourers belonging to the plantation, besides the total loss of the three manumitted negro women: the Appellant, however, still continued liable to defray all the expenses of the plantation; he was therefore entitled, by the law in force in the colony, to have an abatement made to him out of the rent agreed to be paid, and his only remedy was to obtain a remission of rent in re-[455]spect thereof—he could not counter-claim, for neither the Act of Parliament, or the Rules of the Commissioners, contemplated such a case as his. It is provided for only by the civil law.

Mr. Kindersley, Q.C., and Mr. J. Parker, for the Respondents.—The Appellant, if he has any claim to a remission of the rent, ought to have put in a counter-claim before the Commissioners, for a share of the compensation money. The rules promulgated by the Commissioners provide for every sort of interest. It is clear he has mistaken his way; he was only entitled to an abatement of the rent in respect of the diminution of value of the labour of the slaves; he could not claim in the Court at British Guiana compensation for loss occasioned by the Act of Parliament abridging the hours of labour of the slaves, for a special remedy is given by the Act, and Commissioners appointed to adjudge compensation, and that was the tribunal he ought to have applied to for redress. *Gordon v. Bruce* (2 Moore's P.C. Cases, 261).

Mr. Baron Parke.—This is not a question of compensation for the loss of the services of the slaves by reason of the diminution of their labour under the slave abolition Act: that ought to have been the subject of a counter-claim, and is provided for by the Act, and the 5th rule of the Commissioners framed under it; but the only question here is, whether the Court below ought not to have allowed an abatement in the amount claimed, in respect of the three manumitted negro women, whose [456] services were entirely lost by the act of the Respondents. The case is similar in principle to one recently decided in the Court of Exchequer, *Wainwright v. Ramsden*, (5 Meeson and Welsby, 601.) where the party having neglected to claim compensation under a railway act, was held precluded from insisting on an abatement of the rent due for the premises. Their Lordships think that the Appellant's claim to that extent ought to be allowed, and will therefore advise Her Majesty to vary the Decree of the Court below, by deducting the estimated value of these negroes, which, from the Appellant's evidence, seems to be 600 guilders,—to the extent of that sum, therefore, with interest, the Decree of the Court below must be varied, but, under the circumstances, without costs on either side.

By an Order in Council, bearing date the 11th day of August 1841, it was ordered, that the definitive sentence of the superior Court of Civil Justice for the district of Demerara and Essequibo, in the colony of British Guiana, of the 23rd of February 1839, ought to be varied, by condemning the Appellant to pay to the

Plaintiff the sum of 8236 guilders 9 stivers and 8 pennings, and 1386 guilders 10 stivers for the balance of interest due to the Plaintiff, to the 28th of February 1837, (instead of the sums of 8836 guilders 9 stivers and 8 pennings, and 1440 guilders 10 stivers,) with further interest in the aforesaid sum of 8236 guilders 9 stivers and 8 pennings, from the 28th of February 1837, until fully paid, with costs.

[457] ON APPEAL FROM THE ROYAL COURT OF JERSEY.

PETER BROUARD,—*Appellant*; PHILIP DUMARESQUE and Others,—*Respondents* * [Dec. 3, 1841].

A vessel was mortgaged for a nominal sum to secure an unascertained balance due to the mortgagee, with power to sell by public auction; and in case the vessel could not be sold, the mortgagee was to hold, enjoy and possess the free use, control and possession thereof as sole owner, until the full amount of his claims should be satisfied. Default was made in payment of the sum named before the real balance was ascertained, and pending the investigation thereof before arbitrators, and the mortgagee caused the vessel to be sold by private contract. Held by the Judicial Committee reversing the decisions of the Inferior and Supreme Courts in the Island, that such sale was wrongful, and not warranted by the conditions of the mortgage deed, and an account of the value of the ship at the time of such sale ordered to be taken, and the amount thereof paid to the mortgagee [3 Moo. P.C. 464].

Appeal in *forma pauperis* allowed, the Appellant by his petition and affidavit alleging that he was not worth £5 besides wearing apparel, etc. [3 Moo. P.C. 462].

This was an appeal from a decision of the Royal Court of Jersey, affirming the Judgment of the Inferior Court in an action of Remonstrance brought by the Appellant against the Respondent, for the restoration of the ship or vessel *Reward*, and compensation in damages for having illegally sold the same.

The Appellant was a ship-builder and general merchant, resident at Gaspé in North America, transacting business for and in correspondence with Helier Vibert, a merchant and inhabitant of the Island of Jersey.

In the year 1834 the Appellant completed a vessel of 157½ tons, called the *Reward*; in the months of November and December previous wrote to Vibert, re-[458]-questing him to send out the necessary rigging and equipments, termed in nautical phraseology the "Inventory," for fitting out the vessel.

At the period when this order reached Jersey, Vibert had become insolvent, and his effects had been assigned over to Dumaresque, the Respondent, and others, as sureties, in trust for his creditors, in consequence of which the Respondent went himself to Gaspé to recover the property there situate, belonging to Vibert, and carried out the "Inventory" so ordered by the Appellant.

Various sums were demanded by Vibert's assignees from the Appellant, independent of the amount of the inventory, the particulars of which they were unable to state or explain, the insolvent's books being at Jersey, but which being disputed by the Appellant, it was agreed between them that the amount so claimed should be taken at the nominal sum of £1280, to be secured by mortgage of the vessel, which it was stipulated should forthwith sail for the port of Jersey, and that the accounts between Vibert and the Appellant should be there investigated by competent accountants.

For the purpose of carrying this arrangement into effect, it was agreed that the Appellant should finish and have launched with all possible dispatch the vessel *Reward*, and that the Respondent should furnish the inventory necessary to put her

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and The Right Hon. Dr. Lushington.

to sea, to proceed to the Island of Jersey, that the certificate of registry should pass one half to each party, and that the vessel should be sold in Jersey in the course of three months after her arrival, and after deducting the amount of the inventory advanced by the Respondent, and the balance due to Vibert, transferred to the Respondent. [459] This agreement was reduced into writing and duly executed on the 9th of June 1831; the vessel was launched on the 21st of October 1834, and sailed for Jersey on the 21st of November 1834. On the morning of her departure from Gaspé, the Appellant, at the request of the Respondent, executed three documents: First, a bill of sale, dated 29th of October 1834, of thirty-two sixty-four parts of all and singular the masts, sails, etc. and appurtenances whatsoever to the said ship or vessel belonging; the consideration money being £600, with memorandum endorsed thereon, stating that "the within bill of sale being given in part security for the payment of advances, debts and inventory, the same shall cease and be of none effect as soon as the amount is fully paid, and the transfer shall be declared cancelled and of no force to the within named P. Dumaresque, when the said P. Brouard shall have so paid the full amount of the said engagements."

The second was a document of the same date, in the nature of a bond and mortgage from the Appellant, of the vessel, with a power of sale by public auction, the proceeds to be applied in liquidation of the debts due to the Respondent, and in case the said vessel could not be sold, then the Respondent was to hold, enjoy and possess the free use, control and possession of the said vessel as sole owner, until the amount of his claims should be fully paid.

The third, also of even date, was an agreement to refer the accounts then pending between the parties to the arbitration of proper and competent accountants, the Respondent undertaking not to proceed to act on the bond and mortgage until the exact amount due from the Appellant should have been established.

[460] The vessel arrived in Jersey in December 1834. The accounts, having been delivered by the Respondent and his co-sureties to the Appellant, were, by an Act of the Royal Court, of March 1835, referred to four persons as arbitrators, with power to nominate a fifth as umpire, if they should deem it necessary.

The Appellant having quitted Jersey, with a view as was alleged, of proceeding to Gaspé, to obtain further evidence of the claims made by him against the estate of Vibert, the Respondent, notwithstanding that the accounts were still pending before the arbitrators, and no balance ascertained, advertized the ship *Reward* for sale on two several occasions by public auction; no sale at either time took place, but on the 31st of July 1835, and before any award had been made by the arbitrators, the Respondent transferred the *Reward*, with all her contents, to Francis Bertram, under sale by private contract, for the sum of £625 Jersey currency, equal to £576 18s. 6d. sterling.

The sale was entered on the books of the Custom House at Jersey, as having been made by the Respondent pursuant to the mortgage deed of the 29th of October 1831, whereby in default of payment of the sum therein named three months after the arrival of the said vessel, he was authorized to sell the same by public auction; the condition then appearing not to have been performed.

In November 1835, the Appellant returned to Jersey, and finding the vessel had been sold in his absence, he applied in the first instance to the Respondent to show his authority for the sale: and subsequently to the arbitrators to proceed with the accounts; and being desirous that the vessel should be replaced as originally agreed upon, he commenced an action of re-[461]-monstrance in the inferior Court of Jersey against the Respondent for restitution of half the ship *Reward*, and for recovery of damages.

The cause was heard before the inferior number, on the 24th of September 1836, when the Court sent the case to the arbitrators to make their award thereon.

The arbitrators accordingly met and made their award, whereby they adjudged the sum of £667 1s. 4d. (equal to £605 15s. sterling) to be due from the Appellant to the Respondent; but did not take into account the value of the ship, or the price for which the same was nominally sold.

The arbitrators having declined entertaining the question of legality or illegality of the sale of the vessel by the Respondent, and confining themselves solely to the account, the Appellant, on the 11th of March 1837, presented a remonstrance to

the inferior Court against the Respondent, for payment of the sum of £2076 18s. 6d. sterling, as the value of the ship, allowing thereout the sum of £615 15s. sterling, so awarded by the arbitrators as aforesaid.

The cause was heard by the inferior Court on the 27th of June 1837, and was decided in favour of the Respondents, liberty being reserved for the Appellant to Appeal to the superior Court.

The Appellant, accordingly, appealed to the Supreme Court, when that Court, on the 2nd of April 1838, affirmed the Judgment of the inferior Court. From this Judgment of affirmance the Appellant appealed to Her Majesty in Council, and being in impoverished circumstances, applied, by Petition, for leave to Appeal in *forma pauperis*.

The Petition stated the facts of the case as above set forth, and prayed for leave to appeal in *forma pau*-[462]-*peris*, and that the usual sureties for prosecuting the Appeal might be dispensed with. It was supported by an affidavit verifying the allegations, and stating that the Petitioner was not worth £5 in the world, excepting his wearing apparel and his interest in the matter at issue; and that he was unable to provide sureties. It was accompanied also by a certificate of Counsel, that the Petitioner had grounds of Appeal.

Their Lordships allowed the Petition (July 6, 1838 *).

Mr. Romilly and Mr. Montagu Smith for the Appellant.—The sale of the ship cannot be supported: it was fraudulent and illegal. Fraudulent in the circumstance under which it was effected, and illegal, because contrary to the power contained in the mortgage deed of the 29th of October 1834, and the stipulations of the various agreements made between the parties. The arbitrators, moreover, omitted altogether to take into consideration the value of the ship at the period of the sale, and made no allowance in respect of such value to the Appellant; the Royal Court ought therefore to have sent back the case to them, to revise and rectify their accounts, and the Appellant is entitled, on that ground, to have the case remitted to the Court below.

Mr. Stuart Wortley, Q.C., and Mr. Crompton, Q.C., for the Respondents.—The voluntary absence of the Appellant from the Island was sufficient to justify the sale of the vessel, which cannot now be set aside. The condition of the [463] Mortgage Bond had become absolute, and the Respondents were not bound to await the Appellant's return to the Island, which might be indefinite, or to postpone the sale until the arbitrators had made their award, when the Appellant himself was the party withholding the means of completing that award. There is no allegation of fraud in the pleadings, and unless fraud is alleged it cannot be urged; it is never presumed. The Respondents had moreover a right to sell, in the circumstances, by the Civil Law (3 Burge. Com. 206-7).

Lord Campbell (Dec. 18).—This is an Appeal from a Judgment of the Royal Court of the Island of Jersey, in a suit instituted by the Appellant, for wrongfully selling his ship, the *Reward*, by private contract, on the 31st of July 1835.

The Court below was of opinion that the sale was lawful, and gave Judgment for the Respondents.

The ship in question belonged to the Appellant, and had been made over to the Respondent, Dumaresque, as a security for the payment of certain sums of money, the amount of which, at the time, was unascertained.

It was contended before us, that according to the contract between the parties, Dumaresque had no authority to sell the ship till the amount had been ascertained by arbitrators, who had been appointed for that purpose; and, at any rate, that the sale was unlawful, as it was by private contract, whereas Dumaresque, the mortgagee, had no authority to sell, unless by public auction.

The first question is attended with considerable difficulty, from the multiplicity and vagueness of the [464] instruments executed by the parties in the course of the transaction. But on this question it will not be necessary for their Lordships

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir Herbert Jenner, and the Chief Judge in Bankruptcy [Sir Thomas Erskine].

to give any opinion, as they clearly think that the sale was unlawful, being by private contract.

By an instrument, bearing date the 29th of October 1834, to the terms of which Dumaresque must be taken to have acceded, it was stipulated, that at the end of three months after the ship's arrival at Jersey, Dumaresque was to be at liberty, and was authorized to sell her by public auction, in Jersey, and to apply the proceeds in liquidation of the debt due to him; or in case the vessel could not be sold, then Dumaresque was to hold, enjoy and possess the free use, control and possession of the vessel, as sole owner, until the full amount of his claims should be satisfied. We conceive that Dumaresque hereby renounced any power that he might have had, as mortgagee, otherwise to have disposed of the vessel, and to have agreed, that if he could not sell her by public auction, he would keep her in his possession, and employ her till from her earnings his claims were satisfied. The mortgagor might have very good reasons for guarding against a sale by private contract, and stipulating for some other mode whereby the mortgaged property might be rendered available for the benefit of the mortgagee.

It follows that the sale by private contract, on the 31st of July 1835, was wrongful, even supposing that Dumaresque was at liberty to sell by public auction at the expiration of three months after her arrival at Jersey, and before the balance due on all the accounts had been ascertained.

Their Lordships will, therefore, advise Her Majesty, that the Judgment appealed against should be re-[465]-versed; that the Respondent, Dumaresque, be declared liable to the Appellant for the value of the ship, on the 31st day of July 1835; that it be referred to the Royal Court of the Island of Jersey, to ascertain such value; and that the Respondent, Dumaresque, be ordered to pay the amount to the Appellant, deducting therefrom the balance found due by the award of the arbitrators, from the Appellant to Dumaresque.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, l.; also tit. SHIPPING, A.; IX. MORTGAGE, 4. On point as to *in forma pauperis* appeals, see *Brouard v. Dumaresque*, 1848, 6 Moo. P.C. 412; *In re Lemprière*, 1858, 11 Moo. P.C. 398; *Bunny v. Hart*, 1857, 11 Moo. P.C. 199; *In re Sarchet*, 1856, 10 Moo. P.C. 533; *Kelly v. Corlett*, 1860, 14 Moo. P.C. 89; *M'Leod v. St. Aubyn* (1899), A.C. 549.]

ON APPEAL FROM THE COURT OF FIRST INSTANCE OF CIVIL JURISDICTION OF THE ISLAND OF TRINIDAD.

The Right Hon. Sir GEORGE FITZGERALD HILL,—*Appellant*; THOMAS BIGGE and EDMOND WALLER RUNDELL, *Respondents* * [December 4, 1841].

Plea to an action of debt, brought in the Court of First Instance in the Island of Trinidad, that the Defendant was, at the commencement of the action, and still continued to be, Lieutenant-Governor of the Island, and as such not liable to be sued; overruled.

Semble:—Though judgment be given against such Governor, his person is not liable to be taken in execution while on service.

The Appellant, the Right Hon. Sir George Fitzgerald Hill, on the 10th of November 1825, became bound by his writing obligatory to Philip Rundell, John Bridge, Edmond Waller Rundell, and Thomas [466] Bigge, of the City of London, jewellers, and co-partners, in the sum of £825 13s., Irish money.

The Appellant, some time after giving the said bond, became Lieutenant-Governor of the Island of Trinidad and its dependencies.

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

On the 24th of June 1837, the Respondents, Thomas Bigge and Edmond Waller Rundell, the surviving partners of Rundell, Bridge, and Co., brought their action in the Court of First Instance of Civil Jurisdiction of the Island of Trinidad, for the recovery of the above debt.

On the 13th of July 1837, the Appellant came into Court under protest, and pleaded that the said Court ought not to hear or take further cognizance of the action, because, at the time of the commencement of the said action, he was, and still continued, Lieutenant-Governor of the Island of Trinidad, and its dependencies, and that he was therefore not liable to be sued in the said Court.

The Respondents demurred to the plea, and prayed judgment. The cause was declared contested, and on the 17th of November 1837 the cause was tried, and the Court, after hearing counsel in support of and against the exception pleaded by the Appellant, on the 20th of November 1837, ordered Judgment to be entered up in favour of the Respondents against the Appellant, for the amount of the debt, with interest, and all costs.

From this Judgment the present Appeal was brought.

Mr. Burge, Q.C., and Dr. Addams, for the Appellant.—The Appellant being Lieutenant-Governor of the Colony, is exempted from being called on for liabilities [467] in the colony over which he is placed. By the terms of his commission, he is vested with the legislative as well as the executive power (Stoke's Brit. Colonies, 150, 154, 188); his exemption cannot, therefore, be merely personal, as from arrest, but is much higher; he is not within the jurisdiction of the Courts; they are incompetent to entertain a suit, or to pronounce judgment therein against him.

This privilege is not one merely of municipal law, but is founded on a higher title, viz., the Law of Nations. Thus Puffendorf, *de officio hominis et civis*, says—"If the subject be aggrieved by a sovereign, he cannot maintain an action, or oblige him to redress: he may persuade him if he can." The same position is laid down by Locke in his *Essay on Government* (part 2, sec. 205), who observes, "that it is better a private mischief should ensue to an individual, than that the peace and security of Government should be violated by an attack upon the magistrate exercising the power of state;" and by the law of this country, if redress is sought for an injury committed by the Crown, it must be, if there is any redress, by petition of right (3 Black. Com. 254-5).

The Statute 11 and 12 Will. III., c. 12, made to punish Governors of plantations, for crimes committed by them in such plantations, recites, that a due punishment is not provided for such offences, and that Governors, etc., have taken advantage thereof, "not deeming themselves punishable for the same here, not accountable for their crimes and offences to any person within their respective Governments and commands." Now if there was no jurisdiction against [468] a Governor in criminal matters, before the statute, *a fortiori*, none could have existed in civil cases, and the statute is confined to criminal offences only.

The authority of the Governor of Trinidad is derived from the proclamation of the 19th of June 1813 (West Ind. Com. Trinidad, App. p. 176; 1 Howard's Col. L. 153). By that, all the powers of the executive government within the Island are vested solely in the Governor for the time being; and all such judicial powers as, previous to the surrender of the Island, were exercised by the Spanish Governors, are to be exercised by the Governor then appointed. This includes the authority and jurisdiction of the Court of Audiencia. By the constitution of the Colony under the Spanish Government, the Court of Audiencia had original, civil and criminal jurisdiction over all the inhabitants of the Island (West Ind. Com. Trinidad, p. 18), so that the Governor is, by the proclamation of June 1813, invested with like power; can arrest, grant, or repeal the writ of *habeas corpus*, try actions, and do all such acts as belong to the supreme authority, acting judicially as well as executively. Now, is this consistent with his being liable to be sued in an action of debt? The doctrine of the inviolability of a Governor is derived from the Civil Law; it is expressly provided for "*In jus vocari non oportet, neque Consulem, neque Prefectum, neque Praetorem, neque Proconsulem, neque caeteros Magistratus, qui imperium habent, qui coercere aliquem possunt, et jubere in carcerem duci*" (Dig. Lib. 2. tit. 1. l. 2): and has been adopted by the Spanish law (1 White's Recopulation, 367), which is the authority in Trinidad.

In *Fabrigas v. Mostyn* (1 Cowp. 161), Lord C. J. Mansfield, [469] assigning the grounds of his judgment, says: "Now in this case no other jurisdiction is shown even by way of argument: and it is most certain that if the King's Court cannot hold plea in such a case, there is no other Court upon earth that can do it, for it is truly said that the Governor is in the nature of a Viceroy, and of necessity part of the privileges of the King are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because, what would the consequence be? Why, if a civil action lies against him, and a judgment obtained for damages, he might be taken up and put in prison on a *capias*; and therefore locally, during the time of his government, the Courts in the Island cannot hold plea against him." That was an action brought in England against a Governor of Minorca for trespass and false imprisonment, and the very circumstance of its being held to lie in the Courts here, clearly shows that it could not be brought in the Courts there—the argument of the Lord Chief Justice is conclusive. In *Tandy v. The Earl of Westmorland* (27 State Trials, 1216: 20 State Trials, 229), an action was brought against the Defendant for an act done by him as Lord-Lieutenant of Ireland, and the subpoena after solemn argument was quashed. The action was brought in Ireland, and the Lord Chief Baron of the Exchequer, Lord Fitzgibbon, was clearly of opinion that no such action lay, and gave judgment accordingly. The point has been expressly decided in Canada in *Harvey v. Lord Aylmer* (1 Stuart, Rep. of Cases in the K.B. in Lower Canada, 542): there an action of debt was brought against the Defendant by a servant, and the claim [470] being an account of wages, and damages for the non-payment thereof. The Defendant pleaded that he was Governor of the province of Lower Canada, and averred that so long as he continued to execute the said office and trust, no suit nor action could be had or maintained against him in any of his Majesty's Courts within the province, for any matter or thing whatsoever; and the Court allowed the exception, and dismissed the action, the Chief Justice Sewell observing that there was no room to doubt the validity of the exception which had been filed. The Court were of opinion that the case of *Fabrigas v. Mostyn* [Cowp. 161] was alone sufficient to determine the question, but they cited all the authorities, and stated two cases of a similar nature, which had already been decided in the Upper Province of the country. The inconvenience of the rule forms no argument against it: the subject cannot be said to be without remedy, for he may petition for the Governor's removal, and the Crown might put him on terms to do justice if it thought fit—the inconvenience is only similar to the case here of the Will of the Sovereign; there is no law prohibiting the King from making a testamentary disposition of his property, but there is no Court capable of administering such property, or of granting probate of such a Will; that is a practical hardship both upon the Sovereign and the parties who would be beneficially entitled (1 Add. Ecc. Reps. 255 [see now 25 and 26 Vict. c. 37, s. 7]).

Mr. Erle, Q.C., and Mr. Merrivale, for the Respondents.—The proposition contended for by the Appellant cannot be supported on principles either of law or [471] justice. It is neither consistent with the Law of England or the Law of Spain, which is in some measure the rule by which this case must be governed. The protection sought, would give impunity to every Governor of a colony for any act committed by him in the colony over which he is set; and release him from every contract or civil obligation. This exemption from the responsibilities of an ordinary citizen is founded on a supposed identity of the office of Governor and that of Sovereign. But the privilege claimed would be even then too high, for the Sovereign has no such extravagant prerogative, and there is no real analogy between the two offices.

The authority of a Governor is derived from the Crown; it is delegated, and not inherent, and is defined by the Commission and instructions. By the usual form of the Commission (Stoke's British Colonies, 154), the Governor is Captain-General of the forces by sea and land within his province: he is one of the constituent parts of the General Assembly of his province; he has the custody of the Great Seal, with the same power as the Lord Chancellor of England; he is the Ordinary within his province, and presides in the Court of Error, of which he and the Council are Judges, and he is Vice-Admiral within his province, but does not sit in the Court of

Vice-Admiralty, there being a Judge of that Court. The instructions formerly issued to the Governor of Trinidad are to be found in the memorable trial of General Picton (30 State Tr. 225, 499, 500) for a misdemeanour, in which the question turned upon the legality of the application of the torture by the Law of Spain, and the liability of [472] the Governor for applying it. The case was thrice argued upon the special verdict, but no decision was pronounced by the Court. There is however nothing throughout these lengthened proceedings to give colour to the supposition that he could not be proceeded against, because he was Viceroy of the colony—no such ground was taken: the sole question was, whether it was a judicial act, and if so, whether the act done was according to the Laws of Spain. The powers of Captains-General, Governors or Viceroy in Spain, are derived from *cedulas* (royal provisions) or instructions, as in this country, and no such privilege as that contended for here, is to be found in the books containing either the instructions or the laws relating to them (1 White's New Recopulation, 367-372). On the contrary, by the *Recopulation de leyes* it is provided that those who shall think themselves aggrieved by the acts of the Viceroy, or President, may appeal to the Audience, that is, the Royal Tribunal, and neither shall such Viceroy prevent such appeals, or be present at them (Lib. 11, tit. 15, l. 35; White's New Recop. 34).

The 11 and 12 Will. III., c. 12, is a declaratory act (4 Inst. 284). The preamble recites that the Governors, etc., "not deeming themselves liable"—that is no declaration that they were not liable: but the enacting part clearly shows the object of the Act, which was to enable parties to proceed in the Court of King's Bench here for offences committed in the Colonies, and is analogous to the provisions of the Piracy Acts for offences committed on the high seas. The absence of any provision in that Act against civil injuries is a strong inference that Governors were amenable for such before [473] the Act. Lord Bellamont's case (2 Salk. 625), *Comyn v. Sabina* (cited 1 Cowp. 169, 175), and *Fabrigas v. Mostyn*, all show such liability to attach to the office of Governor. In the latter case, Lord Mansfield says, "The great difficulty I have had in both the arguments has been to comprehend clearly what the question is which is meant seriously to be brought before the Court. It is said, 1st, that the Defendant being Governor of Minorca is answerable for no injury whatsoever done by him in that capacity. It is truly said, that the Governor is in the nature of a Viceroy, and therefore, locally, during his government, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment;" and he adds, that "to lay down in an English Court of Justice such a monstrous proposition, that a Governor, acting by virtue of Letters Patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property with impunity—is a doctrine that cannot be maintained." The case of *Harvey v. Lord Aylmer* is no authority here; it is manifest that Chief Justice Sewell proceeded upon a misapprehension of the case of *Fabrigas v. Mostyn*; he states that to be decisive of the non-liability of a Governor; but the whole tenor of Lord Mansfield's reasoning and judgment is against such a conclusion. In *Tandy v. Earl of Westmoreland*, the act complained of was a political act, and for such, a Governor or Viceroy would not be liable any more than a Judge for a judicial act; but that is not this case: the question here is whether the Appellant [474] can screen himself from an action upon his bond on the plea that he is Governor of the Colony in which the action is brought. He may be free from arrest: that is the common case of members of Parliament, ambassadors, servants, soldiers, and others engaged in the service of the Sovereign or that of the State (Sir T. Raymond, Rep. 151; 3 Black. Com. 255): but though such persons have freedom from arrest, can it be argued that their property is not liable? that judgment may not be had or execution issued against their goods and chattels, or even their lands? What reason is there against a similar rule here? There is, however, no pretence for presuming such exemption, for by the law of Trinidad there is no power of arrest before judgment; and after judgment, execution operates against both personal and real property before the person can be attached (Trin. Com. Rep. 12, 16, 69, 91). With respect to the practice of the Civil Law, the passages quoted from the digest must be taken with great limitation. The officer, under the Roman law, nearest answering to our Governors of Colonies, were

the Presidents or *Præses*, who were sent into the provinces directly under the control of the Emperor (Dig. lib. 1, tit. 18, l. 1 and 6), and though they could not be sued in any Court of law, if they were vested with jurisdiction, and had a coercive and punitive power during the time of their office, yet at its expiration they might (Dig. lib. 5, tit. 1, l. 48), and were obliged to remain fifty days in the cities or provinces over which they presided, after the expiration of their office, to enable the Provincials to prefer any claim or complaints [475] against them (Bart. l. 24; Dig. 48, tit. 5). Grotius confines the question of the non-liability of Kings, to such as are entrusted with legislative power, and distinguishes between the acts done by a person having such authority in his legislative or in his private capacity: in the latter there is no exemption (2 Rutherford's Inst. 263-4).

Lord Brougham (Dec. 18).—This is an Appeal from the decision of the Court of First Instance of Civil Jurisdiction in the Island of Trinidad, in which a Petition was filed on the 24th of July 1837, by Messrs. Thomas Bigge and Edmond Walter Rundell, the surviving partners of Philip Rundell and John Bridge, of the City of London, jewellers, to whom the Appellant, Sir George Fitzgerald Hill, Lieutenant-Governor of the Island of Trinidad, had executed a bond on the 10th of November 1825, about twelve years previous, for the sum of £825 13s. sterling. The Petition prayed a citation against the Appellant to answer the premises, which citation was accordingly issued; was duly served, and the Appellant was summoned to answer the Petition so filed against him. He appeared under protest, and filed a plea setting forth that he was at the time of the Petition being filed, and at the date of the plea, Lieutenant-Governor of the said Island and its dependencies, and, as such Lieutenant-Governor, he was not liable to be sued in the said Court, nor bound to appear to any process issuing therefrom, nor to answer to any action instituted therein; and, according to the proceedings in that Court, the issue was joined upon the plea which leaves the whole [476] question for the Court, and the Court having heard the parties, postponed their Judgment. They afterwards gave Judgment, by which they ordered payment by the Defendant, of the sum, together with interest, amounting to the sum of £1578 9s. 7d., currency.

From this Judgment the present Appeal is brought; and the question raised in this case is, whether an action will lie against the Governor of a Colony, in the Courts of that Colony, while he is such Governor, for a cause of action wholly unconnected with his official capacity, and accruing out of the Colony before his government commenced?—and this question appears to be one, whatever may be its importance, of no great difficulty.

It may safely be affirmed that they who maintain the exemption of any person from the law, by which all the King's subjects are bound, or, what is the same thing, from the jurisdiction of the Courts which administer that law to all besides, are bound to show some reason or authority, leaving no doubt upon the point.

The reference to analogies, or the supposition of inconvenient consequences, must be much more pregnant than any that can be urged in this case, to support or even to countenance such a claim. If it be said that the Governor of a Colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him:—"The Governor" (said Lord Chief Justice De Grey, in *Fabrigas v. Mostyn*, when that case was before the Common Pleas, which afterwards came by error into [477] B. R.) "is the King's servant: his commission is from him, and he is to execute the powers he is invested with under that commission; which is to execute the laws of Minorca, under such instructions as the King shall make in Council." It is proper to observe, that this was the case of the Governor of a Province formerly, and once belonging to the Crown of Spain, as Trinidad formerly did; and that one of the arguments for the Defendant put his claim upon the highest ground, namely, that he was by the Spanish law and constitution absolute within a district at least of his government, having "supreme power vested in him, and being only accountable to God." Again this Court, in *Cameron v. Kyte*, (3 Knapps' P.C. Cases, 332,) when a claim to represent the Sovereign and hold the royal power by delegation was set up, refused to allow it, and considered him as only an officer with a limited authority. Their Lordships, in deciding that case, referred

to the *dictum* of Sir William Scott in the *Rolla*, (6 Robinson, Adm. Rep. 364,) that a naval commander may be reasonably supposed to carry with him such a portion of the sovereign authority as shall be necessary to provide for the exigencies of the service. But they said that this observation is plainly applicable only to the case of a commander carrying on war in a remote quarter, and the authority necessarily incident to that situation, and can have no application to the case of a Colonial Governor. Nor must we forget, in reference to the position of the supreme power in the state, that by our law and constitution it is not in the Sovereign, but in the Parliament, the Sovereign himself being liable to be sued, though in a particular manner; and if his liability be such, even as much restricted as some have occasionally maintained, it would still be [478] greater than the Appellant's argument supposes the liability of a Governor to be.

The consequences imagined to follow from holding the Governors liable to action like their fellow subjects are incorrectly stated, and, if true, would not decide the question. For it by no means follows that because an action may be maintained and judgment recovered, therefore the same process must issue against the Governor as against another person, pending his government. His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now, of persons privileged from legal process; but there still are some such exemptions, as privilege of Peerage and of Parliament, and of persons in attendance upon the Sovereign, and upon Courts of Justice. None of these privileges protect from suits, all more or less protect from personal arrest in execution, or judgment recovered by suit. Indeed the old, and we may now say obsolete writ of protection, which the King granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the Courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment. Cro. Jac. 419, 25 Ed. III., s. 5, c. 119. It may be observed in passing, that those protections were a provision made by the old law for the security of persons in the foreign service of the Crown: as commanders of armies, ambassadors, and doubtless governors of the continental dominions also. Co. Litt. 130 a. It therefore is not at all necessary that in holding a Governor liable to be sued, we should hold his person liable to arrest while on service—that is, while resident in his government. It is not even ne-[479]cessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is subject to a different consideration.

Next: Suppose all these alleged consequences had been accurately stated, they could not necessarily decide the question: many cases might be put, of as great inconvenience, and even of as great violence done to public feeling, and as great mischief to the public service, by the execution of legal process, as any in the cases that have been put. Yet in none of these circumstances can it for a moment be pretended that the law is not to take its course. The inconvenience which would result from a general officer or an ambassador being taken in execution, on the eve of his departure on service abroad, or the mischiefs that would ensue to the administration of justice from a Judge being taken in execution almost at any time, are quite undeniable; but equally certain it is, that these inconveniences offered no argument whatever against the unquestionable liability of all those functionaries to undergo, like the rest of the King's subjects, the process of the law.

Indeed, it is manifest that if these alleged consequences prove anything, they prove too much; they go to set up an exemption from suit in the Courts of this country during the continuance of the Governor's functions. For nothing that happens to him within the limits of his own government could be much more injurious to his authority than his being outlawed in the Courts of Westminster, or having judgments against him there; supposing he prevented the outlawry by appearing to the actions.

Then, is there any authority of decided cases for [480] the position in question? It is unnecessary to say anything of *Tandy v. Lord Westmoreland*, because the question there arose upon an act of the Lord-Lieutenant in his capacity of Governor, and because there would be no safety in relying upon the report of the case; it

ascribes *dicta* to the Court which there is every reason to suppose must be inaccurately reported, *dicta* in some of which it is impossible to concur.

The case of *Fabrigas v. Mostyn*, when it came by error into the King's Bench, furnishes the only thing like authority for the contention of those who seek to impeach the judgment under review, and it is not pretended that the decision is upon the point now in question. An action of trespass and false imprisonment having been brought against the Governor of Minorca, he pleaded first the general issue, and then a justification: that he had, as Governor, and in the discharge of his duty, imprisoned and removed Plaintiff, to prevent and put down a riot and mutiny in which he was engaged. To this special plea there was a replication *de injuria*, and both issues were found for Plaintiff, whereupon the Defendant having tendered a bill of exceptions on the ground that the learned Judge who tried the cause ought to have directed the jury to find for the Defendant, because he had acted as Governor of Minorca, and was not liable to be sued in the Courts of England, for acts done in Minorca, a writ of error was brought in B. R., and the Court gave judgment for the Defendant in error. (Plaintiff below,) holding it quite clear that an action will lie, and that the learned Judge did right in not directing the jury as required by the Defendant. There having been no evidence to support the plea of justification, there could be no objection taken to the finding of the jury, and a motion for a new trial in the Com-[481]-mon pleas had been refused, whether made against the verdict or against the Judge's directions does not distinctly appear. Nor indeed is it quite clear from the report, in which way the Governor's counsel really meant to shape their case; and this, though three elaborate arguments had been held, is observed upon by the Court in passing the Judgment.

This much, however, is quite certain—that the decision is not against the liability of Governor Mostyn, to be sued in the Island during his government, even for acts of state done by him, much less for a private debt—contracted in his individual capacity, before his government commenced. It is only a decision that he was liable to be sued in England for personal wrongs done by him while Governor of Minorca.

Nor does the decision thus given rest upon any doctrine denying his liability to be sued in the Island. There is no doubt a *dictum* of Lord Mansfield in giving the Judgment,—that “the Governor is in the nature of a Viceroy, and that therefore locally during his government no civil or criminal action will lie against him.” And the reason, and the only reason, given for this position is, because upon process he would be subject to imprisonment; with the most profound respect for the authority of that illustrious Judge it must be observed, that, as has been shown, the Governor being liable to process during his government, would not of any necessity follow from his being liable to action, and that the same argument might be used to show that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege. But the decision in the case does not rest on this *dictum*: on the contrary, Lord Mansfield goes on to say that another reason of a different kind “would alone be deci-[482]-sive,” and indeed the *dictum* itself is introduced as if the question had arisen upon a plea in abatement to the jurisdiction—whereas it arose not on the pleadings at all, as his Lordship more than once remarked. Nothing can be more clear than the action being of a transitory nature: its being maintainable in Minorca would not have prevented it from lying in England also. It is a possibility that the expressions used may have been somewhat altered in the report. It certainly represents Lord Mansfield (Cowp. 174) to have treated the manner in which the Privy Council deals with colonial law, as a similar case to that of courts having to examine questions of foreign law, which is proved as matter of fact. But supposing the report is quite accurate in all respects, the decision in no way supports the contention of the Appellant.

A case was decided in Parliament, at the end of Charles II.'s reign—*Dutton v. Howell*—which Governor Mostyn's counsel relied much upon, and in which the Judgment of all the Judges (for it had been brought from the Exchequer Chamber and King's Bench) was reversed, and a Governor held not liable to be sued in England, for imprisoning a person guilty of official delinquency under his government. It is quite clear that this case afforded no precedent for Governor Mostyn's, much less for the defence to the present action. It went on the ground of the Governor

and his Council having acted judicially; and though the counsel for the Plaintiff in error before the House of Lords urged, among other things, that Governors of Scotland and Ireland could not be sued, so did they also contend, that it would be equally dangerous to sue privy councillors (Show P.C. 27); a position probably as much disregarded by the House of Lords, [483] who reversed the Judgment, as it certainly had been, with the other arguments of the same caste, by the Judges of the three Courts who had pronounced it.

It is unnecessary to say anything respecting the statutory provision of 11th and 12th Will. III., c. 12, which in one view makes rather more against the Appellant than it does for him, nor respecting the alleged judicial powers of the Governor of Trinidad, as he appears not to stand in the situation which has been supposed. It cannot be alleged that the process runs in his name; and even if he were (which he is not) the Court of Error, that would not decide that he cannot be sued. The Judges of Courts in this country, which have the most unquestionable jurisdiction in certain actions, are themselves liable to be sued in such Courts; and cases might easily be figured, in which great difficulty would arise how to try suits brought against them in consequence of their official position: but the possibility of such difficulties, whatever legislative enactments it might give rise to upon its nearer approach, can never surely be urged as a reason for denying what all men know to be the law, namely, that those parties are liable to be sued.

The Judgment appealed from must, therefore, be affirmed, and their Lordships see no reason for varying from the general rule. It must, therefore, be affirmed with costs.

[S.C., with notes in 4 St. Tr. (N.S.) 723. As to position of Colonial Governor, see *Cameron v. Kyte*, 1835, 3 Knapp, 332, and note thereto at p. 347; *Musgrave v. Pulido*, 1879, 5 A.C. 102; Anson, *Law of Constitution*, vol. 2, 2nd Edit., p. 475 *et seq.*; Forsyth, *Const. Law*, 80, 84.]

[484] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

JOHN TOUZEL,—*Appellant*; PHILIP FILLEUL and PHILIP TOUZEL,—*Respondents* * [Dec. 14, 1841, and Feb. 4, 1842].

The principle of the *Droit de Retrait* (as formerly existing in Jersey) is to place the person exercising the right in the same situation as the vendee; but by the law of Jersey the heir is not bound to perform the stipulations of an original contract where it is personal; where, therefore, a contract was of a mixed nature, the price of the purchase being to be paid partly in money and partly in services, the Judicial Committee held, affirming the Judgment of the Court below, that such contract could not be enforced against the vendor's heir, so as to give him a right to the redemption of the estate.

On the 28th of September 1832, the Respondent, Philip Touzel, an aged and infirm man, by a contract of that date, "of his own free will," (in the form usual in the Island,) "leased, quitted, made over, and surrendered for him and his heirs, by way of *demission*," unto Philip Touzel, the other Respondent, and his heirs, a house, offices, and appurtenances, together with certain lands attached thereto, situate in the parish of St. Clement, in the Island of Jersey, upon the following terms and conditions: viz., that the said Respondent, Philip Filleul, and his heirs, should pay, acquit, and discharge all and every such rents, dues, and seigneurial rights as might be owing for and on count of the premises, and generally all and every such debts as the Respondent, Philip Touzel, might [485] justly owe, and further to maintain, lodge, wash for, and support the said Philip Touzel, and generally to supply him with all things necessary to human life, as well in sickness as in health,

* Present: The Lord President [Lord Wharnccliffe], Lord Brougham, Mr. Baron Parke, and The Right Hon. Dr. Lushington.

and after his decease to bury him in a becoming manner, according to his state and condition. And it was further agreed between the said parties, that if they could not agree to live together, then the Respondent, Philip Filleul, or his heirs, should in such case allow him, the said Philip Touzel, the use of two rooms in the said house, and pay him the sum of 266 livres 13 sous 4 deniers yearly, during his life.

In consequence of the above conveyance, the Respondent, Philip Filleul, entered into possession of the said house, lands, and premises, and the Respondent, Touzel, who had already lived with the Respondent, Philip Filleul, a considerable time, still continued to reside with him. The property thus conveyed was the whole of Touzel's real and personal estate.

In the month of May 1833, the Appellant, John Touzel, who was the brother of the Respondent, Philip Touzel, by virtue of the then existing custom of the Island of Jersey, called "*Retrait lignager*," claimed the right of redemption, or pre-emption, of the said house, lands, and premises, and commenced an action against the Respondent, Philip Filleul, in the Royal Court of Jersey, to exhibit the said contract before the Court, to receive the money he had disbursed, and to quit possession of the said house, land, and premises.

The cause was tried before the inferior number, consisting of the Bailley and three of the Jurats, on the 9th of May 1833, when the Court decided in favour [486] of the Appellant, by sending the parties before the Viscount, before whom payment was ordered to take place on the 6th of July following.

The Respondent, Philip Filleul, appealed from the above decision to the full Court.

On the 29th of July 1833, an Act was passed by the States of the Island of Jersey, by which the right of the "*Retrait lignager*" was abolished absolutely, from the 1st of January 1834. This Act was ratified by His late Majesty in Council, on the 30th of July 1834.

The Appeal of Philip Filleul came on for hearing on the 18th day of November 1835, when the Respondent, Philip Touzel, asked permission of the Court to intervene in the cause, inasmuch as he was interested in the same, on account of the clause by which it was stipulated that he should be maintained, lodged, washed for, and supported by Philip Filleul, and supplied with all things necessary for human life, as well in sickness as in health, and be by him buried after his death. The Court permitted his intervention.

On the 25th of November 1835, the Royal Court reversed the Judgment of the inferior number, and decided that, inasmuch as the contract was a "*délaissement au demission*," it was not of a nature to give rise to the "*Retrait lignager*," or right of redemption or pre-emption.

From this decision the present Appeal was brought. On the part of the Appellant, the following reasons were submitted for reversing the Judgment:—

I. Because every transfer of land in Jersey, in discharge of a debt, or in consideration of any payment whatever (except the payment of previously existing [487] rents, or other incumbrances charged upon lands), was, by the law of Jersey, a sale, and subject to the "*Retrait lignager*."

II. Because upon a sale in consideration of the payment by the purchaser of the vendor's debts, the law of Jersey obliged the relation exercising the right of re-purchase, to pay to the purchaser such of the debts as the purchaser had paid, and to give him security for the payment of such of them as might afterwards be demanded of him.

III. Because the "*Retrait lignager*" had in no instance been defeated by the contract being of a mixed nature. So that in an exchange or a gift of land (to which kinds of conveyance the law of Jersey never extended the "*Retrait lignager*"), if any money or pecuniary consideration passed, the land conveyed to the person paying such consideration was by the law of Jersey subject to the "*Retrait lignager*."

IV. Because the law of Jersey never permitted the relation's right of re-purchase to be defeated by any contract between the vendor and purchaser.

V. Because in every sale of land in Jersey the relation's right of re-purchase might, according to the Judgment of the 25th November 1835, have been defeated

by a third person lending the amount of the purchase-money to the vendor, and receiving payment of that debt from the purchaser.

The Respondent submitted that the Judgment appealed from was just and proper, for the following reasons:—

I. Because the condition that the donee shall pay the donor's debts, was not sufficient to bring the present contract within the definition of a conveyance in the nature of a sale, so as to make it subject to the [488] right of pre-emption. The stipulation for the payment of the debts being introduced only because it would have been a fraud on the donor's creditors not to have provided for the payment of his debts, and such a stipulation had not the effect of making the deed void or voidable, as against the person claiming the right of *retrait* or pre-emption.

II. Because it is required by the law, that the person claiming the *retrait* or right of redemption or pre-emption, should fulfil all the conditions of the deed; but in this case it would be impossible for the Appellant to perform them.

III. Because by the laws of Normandy, and the custom of Jersey, founded thereupon, a deed of this nature, being one of *démision* or *délaissances*, was not subject to the claim of *retrait*, or right of redemption or pre-emption.

Mr. Burge, Q.C., and Mr. Busk, in support of the Appeal cited Terrier's Dic. tit. *Retrait*, 316; *Coutume de Normandy*, tit. 18, art. 482, p. 445; 2 Basnage, 206, 274-5-6, 280, 330, 335; 1 Godefroy, 191, art. 496, 450; et vol. 2, p. 206, art. 452; Berauld, 5; 2 Potier, pt. 1, ch. 2, s. 16, p. 296.

Mr. Russell, Q.C., and Mr. Wigram, for the Respondent, were not called upon by the Court.

Mr. Baron Parke.—This Appeal is to be decided on the principle which governs the *Droit de Retrait*, which is, that the vendor is to be put in the same situation as he was before the contract; he is not to suffer by the exercise [489] of the right, by the heir, to redeem the family estate, but he is to be in the situation he originally stood in. If the sale is for money, he may be in the same situation, but if it is a case in which the contract is for something personal to be done for him by the vendee, he cannot be in the same situation, which is inconsistent with the principle of the *Droit de Retrait*. If in the circumstances of this case it could be made out by the authority of Potier that the *Droit de Retrait* might be exercised, considerable effect would be produced upon their Lordships' minds, and their Lordships were struck by the case cited from Potier, in which by the law of France the party is bound to perform the contract. But throughout the Appellant's argument he could produce no law from the Island of Jersey to that effect, and to say in this case that the *Droit de Retrait* was to be enforced, would be to alter the law of Jersey, and would make it very different to what it is at present. The vendor must be maintained by the heir-at-law, or he would be put in a different situation, or he must commute the maintenance by the fixed stipend which he was to receive, and to have two rooms in the house. In that case he would have the responsibility of the heir, instead of the personal responsibility of the party with whom he had contracted, and we do not find that there is any authority to be cited from the law of Jersey, to show that the heir is bound to perform the stipulations of the original contract, and therefore the party conveying cannot be put in the same situation in which he intended to be placed when he entered into the contract with the vendee.

We, therefore, think that the Judgment of the Court below, reversing the Judgment of the Bailey and three [490] of the Jurats, is perfectly right, and their Lordships have the satisfaction in this case of knowing that their opinion agrees with those of the highest authorities in the Island, who have had the best means of forming a correct judgment upon the subject.

Their Lordships are therefore of opinion that this Appeal must be dismissed with costs.

[Mews' Dig. tit. COLONY. II. PARTICULAR COLONIES, 13. *Jersey and Guernsey*, c.]

ON APPEAL FROM THE COURT OF APPEALS OF CIVIL JURISDICTION
OF THE ISLAND OF TRINIDAD.

EDWARD JACKSON,—*Appellant*; PHILIP and GEORGE PROTHERO,—
Respondents * [May 18, 1842].

Appeal dismissed for want of prosecution.

Semble:—It is not necessary for the Respondent to lodge a printed Case and Appendix before moving to dismiss the Appeal for non-prosecution.

The Petition in this case was presented by the Respondents to dismiss the Appeal for non-prosecution.

The Petitioners had instituted actions in the Court of First Instance of Trinidad against the heirs of one William Walker, deceased, and obtained judgment in such actions for the sum of £109,836 17s. 3d., currency, upon which writs of execution were duly issued. The Appellant was the syndic of certain creditors of William Walker, and on the 11th of November 1824, instituted his action of *Terceira* against [491] the Petitioners, for £13,555 15s. 3d. out of the estate of William Walker.

On the 11th of May 1825, the Court of First Instance pronounced sentence in the action, decreeing that the judicial referee of the Island should report the amount due to the Appellant.

The Petitioners appealed from this sentence to the Court of Appeal of Civil Jurisdiction in the Island, which Court, on the 8th of December 1825, reversed the sentence of the Court of First Instance, so far as that Court gave preference to the Appellant over the Respondent.

The Appellant obtained leave from the Court to appeal to His Majesty in Council from this sentence, but did not lodge his appeal in England till December 1828.

The Respondents put in an appearance in January 1829, but no steps were taken by the Appellant from that time in the Appeal.

Under these circumstances, the Respondents presented the present Petition, praying that the Appeal might be dismissed for non-prosecution. The Petition was supported by the Affidavit of one of the Respondents, verifying the dates, and in which he stated that the proceedings appealed from being very voluminous, could only be obtained at an expense of several hundred pounds, and that the Respondents having good reason to believe that the Appellant did not intend to prosecute his Appeal, had, for that reason, and on account of the great expense attending the same, abstained from obtaining certified copies of such proceedings.

Notice of the Petition was served on the agent for the Appellant, who appeared at the hearing, but stated [492] that he had received no instructions to prosecute the Appeal, but on receiving such notice to dismiss, had sent out to Trinidad, but had not yet had time to receive an answer.

Mr. Burge, Q.C., in support of the Petition, submitted that there was no rule to compel the Respondents to print their Case and Appendix before moving to dismiss, when the Appeal was not prosecuted, though something like a rule existed, when the Judgment of the Court below is affirmed and the Appeal dismissed, but that the present application was for a mere dismissal of the Appeal for non-prosecution.

Lord Brougham.—The prayer of the Petition must be granted, and the Appeal dismissed for want of prosecution. There is no such rule as requires the Respondent to print his Case, before applying to dismiss, when the Appeal is not prosecuted by the Appellant.

By an Order in Council, of the 3rd of June 1842, it was ordered that the Appeal from the Judgment of the Court of Appeals of the 8th of December 1825 be dismissed for non-prosecution, whereof all parties whom it might concern were to take notice and govern themselves accordingly.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, c.]

* Present: Lord Brougham, Lord Campbell, the Vice-Chancellor Wigram, and the Right Hon. Dr. Lushington.

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, 1841-45. By EDMUND
F. MOORE, Barrister-at-Law. Vol. IV.

ON APPEAL FROM THE SUPREME COURT OF CIVIL JUSTICE OF
BRITISH GUIANA.

DONALD CHARLES CAMERON,—*Appellant*; The Representatives of JAMES
FRASER, deceased,—*Respondents* * [Feb. 4 and 5, 1842].

A. sold to B. a plantation in Berbice. The purchase-money was secured by bills of exchange drawn by B. on houses in England: and as a further security, B. on receiving a transport of the estate, hypothecated the same to A. for the amount of the purchase-money then due on the bills, with interest and damages accruing thereon, declaring such mortgage to be a first and preferent charge. Some of the bills were protested and returned to the colony, and the plantation was in consequence sold under an execution-sale at the suit of A. The Supreme Court of British Guiana in adjudicating the claim of A. and the other creditors of B., held A. to have a preferential claim for the principal and interest due upon the protested bills, but refused to allow such right for the damages consequent thereon. The Decree, so far as it refused the preferential right for damages, held erroneous, and reversed.

An interlocutory order, referring matters of account to the sworn Accountant of the Court of Civil Justice in Berbice, with instructions thereon, is not such a definitive sentence as by the rules of the Civil Law requires a specific appeal, but may be questioned on a general appeal from the final sentence of the Court [4 Moo. P.C. 9, 10].

The Appellant, Donald Charles Cameron, was originally the owner of a sugar plantation called Canefield, in the colony of Berbice. In 1816 he entered into a contract with Lewis Cameron, for the sale of a moiety [2] of the plantation, *cum annexis*, with certain slaves thereon, for the sum of £23,000 sterling. Part of the purchase-money was paid at the time, and it was agreed that the residue should be paid by instalments, to be secured by a mortgage of the premises to be granted by the purchaser on receiving a transport of the plantation from the Appellant. On the 16th of January 1819, there was due in respect of the purchase-money, the sum £10,420, in payment of which, Lewis Cameron drew three bills of exchange, of even date, upon Messrs. Campbell, Bowden and Co. of London, payable to the Appellant on order respectively, twelve, eighteen and twenty-four months after date, with interest at the rate of six per cent., and damages at 12½ per cent. per annum, as per agreement.

On the same day the Appellant agreed to sell the other moiety of the plantation

* Present: Lord Wynford, Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington.

to Lewis Cameron for the sum of £35,475 sterling, for which he drew six bills of exchange on Messrs. Davidsons, Barkly and Co. of London, in favour of the Appellant, payable in succession, at intervals of six months, with interest, the payment whereof was to be secured by mortgage, in like manner as upon the previous purchase. In pursuance of these agreements, an Act of Transport of the entirety of the plantation, *cum annexis*, was on the 12th of April 1819 passed in due form of law, by the Appellant, to Lewis Cameron: and on the same day an Act of Hypothecation of the estate was executed by Lewis Cameron to the Appellant, to secure as well the sum of £35,475, the purchase-money of the last moiety of the estate, as also the sum of £10,420, the residue of that due for the first. The mortgage-deed set forth the particulars of the sums due upon the several bills of exchange, and the respective [3] times the same would become payable: and after providing for the consignments from the estate, and the application thereof, it declared that,—“For the due payment and discharge of the debts thereinbefore confessed and specified, amounting to £45,895 sterling, and the further interest or damages accruing thereon, he, Lewis Cameron, over and above the general bond or obligation, on his person and effects thereby included, declared specially to charge, mortgage and hypothecate, all the said plantation, commonly called or known by the name of Canefield, situate, etc., with all the erections and buildings thereon, cultivation, and further appurtenances thereto belonging, together with 284 slaves thereto attached, whose names were thereunto annexed, the said plantation and slaves, with their increase and further cultivation, buildings and improvements, to remain bound, mortgaged, and executable, for the payment of the said bills of exchange thereinbefore recited and confessed, as a first and preferent charge thereon, until full satisfaction thereof, and until the last as well as the first-mentioned bills were fully paid and satisfied, with submission to the judicature of the Court, to be condemned to pay and satisfy the debt therein confessed, and to do, perform and execute, all and every the matters and things thereby promised and engaged for such purposes, irrevocably empowering the two senior clerks, for the time being, in the Secretary's office of the said colony, reciprocally to ask and demand, confess and consent, in said willing condemnation.”

Five of the six bills drawn on Messrs. Davidsons, Barkly and Co., and the three drawn on Messrs. Campbell, Bowden and Co., were protested for non-payment, and [4] returned to the colony. In accordance with the power contained in the mortgage-deed, sentence of willing condemnation was pronounced against Lewis Cameron, the mortgagor, and the plantation, *cum annexis*, and slaves, were taken in execution, and sold at the suit of the Appellant.

Upon the execution-sale having been made, the Appellant, according to the practice of the Court, caused edicted summonses to be issued, calling all known and unknown creditors and claimants in the proceeds of the sale, to file their claims against the same before the Court. Whereupon the Respondents as the representatives of the estate of James Fraser, deceased, appeared and made claim of preference for £10,000, due to that estate, on account of a sentence of the Court of Civil Justice of the 15th of September 1809, and which sum, Jacob Gerard Cloot de Nieuwerkerk (who had become a joint proprietor of the plantation Canefield with Lewis Cameron) were together condemned to pay the Respondents, by a definitive sentence of the Court of the 28th August 1823.

It appeared that Lewis Cameron and de Nieuwerkerk had jointly dealt with the estate, and, among other transactions, had hypothecated the same for advances made to them by a mercantile house in Bristol. This hypothecation was expressed to be subject to that previously made to the Appellant for payment of the then protested bills, drawn on Messrs. Campbell, Bowden and Co., and Messrs. Davidsons and Co. as above stated, which were scheduled, the account being exhibited, with damages, at the rate of $12\frac{1}{2}$ per cent., expressed to be “as per agreement,” and interest and costs.

Various proceedings took place between the Appellant as Plaintiff and *Debattant*, and the Respondent as [5] Defendant and *Debattee*, before the Court, relative to the Appellant's mortgage debt, and the amount and full particulars thereof.

The Court having heard the parties, and read and examined the documents and vouchers produced, referred the accounts of the Plaintiff and *Debattant* to the sworn Accountant of the district, to settle and adjust the balance due to the Plaintiff, under

and by virtue of the mortgage-deed, with interest thereon, *under deduction of all charges for damages and interest on such damages*: and the Court further directed the Report of the Accountant thereon to be laid before it at its next session, when it would pass a definitive sentence.

This Decree or Order was not appealed from, and in obedience thereto the Accountant made his Report in relation to the claim filed by the Appellant, and submitted, among other things, whether any notice was to be taken of the damages on two bills of exchange, which appeared to have been paid and retired, but which were not filed. The Court replied in the negative to this query, and the Accountant proceeded to make his second Report, whereby he certified, that the balance in favour of the Appellant in respect of his mortgage claim was £23,473 13s. 5d., for which he had a preferent right over the Respondent on the proceeds of the plantation Canefield, with its buildings and appurtenances. This Report was confirmed by the Court, and a Decree made on the 19th of October 1837, in the terms thereof; but as the sum awarded did not include the damages consequent on such of the bills as were protested, and not otherwise paid, the Appellant appealed against that part of the sentence which refused to allow him any preferent right on account of those damages.

[6] Mr. Burge, Q.C., Mr. Turner, Q.C., and Mr. Oliver, for the Appellant.

The sentence of the Supreme Court, in rejecting the Appellant's claim for damages and interest thereon, in respect of the protested bills, is erroneous, and contrary to the law and usage in force in the colony. Such damages constituted part of the debt secured by the mortgage-deed, and were recoverable with the same rights of preference and priority as belonged to the principal sums and interest on the bills themselves. It is manifest that the distinction made by the Court between the principal monies and interest, and the damages on the bills, is ill-founded in law, and cannot be sustained.

But the Respondents assume that we are pre-empted from opening this question, as we did not interpose an appeal from the order of reference to the Accountant. This objection is untenable. The order of reference was not a definitive sentence. No appeal lies from an interlocutory order.—Voet, lib. 49, tit. 1. *De Appellationibus*. 2nd Rep. of W. I. Coms., 197.

Mr. Tinney, Q.C., and Mr. Ellison, for the Respondents.—The Accountant's Report, finally approved by the Decree appealed from, was made upon correct principles. In point of time, we are the first mortgagees having a tacit hypothec by virtue of the sentence of the 15th September 1809. Dig. lib. 42, t. 1, l. 61; that sentence was confirmed by the sentence of the 28th August 1823, which was appealed and affirmed by this Court in 1830. The judgment too was in favour of minors, who have a tacit hypothec on the property of their tutors and curators. Dig. lib. 27, [7] tit. 9, l. 3. The charges and damages, and the interest upon such charges and damages, could not lawfully be added to the mortgage security. *Ex parte Marlar* (1 Atk. 151). But this question cannot now be opened, for the first Decree was a definitive sentence, and ought to have been appealed from. The effect of the order of the Court, directing that, in settling and adjusting the balance due to the Appellant upon his mortgage, all charges for damages were to be disallowed, was, to preclude the Court from varying the account as to the damages. No appeal was preferred from this order, or from the subsequent order confirming the Accountant's report. The objections urged against these orders cannot now be entertained.

The Right Hon. Dr. Lushington.—In this case, their Lordships are of opinion that no reasonable doubt can be raised as to the true construction of the instrument of mortgage. They are of opinion, that under the mortgage-deed, of the 12th of April 1819, a good lien was created for the whole amount of the purchase-monies, including the bills of exchange, the interest due thereon, the cost of protest, and the damages.

The question, then, is, whether anything has been stated on behalf of the Respondents, which ought to detract from, or in any way diminish, the right apparently conferred by this deed. Now, it has been contended, on behalf of the Respondents, that the parties whom they represent, by virtue of a decree made in the Court below some years since, viz. on the 28th of August 1823, and affirmed by a judgment of the Privy Council about the year 1830, that they, as representing [8] the estate and

the property of minors, have a right to be considered as having a preferential claim against the whole property of Lewis Cameron, who was one of the persons against whom that suit was brought, and who appears to have intruded with that estate, and it must be taken, upon the face of those proceedings, to have appropriated thereby to his own use the property belonging to the minors.

Assuming that this argument is to all intents and purposes correct, and that in virtue of the decisions of the Court below, and of this Court, the Respondents would be generally entitled to have such a lien, or tacit hypothec, as it is called, from the date and period of the commencement of their guardianship, their Lordships are of opinion that that circumstance in no degree whatsoever militates against the claim of the present Appellant, because in looking at this case, in the first place, their Lordships see that the Court below, if they had been disposed to pronounce for the tacit hypothec, has not considered that circumstance, as in any degree pre-empting the present Appellants from having their claim under the deed of April 1819, for the repayment of the purchase-money and interest, and their Lordships are clearly of opinion, that if that tacit hypothec form no objection to the Appellants' receiving their purchase-money and their interest under that Deed, such tacit hypothec, if it exist, is equally inoperative as a bar or objection to the Appellants' right to the damages which they considered a part of the purchase-money and interest.

This then disposes of the first objection which has been raised, and there appears to be only one other matter which requires any notice by their Lordships. It has been contended in this case that the Appellant [9] is pre-empted from his Appeal in consequence of not having appealed from the Order by which the Accountant was directed to make up his account, excluding from that account the damages which were claimed in consequence of the return and protesting of those bills. Now, in order to decide that question, it is first expedient to look at the terms of the order itself, and it is in these words:—"The Court having heard the parties, and having read and examined the documents and vouchers filed and produced in this matter, refers the accounts of the Plaintiff and *Debattant* to the sworn Accountant of the district of Berbice, to settle and adjust the balance due to the said Plaintiff, under and by virtue of the mortgage-deed, with the interest legally due thereon, under deduction of all charges for damages and interest on such damages. The Court further directs the report of the sworn Accountant hereon to be laid before it at its next session in the district of Berbice, when it will pass a definitive sentence."

Now then, first, it is clear that according to every construction which possibly could be put upon the passage which I have read, this Order of the Court did not purport to be a definitive sentence; and then the next question would arise, that if not a definitive sentence, whether it was an interlocutory order, having the force or effect of a definitive sentence, and supposing it to have such force and effect, whether the consequence would be, that not having appealed from it, the Appellant would now be pre-empted from asserting this Appeal. Their Lordships are of opinion in the first place, that there is nothing to induce them to come to the conclusion that it can be called an interlocutory order, having the force or effect of a [10] definitive sentence. The meaning of those words perhaps it is unnecessary to enter into, particularly upon the present occasion; but the real purport and effect of them must be to all intents and purposes as conclusive of the whole rights of the parties as a definitive sentence itself, to the extent it goes, and their Lordships see no reason to think that upon the present occasion any such interpretation can be put upon it.

But there is also another part of the case, which is one of very great importance. It does not at all follow with respect to those Appeals that come from Courts practising according to the Civil Law, that because you have a right to Appeal from an interlocutory order or Decree, that therefore you are bound to avail yourself of that right of Appeal, and it would be attended with very great inconvenience if the contrary rule was established, because the evil of it would be, that in all those cases of the description of which this is, upon every little order being made which possibly might have the effect of ultimately concluding the case, you would have an Appeal here, and the delay that would interpose would perfectly frustrate all the purposes of an Appeal.

Upon these grounds, then, their Lordships are of opinion, that they must reverse the sentence of the Court below, and pronounce for the Appeal; but they are desirous,

in order to prevent any further difficulties arising, that the Counsel should submit to their Lordships a minute of what they desire to be done, to enable them to make the Order as clear as possible.

In accordance with their Lordships' desire, the Appellant's Counsel submitted the minutes of the Order, wherein, after the reversal of that part of the sentence of [11] the Court below, which rejected the further claim and demand of the Appellants, they suggested a reference of the accounts to the sworn Accountant of the district of Berbice, to settle and adjust the balance due to the Appellant under his mortgage-deed, including the bills in question, with damages, charges and interest; such damages to be computed at the rate of twelve and a-half per cent.,—which, being approved by their Lordships, was ordered accordingly.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL. 6. *Practice, &c. Other Matters.*

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY IN ENGLAND.

JAMES STUART,—*Appellant*; RICHARD ISEMONGER,—*Respondent**

[Feb. 11, 1842].

The 6th Geo. IV., c. 125, s. 55, does not exempt the owners and masters of vessels having a licensed pilot on board, from liability in respect of damages done by their vessel, unless the damage was solely caused by the neglect, default, incompetency, or incapacity of the pilot [4 Moo. P.C. 17].

Where, therefore, it was proved that the accident happened through the carelessness of the master and crew, as well as the pilot, in not keeping a good look-out; the Judicial Committee of the Privy Council held, affirming the sentence of the Admiralty Court, that the civil liability of the owner in respect of damages continued.

The Ship DIANA.

This was originally a cause of damage, civil and maritime, promoted in the High Court of Admiralty of England, by Richard Isemonger, the Respondent, the sole owner of the schooner *Littlehampton*, against James Stuart, the Appellant, the owner of the ship *Diana*, arising from the collision of the *Diana*, when on her voyage from Barbadoes to London, with a cargo of sugar, having Richard Russell, a duly-licensed Cinque Port pilot, on board, with the *Littlehampton*, when on [12] her voyage from Sunderland to Worthing, with a cargo of coals. The collision occurred in that part of the Channel called the Gull Stream, between Ramsgate and Broadstairs, on the morning of the 5th of September 1838, whereby the *Littlehampton* sustained so much damage that she shortly after sunk.

The act on petition alleged that the accident was wholly occasioned by the fault of the *Diana*, in not altering her course, and in not keeping a good look-out. In reply to the act, it was denied by the owners of the *Diana*, that no good look-out was kept on board their vessel, and insisted that the damage was occasioned by the *Littlehampton*; and that even if the accident had been caused by the neglect or incapacity of any one on board the *Diana*, that the same was and could only be attributable to the pilot, inasmuch as the *Diana* at the time was in the sole charge of a duly-licensed pilot, and that all his orders were duly obeyed by the man at the helm and the rest of the crew; that the said pilot, having been taken on board under the provisions of the Act 6 Geo. IV., c. 125, by reason of the premises, the owners of the *Diana* were not answerable for the damage.

The Judge of the Admiralty Court (the Right Hon. Dr. Lushington), assisted by two Trinity Masters, by his sentence (reported 1 W. Robinson's Adm. Rep. 131),

* Present: Lord Wynford, Lord Brougham, Lord Campbell, and Mr. Justice Erskine.

bearing date the 12th of February 1810, decreed for the claim of the Respondent, on the grounds that the accident was solely occasioned by the fault of the persons on board the *Diana*, and that, as the accident was occasioned by the joint misconduct of the pilot and crew, that the liability still attached to the owner of the *Diana*.

From this sentence the present Appeal was brought.

[13] Dr. Addams and Mr. Cleasby for the Appellant.—There is no dispute that the *Diana* was in charge of a duly-licensed pilot, and if any damage was done to the *Littlehampton* by the collision, the presumption is, that the pilot, who is entrusted with the navigation of the vessel, was to blame, and the *onus* of exemption lies on him. By the 6th Geo. IV., c. 125, s. 55, it is enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act, when and so long as such pilot shall be duly qualified to have the charge of such ship or vessel." Having a pilot on board, in conformity with the requisites of this section, exonerates the owner of the ship placed under his control from being answerable for damage done by the collision. *Bennet v. Moita* (7 Taunt. 258), *Ritchie v. Bowsfield* (7 Taunt. 309). The *Christiana* (2 Hagg. Adm. Rep. 183). It may be inferred, that where the master is bound to place his ship in the charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners or their servants. *Caruthers v. Sydebotham* (4 Maul. and Sel. 77); *Abbott on Shipping*, p. 184 (6 Ed. by Shee). The judgment of the Court below condemned the owner of the *Diana*, by reason of the alleged negligence of the master and crew in not keeping a good look-out at the time of the accident, imputing blame to the pilot, and the master [14] and crew. If blame is to be attributed to the master and crew as well as the pilot, the 55th clause is virtually repealed. The blame, if any, should be imputable to the pilot alone, who had the control of the vessel. There is no evidence to show that there was negligence on the part of the master and crew, or that the crew did not obey the pilot. If the owners are to be fixed with the responsibility while the pilot is in charge of the vessel, the party complaining must show that the blame was not attributable to the pilot, but to the master and crew.

The Queen's Advocate (Sir John Dodson) for the Respondent.—Two questions are raised by the Appellant, one of fact and the other of law—first, to whom the blame attached; and, secondly, whether by law, the owner of the *Diana* is exonerated from damages. Upon the first point, the evidence leaves no doubt that the *Diana* was the sole cause of the collision, occasioned by the want of proper care of the persons on board. There was a want of a good look-out, which was clearly the duty of the master and crew, and through their negligence the accident took place. But it is said by the owner of the *Diana*, that, although the accident might have been caused by the *Diana*, still that he was not responsible, as he had a licensed pilot on board, pursuant to the 55th section of the 6th Geo. IV., c. 125, and *Bennet v. Moita* [7 Taunt. 258], and *Ritchie v. Bowsfield* [7 Taunt. 309], are cited in support of such position. These cases are distinguishable, and do not apply to the peculiar circumstances of this case. Here, there is the joint misconduct of the pilot and of the master and crew, which the 55th section does not provide for. [15] The *onus* of exemption is, therefore, thrown on the owner. The objection raised, that the liability by the sentence of the Court below falls upon the owner alone, and not upon the pilot, who was in part to blame, can have no weight. Sir John Nicholl, in the *Giralama* (3 Hagg. Adm. Rep. 169), held, acting upon the authority of the *Neptunia the Second* (1 Dod. 467), that the Act 6th Geo. IV., cap. 125, only exonerates masters and owners from personal responsibilities, leaving the remedy *in rem*. unimpaired.

Lord Brougham (Feb. 19).—This was an Appeal from a Decree of the Court of Admiralty, condemning the Appellant, as the sole owner of the *Diana*, to make good to the Respondent the damage sustained by his ship, the *Littlehampton*. That damage arose from the collision of the two vessels, when the *Diana* had a licensed pilot on board.

The learned Judge in the Court below was assisted by Trinity Masters, who gave

it as their clear opinion that the collision was not occasioned by any fault or neglect on the part of the people belonging to the *Littlehampton*, thus negating one ground of defence taken by the Appellant. In this opinion upon the facts the learned Judge concurred, and their Lordships see no reason to form a different conclusion from the evidence in the cause.

The Trinity Masters also, with the concurrence of the learned Judge, were further decidedly of opinion that the accident was attributable to neglect and deficiency of look-out and management on board the *Diana*, but that the blame was to be shared by the master and crew, with the pilot. They considered that [16] the accident was attributable to the pilot's not sufficiently performing his duty, but they also decidedly thought that there was neglect on the part of the master and crew. Although the evidence on this subject may not be so clear as that which absolves the *Littlehampton*, yet their Lordships can see no good ground for coming to a conclusion different from that to which the Trinity Masters and the Court below were led : and they consider it as sufficiently proved that the master and crew were in part to blame for the neglect which caused the accident.

An argument was raised, both here and in the Court below, that the vessel doing the damage being *prima facie* answerable for it, the proof lies on her owners, of whatever is necessary to bring themselves within the description to which the exception in the Pilot Act [6 Geo. IV. c. 125] refers. If this position were admitted, then, upon the construction of the Act which the Court below has adopted, and which we are about to consider, it would be incumbent upon the Appellant to prove that the accident was solely owing to the pilot's neglect, and that the master and crew had no share of the blame. But there is no occasion to discuss that question in this case, or to inquire how far it is decided in one way by the case of *Bennet v. Moita* (7 Taunt. 258); for, upon which side soever the proof lies, there is no evidence here to show that the pilot was not alone to blame, the master and the crew being also justly chargeable with neglect. The question, therefore, which arises, and the only question is, whether or not, the owner of the *Diana* is discharged from his responsibility for a damage in part occasioned by his servants, the master and crew navigating, but negligently navigating, his vessel, because of that vessel having at the [17] time been in charge of a licensed pilot, to whose neglect in other part the accident was owing? And the answer to this question must depend upon the construction of the Stat. 6 Geo. IV., c. 125, sometimes called the general Pilot Act. The 55th section of that Act provides that "no owner or master shall be answerable for any damage which shall happen from, or by reason or means of, any neglect, default, incompetence, or incapacity of any licensed pilot duly acting in charge of any vessel under the provisions of the Act." Does this provision intend to exempt from all liability, provided there be a pilot on board? Of course it is not contended that such exemption would extend to cases in which damage was done by the crew disobeying the pilot's orders, though he too might be chargeable with neglect of duty. But it is contended, that although the crew be in part to blame, yet, if in any part the pilot be also blameable, the exemption attaches. Now this appears to us a construction contrary to the plain meaning of the words, and inconsistent with all the principles which can be applicable to such a question.

The words are, "damage which shall happen from, or by reason of, or means of, any neglect" of the pilot. He is the cause and author of the damage, from all consequences of which the owners are relieved, upon the ground that they had no choice in his appointment, but were compelled to employ his services. By the Common Law they are answerable for the damage done by their vessel, because it is navigated to their profit, and by their servants. The Statute interposes, and takes the management, in a great degree, out of their hands; it, therefore, indemnifies them from any damage which the person imposed upon them may [18] occasion : but it surely cannot intend to indemnify them for what is, in part, occasioned by their own servants. If it be said that they should be answerable only for the portion of the damage occasioned by their servants, and not for that portion occasioned by the pilot, the answer is plain—no such apportionment of damage is provided for by the Statute; and, in all probability, because it would hardly be possible to do so : but the legislature has done enough to relieve the owners, by exempting them, where the pilot, whom they were forced to employ, has done the mischief, and leaving them answerable where their crew, whom they had

selected for this service, are sharers in the blame. Let it be observed, too, that the exemption is given, not only to the owners, but to the master. If the owners were on board, and so far interfered, as in part to cause the mischief, it could hardly be contended that the Statute would work an indemnity to them, against the consequences of their own negligence. But the master would be exempted from the consequences of his own negligence, if the construction were to prevail, which makes the conduct of the master and crew immaterial, provided the pilot be at all in fault.

The construction which has been adopted below, appears to have proceeded, by reference to the corresponding section in the Act, which first gave this exemption, the 52nd Geo. III., c. 39, s. 30. The words there are, that no owner or master shall be answerable for any loss or damage, for or by reason or means of any neglect, etc., of any pilot taken on board in pursuance of this Act. These words appear plainly to provide, and only to provide, that the owner or master shall not be answerable for the acts, or rather the defaults, of the pilot.

The 53rd section of the later Act, 6 Geo. IV., c. 125, [19] appears further to favour the same construction. It exempts from all consequences of having no pilot on board, provided it can be shown that all means were used to obtain a pilot. But surely, as was said by Sir John Nicholl in *The Girolamo* (3 Hagg. Adm. Rep. 169), this provision never can be intended to exempt from all responsibility for whatever may be done, or whatever may happen, so it may only have chanced that a pilot could not be got : it only exempts from whatever was occasioned solely by the want of a pilot—and by no other cause.

It must be manifest, upon every view which can be taken of the principles applicable to this question, that the civil responsibility of the owners for the damage done in navigating their vessel, like that of all persons employing servants for their own benefit, can be restricted only in so far as their own acts, or, which is the same thing, the acts of their servants, are not the cause of the damage done. To find similar cases would not be easy, because there are hardly any in which persons could be made answerable for the acts of others whom they are forced to employ, and where alone it would be necessary to exempt or indemnify them. The contract of insurance affords, perhaps, some analogy in that very anomalous risk undertaken by the insurers indemnifying the owner against the misconduct, even the criminal misconduct, of his servant, the master. But here the assured cannot recover if the owner at all consented to the barratry, and the indemnities have been absorbed when any negligence of the owners enable the mariners to do the act. *Pipon v. Cope* (1 Camp. 434). Another analogy is furnished by the restriction of the liability of carriers : but let us take [20] the Statutes relative to the liability of shipowners, of which the earliest is 7 Geo. II., c. 15, and the latest the 53 Geo. III., c. 159, which confines their liability for damage done, to the value of the ship and freight. It is to be observed, that this exemption is confined to cases of damage arising “without the fault or privity” of the owner ; and the Courts have held, that a strict construction should be given to a Statute limiting the Common Law responsibility of all persons for injuries occasioned by their acts, or the acts of those in their service ; so that the Court of B. R. in the case of *Gale v. Laurie* (5 B. and C. 156), held fishing-stores to come within the term appurtenances of a ship, used in the Acts, and it is held for the purpose of enlarging the remedy of the party damaged, and thus restraining the exemption, although in a policy upon the ship it was agreed that their stores would not be considered as covered.

It is to be observed, that in the case of *The Girolamo* (3 Hagg. Adm. Rep. 169), though the Court of Admiralty avoided deciding the present question on the ground that its decision was not necessary to dispose of the case, yet the whole remarks of the learned Judge (Sir John Nicholl) very plainly indicate that his opinion strongly inclined towards the construction which their Lordships have now adopted. But their Lordships rely the less upon this circumstance, because Sir John Nicholl appears to have considered the decision of Lord Stowell in *Neptune the Second* (1 Dodson, 467), as a decision upon the point, assuming that learned Judge to have been aware of the Act (52 Geo. III., c. 39), which there is every reason to believe he was not ; for it certainly never can be maintained that this Act, or [21] the one under consideration, is confined in its application to remedies at law ; and that they do not govern the proceedings *in rem* in the Court of Admiralty.

The order of their Lordships therefore is, that the Appeal be dismissed, the sentence of the Court below affirmed, and the cause remitted.

[Mews' Dig. tit. SHIPPING, A. XX. COLLISION, 10. *Compulsory Pilotage*, a. e. S.C. 6 Jur. 157 and below, 1 Rob. W. 131. Followed as to position of owners and masters in *Hammond v. Rogers*, 1850, 7 Moo. P.C. 160; *North German Lloyd S.S. Co. v. The Schwalbe*, 1860, 14 Moo. P.C. 250; and *The Iona*, 1867, L.R. 1 P.C. 432, 4 Moo. P.C. (N.S.) 336; *The Meteor*, 1875, Ir. R. 9 Eq. 567; and see now s. 633 of Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60). By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66) and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict. c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

JUNIUS SMITH,—*Appellant*; NATHANIEL GOULD and Others,—*Respondents* *
[Feb. 11 and 19, 1842].

A Bottomry Bond may be good in part, though void for the residue [4 Moo. P.C. 26].

Where, therefore, a Bottomry Bond was given by the master at New York, as well for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to part of the cargo; as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage; the Judicial Committee, reversing so much of the decision of the Admiralty Court as rejected the Bond *in toto*, sustained the Bond to the extent of the sums advanced for necessary supplies and payment of the port duties.

If reliance is placed upon a difference between the law of England and a Foreign State, the party relying upon the difference is bound by witnesses or authorities to prove such fact [4 Moo. P.C. 26].

THE PRINCE GEORGE.

This was an appeal from a sentence of the Judge of the High Court of Admiralty in a cause of Bottomry, brought by the Appellant, the legal holder (as assignee of Messrs. Wadsworth and Smith of New York, merchants,) of a Bottomry Bond, dated 14th September 1836, for £294 10s., on the ship *Prince George*, and the freight to be earned on a voyage then intended to be made by her; against the said ship, her tackle, etc.; and against Nathaniel Gould and James Dowie, of London, merchants, and Peter McGill, and William Price, of Quebec, merchants, intervening in the cause, as the present owners of the ship.

In the month of September 1836, the ship *Prince George* arrived at New York from London with a general cargo, and a large number of passengers, under a charter-party to the Appellant, being destined from thence to Quebec under a charter-party to the Respondent Gould and others. By the charter-party to the Appellant, a moiety of the freight (the entire sum being £506) was payable in London, previous to the sailing of the ship, and the remainder in New York, on the right delivery of the cargo there. During the voyage, the master broke bulk, and made use of some porter, part of the cargo on freight, a portion of which he used as ship's stores for the crew, and the remainder he sold to some of the steerage passengers. On landing the cargo at New York, part of it was found to have been damaged by bad stowage. The consignees of the porter claimed 588 dollars, as the value of the deficiency

* Present: Lord Wynford, Lord Brougham, Lord Campbell, and Mr. Justice Erskine.

thereof, and the owners of the damaged cargo claimed 1115 dollars, as the amount of the damage. The only fund the master had to meet these claims and the port charges, and the expenses of furnishing the ship with provisions, and fitting her for sea on her further voyage under the second charter-party, was the moiety of the freight, amounting to £253, payable at New York under the first charter-party, which the consignees refused to pay, and the master, not being able to satisfy their claims for the deficiencies in, or damage done to, the cargo, was arrested at their instance. To relieve [23] himself from this arrest, the master applied to Messrs. Wadsworth and Smith, the correspondents and agents of the Appellant at New York, to advance such sums as might be necessary to meet his exigencies, and as neither he nor the owner of the ship had any personal credit in that city, they advised him to raise funds, which they ultimately agreed to furnish on bottomry. No money actually passed through the hands of the master, but Messrs. Wadsworth and Smith made up their accounts, and debited the money received by them for freight, with the claims for damage done to the cargo, and paid the charges and expenses of the ship at New York, necessary to enable her to proceed on her destination, and for repayment of such advances, with a maritime interest of 20 per cent., the master executed the bond now sued for. Messrs. Wadsworth and Smith also drew a bill of exchange for the amount advanced on the owner of the ship, payable at one day's sight after her arrival in London, in the event of which the bond was to be considered as satisfied. The Bill of Exchange having been presented and refused payment, the present suit was instituted, and the learned Judge, (The Right Hon. Dr. Lushington,) by his Decree, bearing date the 2nd of March 1838, pronounced against the force and validity of the bond.

From this sentence the present Appeal was brought.

The Queen's Advocate (Sir John Dodson), and Mr. Toller, for the Appellant, contended that the bond was, in the circumstances, good and valid, the money being advanced for the necessities of the ship in a foreign port, where the master and owners were without personal credit; that the fact of part of the money advanced on the bond, [24] being for the payment to the consignee for damage done to the cargo, did not invalidate the bond, the consignee having by the law of New York a specific lien on the ship, and the master, being without funds from which such damage could be paid, had no other remedy than to hypothecate the ship, to save it from being arrested and sold by the Admiralty Court in New York; that the bill of exchange was only a collateral security, and did not substitute personal security for the hypothecation of the ship.

Dr. Phillimore, for the Respondents, submitted that the circumstances of the case did not show such a necessity as to warrant the master hypothecating the ship, which was done by him solely for the purpose of meeting the personal demand against himself, in respect of the porter, and the claim of the consignees in respect of the damaged goods.

The following authorities were referred to in the course of the argument:—*The Augusta* (1 Dod. Rep. 283); *The Fabula* (1 W. Robinson, 4); *The Jane* (1 Dod. Rep. 461); *The Zodiac* (1 Hagg. Adm. Rep. 320); *Thompson v. The Royal Exchange Insurance Company* (1 Maul. and Sel. 30); *Abbott on Shipping*, 128-30; 1 *Kames Essays*; *Mercatores*, 128; 3 *Kent's Com.* 168; *The General Smith* (4 Wheaton, Sup. Ct. of U. S. Rep. 498).

Lord Campbell (June 20, 1842).—This is an appeal from the Court of Admiralty, in a suit on a Bottomry Bond.

The learned Judge below was of opinion that the Bond was wholly void, on the ground that the master [25] had no authority to hypothecate the ship for any part of the money secured by it.

We should have been of the same opinion, if we had taken the same view of the facts of the case which he appears to have done. If the bond had been given as a security for the amount of the damage done to the cargo on the voyage from London to New York, and the value of certain porter, part of the cargo consumed during the voyage, we should have thought it invalid. The Appellant's Counsel have contended, that by the law of New York, the consignees of the cargo had a specific lien on the ship for any damage sustained by the cargo, in violation of the contract

contained in the bill of lading, and that as the master had no funds from which this damage could be paid, he might hypothecate the ship for the amount, so that she might prosecute her voyage, instead of being arrested and sold by decree of the Admiralty Court. If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship: this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties.

But in this case, there is no sufficient evidence that by the law of New York, the consignee of goods has any specific remedy against the ship for damage they may have sustained in the course of the voyage. No witness professing to be acquainted with the law upon the subject has been examined: and the witnesses who have [26] been examined, only use some loose expressions, from which a doubtful inference as to the state of the law may be drawn.

It is said indeed that we ought, in the absence of evidence, to presume the law to be as contended for by the Appellant, the law of England upon this subject being an exception to the law of all other commercial nations. But we apprehend that where reliance is placed by any party upon a difference between the law of England and the law of a Foreign State upon such a subject, he is bound by witnesses, or books of authority, to show that there is such a difference. In the present instance we believe that the presumption would be contrary to the truth; for although the law of most commercial nations except England gives a specific remedy against the ship for repairs and stores to fit her out for a voyage, it is only in a few States that this remedy against the ship is extended to damage done to the cargo; and there is every reason to believe that such is not the law in New York, as it appears that an act was passed by the legislature of the State, giving a lien on the ship only for repairs and stores (Acts of 22 Sess. c. 1, and 40 Sess. c. 59), leading to the conclusion that the law of that State upon this subject is not further varied from the ancient commercial law of England.

We, therefore, cannot pronounce for the validity of the bond on this ground; and if it really had been given entirely in respect of the claim of the consignees of the cargo, we must have affirmed the Decree.

But upon carefully examining the evidence and the accounts, it appears to us that with the exception of the sum of 329 dollars, the money secured by the bond was required for the ship's necessary disbursements at New [27] York. By the charter-party and bills of lading, a sum of £253 for freight was payable at New York. If this had been received by the master, and therewith he had paid all his port charges and outfit, and a demand being afterwards made upon him by the consignees, he had executed the Bottomry Bond to satisfy this demand; in the absence of evidence of the foreign law upon the subject, we should have considered the bond wholly void. But the depositions show that the master did not receive the £253, and that the whole of that sum was detained by the consignees to cover the amount of the damage done to the cargo, except a balance of eight dollars ninety-one cents. The master had no means of compelling payment of the freight in full. He, therefore, had no funds from which he could pay port duties and other necessary disbursements to enable him to prosecute his voyage, and it is admitted that he could not raise the necessary funds without hypothecating the ship. The bond, therefore, was to secure money borrowed to pay port duties and such other necessary disbursements, not merely to satisfy the demand of the consignees for damage done to the cargo. But we cannot say that the bond is good for the whole. In the principal sum of 1167 dollars, for which it is given, is included an item of 329 dollars in respect of porter, part of the cargo, consumed during the voyage. The evidence certainly shows that the ship was well supplied with water and stores of all sorts, and that it was from the unusual length of the voyage that it became necessary for the crew and passengers to use this porter. But there is no evidence before us that by the law of New York, the consignee of the porter could have detained the ship till his demand was satisfied. The master [28] was arrested; but assuming that he was lawfully arrested, it is impossible to lay it

down for a rule that the master may hypothecate the ship for any demand in respect of which he himself is liable to be arrested in a foreign country.

For the sum of 329 dollars, and the maritime interest calculated upon that sum, the bond cannot be supported. But it is a well-known doctrine in the Admiralty Courts that a Bottomry Bond may be good *pro tanto*, and void for the residue.

Some other small items have been pointed out to us as having been expended before there is evidence of any negotiation for a Bottomry Bond, but we think that these items may be fairly included in the sum to be secured, and that we may presume they were advanced in contemplation of such a security. Bottomry Bonds, for the benefit of the ship owners, and the general advantage of commerce, are greatly favoured in Courts of Admiralty; and where there is no suspicion of fraud, every fair presumption is to be made to support them.

Upon the whole, their Lordships will recommend to Her Majesty that the Decree of the Court below be reversed, and that, deducting the amount of the 329 dollars and interest, there be a Decree in favour of the Appellant, for the principal and interest secured by the bond, with the costs of the Appellant below, leaving the parties respectively to pay their own costs of Appeal.

[Mews' Dig. tit. SHIPPING, A. X. BOTTOMRY, 2. a. Considered as to duty and authority of master in *The Karnak*, 1868, L.R. 2 Ad. and E. 299; and *The Ida*, 1872, L.R. 3 Ad. and E. 550. As to former Admiralty jurisdiction of Judicial Committee, see note to last preceding case (4 Moo. P.C. at p. 21).]

[29] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

CHARLES HENFREY,—*Appellant*; MARY ANN HENFREY,—*Respondent* *

[Feb. 14, 1842].

A Testator left two substantive Wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second Will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of £5; but appointed no Executors. Held, affirming the Decree of the Court below, that the second Will operated as a revocation of the first Will, and was alone entitled to probate.

Semble. Where a party, objecting to a paper annexed to Letters of Administration, has been by the Court assigned to declare whether he propounds another instrument, it is irregular and inconclusive, instead of following up the assignation, to have the question decided upon Petition. But such procedure estoppes the parties from further litigation [4 Moo. P.C. 33].

A reply on the hearing of the Appeal allowed, though not allowed by the practice of the Court below on the original hearing of the Act on Petition [4 Moo. P.C. 33 n. (a)].

Henry Henfrey, formerly of Foundling Terrace, Gray's Inn Road, in the county of Middlesex, but late of Havre de Grace in France, died on the 27th of December 1839. At his death two testamentary papers were found. The first bore date the 14th of July 1838, and the other the 26th of February 1839.

The Will of the 14th of July 1838 was in the following terms:—

"First: I direct that all my just debts and funeral and testamentary expenses shall be paid and satisfied. And whereas I am entitled, under the settlement made on my marriage with my present wife Marian, otherwise Mary Ann Henfrey, and in the events therein mentioned, to the reversion of the sum of two thousand [30] pounds,

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

to be paid and invested under the trusts of the said settlement. Now I give and bequeath unto my said wife Marian, otherwise Mary Ann Henfrey, her executors, administrators, and assigns, one moiety of the said sum of two thousand pounds so settled and to be paid and invested as aforesaid. And I give and bequeath to my said wife all my plate, linen, china, and household effects, and subject to the payment of all my just debts and funeral and testamentary expenses. I give and bequeath all the rest and residue of the estate and effects to which I am or at any time may be entitled, or which I have or may have power to dispose of by this my Will, including all my contingent interest under my late father's will, unto my brother, Charles Henfrey, his executors, administrators, and assigns. And I appoint my said brother, Charles Henfrey, and my brother-in-law, Charles Marston Stretton, executors of this my Will. And I hereby declare my mind and will to be, that the said Charles Henfrey, and Charles Marston Stretton, shall not be answerable or accountable for any more monies than they shall actually receive under this my Will, nor for any involuntary loss whatsoever. And lastly, I hereby revoke and make void all my other Wills." In witness whereof, etc.

The second paper was in these words:—

"I hereby leave all I possess in this world to my wife, Mary Ann Henfrey, containing household furniture, books, etc. I likewise wish to be paid to Miss Diana Maddox the sum of five pounds, which money was borrowed for my use. This 26th day of February 1839."

This paper was signed by the Testator, and attested by two witnesses.

[31] On the 8th of November 1839, Letters of Administration, with the last-mentioned paper annexed, were granted to the said Mary Ann Henfrey. In the month of February 1840, the Appellant commenced proceedings for the purpose of revoking the Letters of Administration, and of obtaining probate of the two papers together, as containing the Will of the deceased. The Appellant was then, in the usual form, assigned to declare whether he propounded the paper of 1838. This assignation was not followed up; but with the consent of the Respondent, the question came on to be decided on an act on petition, brought in by the Appellant, in which he alleged the due execution of both papers by the deceased, and prayed that the administration heretofore granted, might be declared null and void; and probate of the two papers granted to the executors.

On the 5th of June 1840, the Judge of the Prerogative Court (Sir Herbert Jenner) by his decree overruled the petition, and confirmed the Letters of administration already granted (reported 2 Curteis, Ecc. Reps. 468).

From this decision the present Appeal was brought.

Mr. Loftus Wigram, Q.C., and Dr. Addams, for the Appellant,—Argued that the second Will was no revocation of the prior one; that it contained a different specification of property, and was not an ademption of the prior bequests; that there was nothing inconsistent in the two instruments taken together; and that the circumstances of there being no executors named in the second Will, indicated that the Testator did not intend that [32] instrument as a substitution of the former Will, which appointed executors; that the meaning of the Testator could not be ascertained, or his intentions carried out, by a Court of Equity, without reference to the prior Will; that the words, "all I possess in this world, containing household furniture, books, etc.," was meant to comprise property not disposed of by the prior Will; and that probate ought, therefore, to be granted of the two instruments, as forming one substantive and effective Will, otherwise it would preclude the Appellant from raising the question as to the residue in a Court of Equity. They cited and relied on the following authorities:—Swinburne, p. 7, sec. 14; Williams, Exors., 147, 207; 2 Roper's Husb. and Wife, p. 5; *Beard v. Beard* (3 Atk. 73); *Timewell v. Perkins* (2 Atk. 102); *Bridges v. Bridges* (Vin. Abr. tit. Dev. (O. b.) 13).

The Attorney-General (Sir F. Pollock), Dr. Haggard, and Mr. Kinglake, for the Respondent,—Insisted that the second instrument was a good substantive Will, and ought not to be deemed merely a Codicil; that it contained a complete disposition of the Testator's estate; and that even if the former paper was requisite to enable a Court of construction to interpret the latter, that was no ground for granting probate, or declaring that a Will, which was in fact revoked and cancelled; that to entitle two instruments to probate, the latter must be incomplete; and that the appointment of executors was not necessary since the statute of 11 Geo. IV., and 1

Wm. IV., c. 40, which gave the undisposed residue to the next of kin: [33] they cited also 7 Wm. IV., and 1 Vic., c. 26; Williams Executors, 172, 1161.

Dr. Addams in reply (a).

The Right Hon. Dr. Lushington (Feb. 19).—In this case the Testator, at his death, left behind him two testamentary papers, both duly executed, the first bearing date the 14th of July 1838, the second the 26th of February 1839. On the death of the Testator, administration had been originally granted to the widow, with the latter paper only annexed. This administration was called in by the brother of the Testator interested under the paper of 1838; the brother was then in the usual form assigned to declare whether he propounded the paper of 1838. This assignation was never complied with, but a novel mode of proceeding was resorted to, and, as is alleged, with the consent of the widow; a mode of proceeding certainly irregular, and which might, in many cases, be productive of serious inconvenience; for, in fact, this act on petition is a mere motion. Neither the parties principal could be concluded by it, nor persons claiming under them, nor other persons, if there had been any interested under either of the papers; and this might operate most inconveniently against one of the most salutary rules of the Prerogative Court, which, where a paper is regularly propounded, and no fraud, has the effect of binding subordinate interests, though not made par-[34]-ties to the cause; of this opinion was the learned Judge of the Court below, when he stated at the end of his judgment that the question might be brought on in a more formal shape.

Inconclusive, however, as these proceedings may be, unless the parties are estopped by agreement from further measures, their Lordships must now determine whether the Decree of the Court below, on the case as represented to that Court, was justly founded.

The question to be decided is, whether the subsequent paper is a total or a partial revocation of the Will first executed—whether it be a Codicil to it or not; for I greatly doubt if in any possible view of the case, probate could pass of the two papers as containing the Will. I know not of any case resembling this, of two executed papers receiving probate as containing the Will. *Ingram v. Strong* (2 Phill. 312, 313).

Then the question is, total revocation or partial revocation. On this question, Sir John Nicholl says in *Methuen v. Methuen* (2 Phill. 426), “In the Court of Probate the whole question is one of intention;—the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court.”

In deciding this question, reference is always had in the first instance to the instruments themselves, which, of necessity, involves for this purpose, though containing the *animus revocandi*, the construction of the papers; of this there never was or could be any doubt, for it was literally the daily practice of the Court: the doubts which did arise as to the extent which the Court would or must go in the construction of instruments, was as to the construction of powers, not of the testamentary instruments made under them, for the pur-[35]-pose of ascertaining the *animus testandi*; and *Hughes v. Turner* (3 Hagg. Ecc. Rep. 30) settled that, even in the case of powers, the Court was not at liberty to relieve itself from the task of construing the power itself.

In this case there are no facts or circumstances or other evidence, and the conclusion must be drawn from the instruments themselves exclusively.

Now the Testator, by the Will of 1839, must be presumed to have intended to make some alteration in his testamentary disposition; but if the words of that instrument are to be limited according to the construction attempted to be put upon them by the Appellant, the only possible alteration would be to give the books in addition, if they do not pass before, by the words “household effects,” but this limitation would be wholly inconsistent with the large terms in which the bequest is framed. The words “I hereby leave all I possess in this world,” would *prima facie* import a bequest of all which the Testator had the power to bequeath. Then are

(a) An objection was taken to the reply, as contrary to the practice in the Court below, on an Act on Petition, but their Lordships observed that the uniform practice in this Court was to allow the Appellant’s counsel to reply.

they qualified and restricted to what on the face of the papers appears but a small part! The word "containing" may certainly admit of being construed as meaning "inclusive," and not as taxative of the general bequest, and this clearly appears to their Lordships to be the true construction.

Then, the Will of 1839 gives the whole property to the wife. On what possible principle can it be contended that it does not revoke the former Will? Can two Wills, both disposing of the whole property, be included in one probate? Can the Will of 1838 be joined in probate with the Will of 1839? Such a course would be against the whole practice of the Court, and productive of utter confusion and litigation. Sir John Nicholl, in *Masterman v. Maberly* (2 Hagg. Ecc. Rep. [36] 236), said, "Is there any instance where two papers, both complete as to the disposition of personalty, and where the only defect of the second paper is a want of due execution, have been admitted to probate as together containing the last Will?" And in that case there was much less objection, for the second set of papers was unexecuted. But it is said that there is no revocation of the appointment of executors, and that the case of *Beard v. Beard* (3 Atk. 72) is an authority for the prayer now made; but that case was totally different. In that case there was no revocation of the Will, as a Will, by any subsequent testamentary paper. The operation of the Will was prevented by deed-poll; so it might be by bankruptcy, loss, or giving away of property, or death of legatees; but into such facts a Court of Probate never inquires; it knows nothing but of revocation by subsequent Will of the instrument itself, or legal or presumed revocations of the instrument itself; as cancellation; or, before the late Statute, marriage of a woman, or marriage and birth of a child.

As to the authority from Swinburne, that doctrine has been exploded so far back that it would be difficult to trace it, and the rule stated by Sir J. Nicholl established, viz., that a paper, disposing of the whole property, is a revocation *in toto* of a previous Will, also disposing of the whole. The Appeal must be dismissed with costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; o. *Other Matters*; also tit. PRACTICE; XV. PETITIONS, a.; also tit. WILL; V. REVOCATION, 2, g. S.C. 6 Jur. 355 and, below, 2 Curt. 468. On point (i.) as to revocation, see *Lemage v. Goodban* 1865, L.R. 1 P. and D. 57; *Pepper v. Pepper*, 1870, I.R. 5 Eq. 85; *Dempsey v. Lawson*, 1877, 2 P.D. 98; *O'Leary v. Douglas*, 1878, 3 L.R. Ir. 323; *In the Goods of Turnour*, 1887, 56 L.T. 671; *In the Goods of Palmer*, 1889, 58 L.J.P. 44; *M'Ara v. M'Cay*, 1889, 23, L.R. Ir. 138; *Chichester v. Quatrefages* (1895), P. 186; *Cadell v. Willocks* (1898), P. 21; (ii.) as to reply, irrespective of practice of court below (4 Moo. P.C. 33 n. (a)), contrast *Logan v. Burslem*, 1842, 4 Moo. P.C. 292 n.*; (iii.) as to costs, see 3 and 4 Will. IV., c. 41, s. 15; 6 and 7 Vict., c. 38, s. 12; O. in C. of 13th June 1853 (Stat. R. and O. Rev. IV., p. 306).]

[37] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

THOMAS LE BRETON, Attorney-General of Jersey, and others. —*Appellants*:
PHILIP LE CAPELAIN,—*Respondent* * [Feb. 14, 1842].

Heard *Ex parte*.

The Royal Court of Jersey have no power to order charges for alterations made in the Court House directed at their instance, to be defrayed out of the Crown Revenues of the Island. Judgment of the Court of Jersey declaring the

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Attorney-General and Receivers of the Island liable for such charges, reversed on Appeal, with costs.

Leave given to appeal though the subject matter of the Suit was below £200, the sum required by the Order in Council of 13th May 1823, and the appeal refused by the Royal Court.

The question raised by this Appeal was the authority of the Royal Court of Jersey to order the application of Her Majesty's Revenue, arising in the island, for the payment of alterations and works in the Court House.

The Appellant, Le Breton, was Her Majesty's Attorney-General for Jersey; Helier Touzel and Matthew Amiraux, the two other Appellants, were the Receivers of the Revenue in the island.

The Hall in which the Royal Court holds its sittings is situate in the same building in which the state or legislative body of Jersey assemble. The whole building is called the Court House.

In the years 1835-6 and 7, the States ordered certain extensive alterations to be made in different parts of the Court House, the expense whereof was defrayed out of the revenue of the State. The members of the Royal Court were dissatisfied with these alterations, and [38] on the 20th of December 1839, made an order that the Viscount should take measures for having the Hall warmed in a proper manner at the charge of the receipt of Her Majesty's Revenue. In pursuance of this order, Mr. Philip Le Gallais, the Deputy-Viscount, engaged the Respondent to put up a stove and other apparatus in the Court House, for the purpose of warming it with hot water. The expense of the work amounted to £45 12s. The Respondent applied to the Appellants, the Receivers of Her Majesty's Revenue, for payment of this amount, which was refused.

In the month of June 1840, the Respondent brought his action against the Appellants and the Deputy-Viscount, to recover this sum.

On the 19th of June 1840, the cause came on before the inferior number of the Royal Court, consisting of the bailiff and two jurats, when the following record of the proceedings was made.

"Royal Court of the Island of Jersey, 19th June 1840.

"Between Thomas Le Breton, Esq., the Queen's Attorney-General, Helier Touzel and Matthew Amiraux, Esquires, Receivers of Her Majesty's revenues in this island, and Philip Le Gallais, Esq., Deputy-Viscount, on the one part, and Mr. Philip Le Capelain of the other part, suing them to pay him the sum of £45 12s. sterling, the amount of what is due to him for an apparatus for warming the Royal Court House, according to an agreement made with the said Deputy-Viscount. On the request of the Attorney-General and Receivers, that the Plaintiff do produce the alleged agreement in the action, the Plaintiff declared that there was no written agreement, but that it had been done verbally with the Deputy-Viscount, for the account of the receipt of the Revenues of Her [39] Majesty. After which, upon the request of the Queen's Attorney-General and Receivers, that the Deputy-Viscount declare whether this be so, the Court decided, by the casting vote of the Chief Magistrate, that the Deputy-Viscount should state how the matter stands. The Deputy-Viscount thereupon stated that he had ordered, at the charge of the receipt of Her Majesty's Revenues, in pursuance of the order which he had received from the Court, according to custom, the work and materials whereof payment is demanded, and that the charges are in conformity with the agreement; and the Deputy-Viscount asked to be dismissed from the action. And on the plea of the Queen's Attorney-General and Receivers, that it being acknowledged that the Receivers have not ordered the works which are the subject of this demand, and upon their plea, that they have neither employed the Plaintiff to do any work on account of the receipt, nor authorized nor sanctioned the works,—that no person has the right or power to dispose of any part of Her Majesty's Revenues, excepting the Governor and the Receivers, nor to order any work at the charge of the receipt, without the previous and special consent of the Governor,—that moreover, the receipt of Her Majesty can, under no circumstances, be liable for the works in question, which only became necessary, in consequence of the alterations which have been effected in the Hall of Audience of the Court, by virtue of an Act of the States, and under the direction of a committee of that body, without the participation of

the Receivers of Her Majesty's Revenues; and the Queen's Attorney-General and Receivers have asked to be dismissed from the action."

[40] The Court then pronounced judgment to the following effect:—"Inasmuch as from all time the Viscount is bound to make all necessary disbursements for the repair of the Royal Court House, at the charge of the receipt of Her Majesty's Revenues, and as the warming of the said Court has always been paid by the said receipt, and that moreover, the work for which payment is demanded was of absolute necessity, the Court has discharged the Deputy-Viscount from the action, and condemned the other Defendants to the demand and costs."

From this sentence the Appellants were allowed to appeal to the greater number of the Royal Court of Jersey, who, on the 30th of September 1840, affirmed the judgment of the inferior number. The Appellants then applied for leave to appeal to Her Majesty in Council, which was refused, the subject-matter of the appeal not amounting to the sum of £200, required [15th of July 1835] by the Orders in Council of the 13th of May 1823; the Judicial Committee (Feb. 24, 1841 *), however, on a special application, allowed the appeal.

The case now came on to be heard *ex parte*, in consequence of the Respondents not appearing to the appeal.

Mr. Kindersley, Q.C., for the Appellants.—The Royal Court of Jersey had no jurisdiction or authority over Her Majesty's Revenue, and, therefore, no power to subject the Revenue to the payment of any such expenses as those in respect of which the action was brought. The revenue is not, by any law, custom, or [41] usage, liable to such expenses. The expenses arising from the repairs of the Court House, effected at the instance of the States, have always been defrayed out of their own revenue. It is impossible to sustain the judgment appealed from; for the Appellants did not engage or employ the Respondent in the work, or in any manner authorize the same. The only person liable was the Deputy-Viscount, who employed the Respondent to do the work; yet he is discharged from the action, while the Appellants are condemned to pay the demand, with costs.

Lord Campbell.—Their Lordships are of opinion that the judgment must be reversed, with costs. Dismiss the Attorney-General of Jersey and the Receivers from the action. The tradesman who supplied the goods will have a good ground of action against the Deputy-Viscount.

[On point as to special leave to appeal, cf. *St. George, Jamaica (Churchwardens of) v. May*, 1858, 12 Moo. P.C. 282; *A-G. of Victoria (In re)*, 1866, 3 Moo. P.C. (N.S.) 527; *Graham v. Berry*, 1865 (*ib.* at p. 227); and see note to *Retemeyer v. Obermüller*, 1837, 2 Moo. P.C. at p. 125. The Order in Council of May 13, 1823, referred to *sup.* (4 Moo. P.C. 40), related to Guernsey and not Jersey. It is given in Stat. R. and O. 1899 (p. 1677). The Jersey Order is one of 15th July 1835 (Stat. R. and O. 1899, p. 1680). See also *Belson v. Belson*, 1849-50, 7 Moo. P.C. 30.]

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

The Right Rev. HENRY HUGHES,—*Appellant*; ANTHONY PORRAL and Others,—*Respondents* † [May 18, June 20, 1842].

The Vicar-General of the Roman Catholic Church at Gibraltar, is liable to account for the fees received by him for administering the offices of the Church, such fees being by custom regulated, and subject to the control of the Assembly of Elders or Junta, of which he is the head, and disposed of by

* Present: Lord Brougham, Lord Denman, Mr. Justice Bosanquet, and the Right Hon. Dr. Lushington.

† Present: Lord Wynford, Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and Right Hon. Dr. Lushington.

them for the general purposes of the Church. Decree granting injunction against the receipt of such fees by the Vicar-General, and directing him to replace in certain parts of the Church, the tariff, or table thereof, varied by dissolving the injunction, and decreeing him only to account as receiver, for all sums paid to him on account of the same [4 Moo. P.C. 60, 61].

This Court has no jurisdiction to direct the release of a party imprisoned for a contempt in the Court below, pending an Appeal respecting the merits of the Suit [4 Moo. P. C. 50].

Evidence not adduced in the Court below or forming part of the transcript admitted on motion to be used at the hearing of the Appeal, subject to all just exceptions [4 Moo. P.C. 51].

This was an Appeal from the Decree of the Supreme Court, whereby it was ordered that the Appellant [42] should pay to the Respondent Anthony Porral, as treasurer of the other Respondents, as such body of elders as in the pleadings mentioned, all such fees and monies as he had in his hands, or possession, of the funds, of the Church of Saint Mary the Crowned, of Gibraltar, and that he should pay monthly and every month, all such fees or monies as he should thereafter collect and receive, as the funds of the said Church, to the said Anthony Porral, the treasurer of the Assembly of Elders, or to the treasurer for the time being, of the said Assembly of Elders. That the injunction formerly granted, to restrain the Defendant, his servants, and all other persons whomsoever acting under him, or by his order, from interfering in the management, paying away, or administering the funds of the said Church, be continued.

The case, as alleged and set forth in the Plaintiffs' bill, disclosed the following facts:—In 1704, the Town and Fortress of Gibraltar having been conquered by the British arms, was ceded by treaty, and became part of the possessions of the Crown of England. By the treaty of cession, the free exercise of their religion was guaranteed to the Roman Catholic inhabitants. At the period of the place coming into the possession of the Crown of England, there was, and has since continued, a Roman Catholic Cathedral [43] Church, known as the Church of St. Mary the Crowned, of Gibraltar, the chief Minister of which is called the Vicar Apostolic. The Bill then alleged, that from time immemorial, the Cathedral Church, in respect to its secular management, and the application and administration of its temporal affairs, and pecuniary funds and the fees to be paid for the acts of the Church, hath been governed and directed by an Assembly of Elders, called also the Junta: that the Appellant, who was Vicar-Apostolic, with the Respondents, formed this assembly, the Vicar being *ex officio* a member and President of the Junta, the other Elders being elected by the lay-members of the Church; that the Vicar was appointed by the authorities at Rome, his stipend or salary being fixed by the Junta, and paid out of the funds of the Church; that the present Appellant came to Gibraltar in January 1810, and had since officiated as Vicar; that on his coming to fill the office, his stipend was fixed, with his concurrence, by the Assembly, at 1200 dollars per annum, and the salaries and pensions of the other acting and retiring clergy and officers of the Cathedral Church were fixed at the same time; that the funds of the Church consisted wholly of the contributions or fees received from individuals, for the performance of the offices of the Church, comprising the administration of baptism, the holy communion, marriage, and burial, together with an allowance of £300 per annum made by the British Government, and paid by Her Majesty's Receiver-General in the colony, by monthly payments; that in 1806, a tariff of fees for the officers of the Church was fixed and agreed upon by the then Vicar-Apostolic and the Junta, copies of which were suspended in conspicuous parts of the Cathedral Church, by [44] which the sums demanded for the several rites were regulated, and had been received by the present Vicar, as well as his predecessors, and by them handed over monthly to the treasurer of the Assembly, for the use of the Church; that in cases of persons being poor, it had been the custom from the earliest times, either partially or wholly to remit the fees; that disputes having arisen between the Appellant and the Respondents respecting the authority of the latter to demand these fees, as well as their right to distribute them, and the table of fees suspended in the Cathedral Church having been removed, as the Junta sup-

posed, by the Vicar-Apostolic, or by his orders, the Appellant, as such Vicar-Apostolic, having refused to pay over the sum collected by him, the Respondents, on the 17th of October 1810, filed their Bill in the Supreme Court of Gibraltar, setting forth the circumstances above stated, and praying for an account of the fees received by the Appellant, from the 1st day of August then last past, or which might have been received, and of his application thereof; that he might be decreed to pay to the Respondent as treasurer of the Assembly of Elders, all such fees and monies as he then had in his hands or possession, and that he might be ordered to put up, and place in their former accustomed places, within the body of the Church, the three tables of fees alleged to have been removed by him, and that he, and all other persons, might be restrained by injunction from administering the monies so collected and received by him, or which might thereafter be collected and received.

On the 17th October, an order was made for the Defendant to appear and to answer within eight weeks, which not being complied with, an Injunction was [45] granted on the 6th November, in the terms prayed for.

The Defendant having appeared and obtained further time, put in his answer on the 4th of January 1841, by which, after denying the immemorial custom pleaded by the Plaintiffs touching the right of the Assembly of Elders to exercise the powers and authorities claimed by them, he admitted the allegations respecting his appointment, his payment over of the fees received, and the acts done by him as President of the Assembly of Elders, but insisted that such payments were made and such acts done and assented to in ignorance of the rights claimed by the Plaintiffs; and he further stated by way of plea, that in missionary countries such as England and Ireland, and also Gibraltar, a dominion of the Crown of England, the Bishop, or Vicar-Apostolic, or other superiors nominated and appointed by the holy See of Rome, hath the lawful power to settle and fix the fees or dues payable, and to be paid, as and for the offices of the Church; and he charged that he was the Vicar-Apostolic and Superior Ecclesiastic lawfully appointed for the Roman Catholic Church of Gibraltar; and that by virtue of such office he hath in himself full right, power, and authority, to manage, govern, and direct all the concerns and affairs of the said Church, and to administer the revenues thereof, according to the established rules and regulations of the Roman Catholic Church; and that no assembly of laymen had, or ought to have, any right to interfere in the management and government of the said Church; but that the same did wholly appertain to ecclesiastical control and jurisdiction. Annexed to the answer was a schedule of the Defendant's receipts and disbursements of fees for the offices of the Church during the [46] months of August, September, October, and November, by which he admitted a balance of 422 dollars, then remaining in his hands.

No replication was filed by the Plaintiffs, but evidence was produced both by the Plaintiffs and Defendant. The Plaintiffs produced, in the first place, an ordinance, made the 30th of November 1771, by the then Assembly of Elders, containing rules made by them for regulating the offices and disposing of the income and temporalities of the Church, and containing also a tariff of fees to be received for each act of the Church, comprising Baptisms, Funerals, and Festivities. This instrument was accompanied by a warrant dated the 8th of February 1778, from Lieut.-General Cornwallis, the then Governor of the Town and Garrison of Gibraltar, approving of, and ratifying and confirming the last-named resolution. An act between the Vicar-Apostolic and certain members of the Junta made on the 23rd of December 1788, to obtain funds for the repair and restoration of the Church, which had been nearly destroyed by the bombardment and siege in 1779. A warrant from General Boyd, Governor of the Fort in 1792, directed to the Vicar and Elders of the Roman Catholic Church, authorising them to carry into execution such regulations, and to levy such equitable contributions on the Roman Catholic inhabitants as are expedient for the support of the sick and poor, the decent maintenance of their clergy, and the repairs of their Church. A conveyance, by way of lease for forty-one years, from the same Governor, of a piece of ground within the garrison, to be used as a cemetery, together with various assignments, by which the same became ultimately vested in the Junta. Regulations made by the Elders in 1795 for interments. A Memorial addressed to the Vicar and Elders in 1798 by certain persons composing the communion of the Roman Catholic Church in Gibraltar, setting forth

their destitution and spiritual wants, and petitioning for certain specific relief, with the answer of the elders thereto. A letter from Major General Barrett to the Vicar, communicating a grant from His Majesty of £1000 towards the rebuilding of the Church, and directing the appointment of three persons to enter into an agreement for the completion of the building. A letter from His Royal Highness the Duke of Kent, addressed to the Vicar and the Elders in acknowledgment of an address presented by them to his Royal Highness. A letter from General Fox to the Elders in 1806, in reply to a memorial presented by them, stating reasons for the removal of the Rev. Mr. Staunton, the then Vicar-Apostolic of the Church, in which he states, "I beg to acquaint you that I by no means think myself authorised to give up, on the part of Government, the right of solely appointing and nominating the Roman Catholic Vicar, if existing circumstances should at any time render it expedient." A tariff of fees made in the same year, containing the following rule among others, "The half of said fees, according to the preceding tariff (*arancel*), will be paid to the Vicar every three months as his dues; of which half, he will give the third part to the Curate, his assistant, and the other half will belong to the Church for the necessary expenses, cleanliness of the Temple, and salary of the superior rector and his assistant." The appointment of an assistant curate in 1808 by the Junta—a convocation for the election of the Junta of Elders in 1810, with the proceedings thereon—a pastoral address from the Vicar-General to the parishioners and congregation—copy [48] of a letter said to have been written in 1815 by the Vicar-General to the Pope, informing his Holiness of the resignation of the then Vicar, and the election of his successor by the Junta, according to the universal custom, and praying a confirmation of such election and appointment—two letters respecting the vacancy of the office and the appointment of a successor, from the Cardinal Prefect at Rome, to the Nuncio at Madrid—with a Papal Bull, dated 6th May 1817, expressing "that the Elders of the Catholics of those parts had, according to custom, recommended one Isidora Dominique as Vicar-Apostolic," and electing, nominating, and appointing him to the office.

The Plaintiffs' evidence consisted further of a letter from the Appellant addressed to the Elders of the Church, notifying his appointment as Vicar-General and only spiritual pastor of the faithful Catholics in the garrison of Gibraltar. Extracts from the minutes of the proceedings of the Junta on such appointment, and subsequently on the arrival of the Appellant—with various proceedings relative to the assignment of the duties and emoluments of the offices of the Church, with the original articles of convention published in 1815, containing the tariff (*arancel*) of fees to be received by the Vicar-General and his assistant, and the mode in which the same were to be distributed. The Plaintiffs also examined witnesses to prove the authority of the Junta and their government of the Church at Gibraltar.

The Appellant examined only one witness, the Rev. Thomas Devereaux, a Roman Catholic priest, who, after stating that in England and Ireland there are no lay bodies or committees having or claiming any such rights and powers as those set up by the Respondents, [49] or any authority whatever to control or interfere with the ecclesiastical dues of the Roman Catholic clergy, said of the demand of the Respondents made against the Appellant, "I think this is in opposition to the spirit of every Catholic Church in every part of the world."

On the 30th of January 1841, the Chief Justice pronounced his decree, declaring that the Respondents were the duly-constituted Elders of the Roman Catholic Church of St. Mary the Crowned, of Gibraltar; and he further declared that the customary right of such Elders to manage and administer the temporalities of the said Church, ought to be established, and he ordered and decreed the same accordingly; and he further ordered that the Appellant should pay to the Respondent, Anthony Porral, as treasurer, the fees already in his hands; and should account for all such as should be received in future, as before set forth; and that the Appellant should put up and place in their former accustomed places within the body of the said Church, the three tables of fees in the Bill mentioned.

The Appellant petitioned the Supreme Court for liberty to appeal against this Decree to Her Majesty in Council; and prayed that in the mean time all proceedings under the same might be suspended. The Supreme Court granted the Appel-

lant liberty to appeal on the terms of his first complying with the Decree in all respects, and entering into sufficient sureties to prosecute his appeal with effect.

The Appellant, declining from conscientious motives, to comply with the conditions upon which the Appeal was granted, was arrested under an attachment for contempt, in not obeying the Decree, and committed [50] to the criminal prison of the garrison, until he should clear his contempt.

On the 19th of May 1841, the Appellant presented his petition to Her Majesty in Council, praying for liberty to appeal against the above-mentioned Decree; that the proceedings against him under the same might in the mean time be stayed; and that he might be released from his imprisonment.

This Petition was heard on the 20th of June 1841,* when their Lordships granted liberty to appeal; but held, that they had no jurisdiction to release the Appellant from his imprisonment for contempt: they recommended such release, however, and the Defendants gave an undertaking for that purpose, to take effect immediately on the arrival of the Order at Gibraltar allowing the Appeal.

An Order in Council, bearing date the 23rd June 1841, was hereupon made by Her Majesty in Council, allowing the Appeal, upon the Appellant entering into sufficient sureties in the sum of £500 to abide by such order as Her Majesty in Council should make in the matter thereof.

Pending the Appeal, and on the 18th of May 1842,† the Respondents moved for, and obtained, from the Judicial Committee, liberty to use as evidence, on the hearing of the Appeal, the "*Decretum Sacra Congregationis de Propaganda Fide*," lodged in the archives of the Church of St. Mary the Crowned, at Gibraltar, and a verified translation thereof, not in evidence in the cause in the Court below.

[51] This was admitted, upon proof thereof by affidavit, subject however to all just exceptions being taken at the hearing.‡

The Appellant at the same time obtained leave, on similar terms, to prove a letter addressed to him from the Prefect and Secretary of the Propagandi Fide, Cardinal Fransoni, Archbishop of Edessa.

The following are translations of these two documents:—

Decree of the Sacred Congregation for the Propagation of the Faith.

Whereas it hath become known that some abuses have now of late crept into the spiritual government of the Catholics of Gibraltar, not without great detriment as well to the peace as to the ecclesiastical administration, the Sacred Congregation, in order to remove hereafter all cause of disturbance, and to establish right order and discipline; having also heard the counsel of the Elders,—hath resolved and decreed that certain rules are to be prescribed, or statutes, thenceforth to be inviolably kept, by which all whom it concerns may be brought back to their duty. Now the rules are these which follow:—

I.

As the Vicar-Apostolic, constituted by the supreme Pontiff, is the ecclesiastical superior of all the Catholics who dwell in Gibraltar, so the others shall owe sub-[52]-jection to him in spiritual matters. He shall have the parochial care of them, and shall appoint a parochial Vicar, who shall assist him in pastoral duties.

II.

Whereas it is by Divine precept commanded to all who are set over the care of souls, to know his sheep—to offer sacrifice for them—to feed them by the preaching of the Divine word, by the administration of sacraments, and by an example of good works—to carry a fatherly care of the poor and other miserable persons, and

* Present: Lord Brougham, Mr. Justice Erskine, Sir Herbert Jenner Fust, and the Right Hon. Dr. Lushington.

† Present: Lord Brougham, Lord Campbell, Vice-Chancellor Wigram, and the Right Hon. Dr. Lushington.

‡ As to the admissibility of proof, not in evidence in the Court below, see *Jephson v. Riera*, 3 Knapp, 130; *Meiklejohn v. Attorney-General of Lower Canada*, 2 Knapp, 328. The Judicial Committee has power, under the 3rd and 4th Wm. IV., c. 41, s. 7 and 8, to examine witnesses *vivâ voce*. See *Mellin v. Mellin*, 2 Moore P.C. Cases, 493.

to bestow diligent attention upon other pastoral duties,—so it shall be the duty of the Vicar-Apostolic, and of his Vicar, diligently to fulfil all those things, and studiously to take every care that all spiritual aids be assiduously ministered to the faithful committed to him.

III.

The Vicar Apostolic, therefore, on every Sunday in the year, and on other Feast Days, shall be bound to celebrate for the people the Mass commanded, and explain in the Spanish language the gospel and those things which are read in the Mass; but if, by any lawful impediment, he be kept from doing so, it shall be sufficient for the parochial Vicar or other fit Priest to discharge this duty at his cost. Yet the Vicar Apostolic is not bound to preach the sermons in Lent, but he, with the consent of the Elders, shall appoint another approved Priest to preach them in every year.

IV.

Also the Vicar-Apostolic shall, on all Sundays and other Feast Days, celebrate a solemn Mass in the parish church afore-mentioned, at the third canonical hour, according to custom, and Vespers at a convenient hour after noon. Moreover, he shall hold public supplications on every Monday in the year, according to custom, for souls detained in purgatory, and all those things, without any special emolument.

V.

Also upon every festival of the year, and all the days of Lent, excepting only the Great Week, the Vicar-Apostolic, together with the parochial Vicar and other Clerks employed in the ministry of the Church, shall be bound to teach and explain to the boys and other rude persons the rudiments of the faith.

VI.

Their duty likewise it shall be diligently to attend the sick, and gratuitously to bestow on them all the aids of the Church; and then also to accompany the dead unto the gate of the city, where, by turn, the one must come back, and the other accompany the corpse unto the cemetery, and perform for it the exequies according to the rites of the Church.

VII.

It will be also the duty of the Vicar-Apostolic, and of his parochial Vicar, gratuitously to celebrate all other ecclesiastical functions, third-day prayers, ninth-day prayers, baptisms, marriages, funeral anniversaries for the dead, and whatever appertains to the administration of sacred rites, excepting masses that are not required by their office; voluntary gratifications which are made to a priest performing sacred rights shall be his. Moreover, letters testimonial of baptisms, of marriages, of deaths, of free estate, and any others that may be, shall belong to the Vicar-Apostolic, provided that the charge of them do not exceed one piece of gold or crown for each.

VIII.

[54] Whereas all those things which are above set forth cannot be performed if the pastor desert his fold; so to the Vicar-Apostolic, the precept of residence, according to the prescript of the holy Council of Trent, session 6, chapter i., and session 13, chapter i., for reformation, is, under canonical penalties, commanded to be altogether kept; nor be it lawful for him to depart from his vicariate beyond eight days: but if, by any just and urgent cause, he shall happen to be longer absent, lest in the mean while the faithful lack spiritual food, he shall constitute some fit priest as Pro-Vicar, who may act in his stead during his absence.

IX.

On the other hand, it is necessary that temporal aids be not wanting to the Vicar-Apostolic, for his fit support; whereas, therefore, the Elders, as well in their own name as in the name of that Catholic people having given their faith, have promised that they will afford to the Vicar-Apostolic a daily pension of three pieces of gold, or crowns, to be paid every three months; as also a house, built in the

year 1804 for the same Vicar,—it shall be their duty exactly to discharge the obligation which they have undertaken.

X.

It shall be the right of the Elders to elect a treasurer and a collector, who may diligently exact the monies arising from the pious offerings of the faithful, and whatever shall be received either from the profits of the Church, or from ecclesiastical acts and taxes, and may deposit the same with the treasurer, setting down always the quantity in tables of receipt; from such treasury shall be drawn all emoluments assigned [55] as well to the Vicar-Apostolic as to others who perform the ministry of the Church, according to the taxation which was imposed before the year 1810, and whatever shall remain thereof shall be laid out on the decking and repairing of the Church, as also in aid of the infirmaries and poor, some deposit being always left for any urgent necessity.

The Sacred Congregation trusts that henceforth all will carefully conform themselves to these Rules, which are delivered for the good of religion, peace, and discipline: but if any one shall, with rash attempt, violate them, he shall be denounced to the Sacred Congregation, that he may be restrained with deserved punishments.

Given at Rome, from the House of the Sacred Congregation for the Propagation of the Faith, on the 17th day of May 1817. L. CARDINAL LITTA, Prefect. C. M. PEDICINI, Secretary.

Letter of the Cardinal Archbishop of Edessa, the Secretary of the Congregation de Propaganda Fide, to the Right Rev. Henry Hughes, Bishop of Heliopolis, and Vicar-Apostolic of Gibraltar.

Most Illustrious and Right Reverend Sir,—This Sacred Congregation has heard with no less surprise than pain, that the members of the so-called Catholic Junta have proceeded to such an excess as to cite you, their Bishop and Pastor, and the representative of this Apostolic See, before the civil tribunals.

The Holy See trusts that the British authorities and magistrates will have for your dignity a regard which some untoward children of the Catholic Church have with such great scandal refused to pay; and that, according to the tenor of the laws and solemn treaties [56] which have guaranteed protection to the Catholics of that city, they will defend the indisputable rights of the Bishop against the insolent rebellion of some misguided individuals belonging to his flock and subject to his spiritual jurisdiction.

Moreover, according to the immutable principles of the Catholic Church, the power which the mis-called Catholic Junta aims at arrogating to itself, is an absolute usurpation, which never was, nor ever can be, recognized by us; and it is enjoined and commanded that you will prevent their exercise of any jurisdiction; that you will intimate to them in the name of this Sacred Congregation, that they immediately dissolve their body. If hitherto, ignorance of the canonical prescriptions has drawn any into error, more or less excusable, they must now and henceforward know, that they cannot, in opposition to ecclesiastical authority, interfere in matters appertaining to the Church; and that they expose themselves to the danger of incurring the most severe censures, if they pertinaciously persevere in warring against their Bishop, by appealing, contrary to the canon law, to lay tribunals, in matters which solely appertain to ecclesiastical authorities.

In fine, we advise you to suspend the payment of the pensions assigned by that Junta from the funds of the Church, until the Sacred Congregation shall have examined the merits of those who are pensioned, and shall have decided on the justice of their claims, and the manner of providing for them. As the question is about funds arising from the salary given to ecclesiastics by the Government, and by the faithful, to the clergymen employed in the sacred ministry, it is an intolerable abuse that lay persons should meddle with [57] the distribution of them; and should a doubt arise about their administration, recourse should be had to the Supreme ecclesiastical authority, namely, the Apostolic See, according to fixed maxims of the Church. Placing this before you as your guide, I pray the Lord to preserve you many years. Yours, etc., G. P. CARDINAL FRANSONI, Prefect. J., ARCHBISHOP OF EDESSA, Secretary.

This document, it was contended, was in effect the Decree of the Council of

Pope Gregory XVI., and bore with it, all the authority of the Holy See in spiritual matters; its authenticity was proved by the affidavit of the Right Rev. Dr. Griffin, the Roman Catholic Vicar-Apostolic of the London district.

The Appeal now came on for hearing, when the Appellant submitted that the Decree of the Supreme Court of Gibraltar ought to be reversed for the following reasons:—

I.—Because the questions in dispute between the Appellant and the Respondents are matters purely of ecclesiastical regulation, which, according to the treaties conceding to the Roman Catholic inhabitants the free exercise of their religion, should be left to the decision of the ecclesiastical authorities, who alone, according to the discipline and canonical institutions of the Roman Catholic Church, are empowered to interfere in such matters.

II.—Because a Court of Equity has no jurisdiction to regulate the amount of fees to be paid by the Roman Catholics in Gibraltar, or in any British possessions, to their clergy for the administration of the sacraments and rites of their religion; all sums so paid by the Roman Catholics being entirely voluntary on the part of those who pay them, the payment of which no [58] Court of Law or Equity can enforce, and consequently has no power to regulate.

III.—Because the Decree appealed from, in effect, directs the Appellant and his clergy to demand the payment of exorbitant fees from the Roman Catholic population of Gibraltar, for the administration of the sacraments and rites of their Church—fees that are much beyond the means of the Spanish population, and the exaction of which would lead to the most serious evils, and which the Appellant, as the Roman Catholic Vicar-Apostolic of Gibraltar, cannot in conscience, and without violating his most sacred duties, permit to be received by his clergy.

IV.—Because there was no evidence whatever given in the cause below, of the election of any Junta of Elders of the Roman Catholic Church of Gibraltar, exercising or claiming to exercise over the temporalities of the Church, and the ecclesiastical functions of the clergy, the powers and authority claimed by the Respondents in their Bill, or to justify the declaration in the Decree, “that the customary right of such elders to manage and administer the temporalities of the Catholic Church of Gibraltar ought to be established;” or to prove that any body of laymen ever interfered in the management of the temporalities of the Roman Catholic Church of Gibraltar, otherwise than as a Council called by the Vicar to aid him with their assistance, but without any power of controlling him.

V.—Because, supposing such a Junta to have been legally established by custom or otherwise, the Respondents have given no evidence whatever that they are, as they allege, the majority of such Junta; or that any of them were duly elected or appointed the members thereof.

[59] VI.—Because evidence was improperly received in the Supreme Court; and one of the Respondents was examined as a witness in the cause, and extracts from the document called the “Book of Archives,” were admitted without any proof whatever of the authenticity or custody of that book.

VII.—Because the Respondents, having filed no replication to the answer of the Appellant, ought not to have been allowed to give any evidence in opposition thereto.

VIII.—Because the Decree directs the Appellant to pay to the Respondent, Anthony Porral, all sums of money which he has received on account of the temporalities of the Church, without specifying the amount to be paid, and without directing any account to be taken of such sums.

IX.—Because the said Decree directs the Appellant to pay to the said Anthony Porral all the future fees to be received as the funds of the Church, and to put up and place in their former accustomed places within the body of the said Church the said then tables of fees; which directions are contrary to the practice of Courts of Equity, and do not, under the circumstances of the said cause, come within the jurisdiction of a Court of Equity.

The Respondents, on the other hand, insisted that the Appeal ought to be dismissed, and the Decree of the Court below affirmed, for the following reasons:—

I.—That the said Decree is according to equity and justice, upon the case made and proved on the part of the Respondents, the Plaintiffs, on the hearing of the said cause.

II.—That the rights and duties of the Respondents, the Elders of the said Church, are most beneficial, and [60] tend, in the highest degree, to the well being and good government of the said Church, and are established by a lawful course of proceeding, custom, and usage, time out of mind, and acquiesced in, and acted upon, by the Vicars of the said Church.

III.—That the Appellant most especially has, both prior and subsequent to his becoming Vicar of the said Church, recognised and acted upon and bound himself by the same, and ought not, in justice, to be permitted any longer to dispute or question the same.

Mr. Kindersley, Q.C., Mr. C. P. Cooper, Q.C., and Mr. Addis, for the Appellant; and

The Solicitor-General (Sir W. Follett), Mr. Turner, Q.C., Mr. Rogers, and Mr. Hoggins, for the Respondents.

The following authorities were cited and referred to in the course of the argument:—*Jephson v. Riera* (3 Knapp, 130), *Lubbock v. Potts* (7 East, 449), *Campbell v. Hall* (1 Cowper, 204), *Cameron v. Kyte* (3 Knapp, 332). 1 Chalmers' Opinions, 177 and 181. *Corpus Juris Can.* b. v., pt. 2, tit. 3, s. 42; Jus. Ecc. Univer., *Pand. Sacri.* pt. ii., pl. 4, 8, 15.

(June 20, 1842.) Their Lordships during the argument, intimated an opinion that they could not take judicial cognizance of the canonical oaths taken by the Appellant; that the question, as far as they could take cognizance of it, was, whether he had received money in the form of fees, and as incident to his office of Vicar-General, which he was bound either by an express or implied contract to pay over, and, if so, to whom such fees were to be paid; that the taking of such fees made [61] him, in fact, a receiver, and involved his liability to account, which they were of opinion he ought to do, and they accordingly varied the Decree of the Court below, by dissolving the Injunction, and made the following report to Her Majesty in Council:—

“That the said Decree of the said Supreme Court of Gibraltar, of the 30th January 1841, ought to be varied, and that, instead of being as it now is, the same ought to stand, and be as follows: It appearing that, according to the usage and practice of and in the Church of St. Maria la Coronaela, and the administration of the concerns and affairs thereof, which have existed and prevailed during a long series of years, next before and up to the appointment of the Appellant to the office in that Church now held by him, and for some time afterwards, and to which usage and practice the Appellant, by accepting, as he did, such office, and by his subsequent conduct, must be taken to have agreed to confirm; their Lordships are of opinion that the sum of dollars 175 11. 5. and the sum of dollars 214. 6. respectively, in the Appellant's answer, or the Schedule A. thereto annexed, received by him for parochial dues, ought to be paid by him to the treasurer, for the time being, of the Cahildi, or body of elders of the said Church for the time being, to be by such treasurer applied according to his duty in that behalf; and it appearing that the Respondent, Anthony Porral, is such treasurer, and the Respondents not desiring that any account should be taken against the Appellant in this suit, or that in this suit any direction should be given touching the Appellant's receipts prior to the 8th November 1840, or the receipts (if any) subsequent to, or not included in, the accounts contained in the said Schedule A.: and it not appearing to be [62] necessary to the protection of any right belonging to, or claimed by, the Respondents, that the Injunction granted in November 1840 should be continued,—their Lordships are further of opinion, that the Injunction ought to be dissolved, without prejudice to any question of right between the parties, and that the Appellant ought to pay, within three months, to the Respondent, Anthony Porral, as such treasurer as aforesaid, the said two several sums of dollars 175 11. 5. and dollars 214. 6., to be by him applied according to the duties of his office of treasurer, and that the said Appellant ought to pay to the Respondents the costs of this suit up to the Decree of January 1841, inclusive, to be taxed by the Master of the Court below, if the parties differ; and their Lordships do direct that the parties do respectively bear their own costs of all subsequent proceedings, to the present time inclusive. And their Lordships are of opinion, that any of the parties should be at liberty to apply to the

said Supreme Court at Gibraltar touching the Receiver that has been appointed, or otherwise, consistently with this Report, in case Her Majesty should be pleased to approve the same, and to order as is herein recommended; and such order of approval on this Report is to be without prejudice to any question as to the right of the sum of dollars 23. 7. and the sum of dollars 8. 1. 12. for alms respectively in the said schedule mentioned, or either of them, and without prejudice to any future proceeding in respect of any receipts by the Appellant subsequent to the year 1840, if any."

This Report being approved by Her Majesty in Council, an Order in accordance therewith was drawn up.

[Mews' Dig. tit. COLONY, III. APPEALS to PRIVY COUNCIL, 1. 4. 6. g.]

[63] ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF NEWFOUNDLAND.

EDWARD KIELLEY,—*Appellant*: WILLIAM CARSON, JOHN KENT, and Others,—*Respondents* * [Jan. 4, 5, and 6, 1841; May 23, 1842].

The House of Assembly of the Island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature [4 Moo. P.C. 84, 86, 88].

Semble.—The House of Commons possess this power only by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti* [4 Moo. P.C. 89].

Semble.—The Crown, by its prerogative, can create a Legislative Assembly in a settled Colony, subordinate to Parliament, but with supreme power within the limits of the Colony for the government of its inhabitants; but

Quere.—Whether it can bestow upon it an authority, viz., that of committing for contempt, not incidental to it by law [4 Moo. P.C. 86].

The principles of *Beaumont v. Barrett* (1 Moore's P.C. Cases, 59) and *Burdett v. Abbott* (14 East, 137) examined [4 Moo. P.C. 91, 92].

This was an appeal from the Supreme Court of Judicature of Newfoundland, upon a judgment on demurrer, pronounced on the 29th of December 1838, in an action brought by the Appellant against the Respondent, for assault, battery, and false imprisonment.

The Appellant was the district surgeon and manager of the Hospital in Saint John's town, the capital of Newfoundland. The Respondent, John Kent, was a member of the House of Assembly of Newfoundland, and, in his place in the House, had made some animadversions on the management of the Hospital.

On the 6th of August 1838, Kent reported to the [64] House of Assembly that the Appellant had been guilty of a contempt, having reproached him in gross and threatening language for the observations he had made, adding, "your privilege shall not protect you." The House immediately referred the consideration of Mr. Kent's complaint to a Committee of Privileges, before whom evidence as to the alleged breach of privilege was taken, and the House, upon their report, voted the Appellant guilty of a breach of the privileges of the House of Assembly, which, if passed unnoticed, would be a sufficient cause for deterring a member from acting with that independent conduct necessary for every Assembly, and ordered that the

* Present: The Lord Chancellor [Lord Lyndhurst], Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, The Vice-Chancellor of England [Sir Lancelot Shadwell], the Lord Chief Justice of the Common Pleas [Sir N. C. Tindal], Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Speaker do issue his warrant to the Serjeant-at-Arms, to bring the Appellant to the Bar of the House, to be dealt with according to the pleasure of the House.

The Appellant was accordingly arrested, and on the following day, the 7th of August, brought to the bar of the House, where the Respondent, William Carson, the Speaker of the House of Assembly, read to him the resolution, which declared his conduct to the Respondent, Kent, to be a breach of privilege, and required him to explain. The Appellant, it appeared, instead of explaining his conduct, made use of violent language towards Mr. Kent, who was then in his place in the House; and the House thereupon directed him to withdraw, in the custody of the Serjeant-at-Arms. The House then resolved, that such conduct was a grievous aggravation and iteration of the contempt offered to the House by the Appellant, and directed that he should continue in the custody of the Serjeant-at-Arms until further order from the House. On the 9th of August the House resolved that the Appellant should again be brought to their Bar, and that he [65] should be required to apologize for the breach of privilege of which he had been guilty. The Appellant was accordingly placed at the bar, but he refused to make an apology. The House thereupon passed a resolution that he should be committed to the gaol of Saint John's, and ordered the Speaker to make out the necessary warrants to the Sheriff and the Gaoler, which was done, and the Appellant was committed thereon.

The Appellant was brought up, on the 10th of August, under a writ of *habeas corpus*, before one of the Judges of the Supreme Court, and discharged [see Printed Cases in Privy Council Appeals, Appx. C.].

In consequence of this commitment and imprisonment, the Appellant, in Michaelmas term 1838, brought an action of trespass and false imprisonment, in the Supreme Court of the Island, against the Respondent Carson, the Speaker, and Walsh the messenger, and Kent and others, members of the House of Assembly. The declaration consisted of four counts. The first count was for breaking and entering the Plaintiff's dwelling-house on the 6th of August, and seizing and imprisoning him, for the space of four days. The third count was for assaulting and imprisoning him generally; and the second and fourth counts, were for the battery.

The Respondent, Carson, pleaded, first, the general issue, and, secondly, a special justification, as Member and Speaker of the House of Assembly, and set forth the circumstances, above-mentioned, and the several resolutions of the House of Assembly, in obedience to which, he averred he had acted.

Similar pleas were put in by the other Respondents.

To these special pleas by Carson, as well as by the other Respondents, the Appellant demurred. The [66] Respondents having joined to the demurrers, they were argued before the Supreme Court, which held them to be sufficient in law, and directed judgment to be entered up for the Defendants [Printed Cases *ubi sup.* Appx. G., and Appx. to Respondents' Case, Nos. 4 and 5].

From this judgment, the present Appeal was brought, which now came on for argument (Jan. 4, 5, and 6, 1841*).

Mr. Pemberton, Q.C., and Mr. Henderson, for the Appellant.—The question now before your Lordships is of great magnitude, involving the liberty of the subject in the Colonies. Three points are raised by this Appeal: First, whether the House of Assembly of Newfoundland had power to commit for a breach of privilege, as incident to the House as a legislative body; secondly, supposing such power to exist, whether it has been rightly exercised in this instance; and, lastly, whether the pleas contain a complete justification to the action. Now we contend, first, that the House of Assembly does not possess, by any law, the power of arresting and imprisoning for breaches of privilege; and even supposing such power to exist, we submit that it can only be exercised against its own members, and not against strangers for alleged contempts committed out of doors. The first consideration arises out of the known distinction between conquered and settled colonies. *Blankard v. Galdy* (2 Salk. 411), *Campbell v. Hall* (20 State Trials, 239). In the former, the power of the Crown is paramount; in the latter, the Colonists carry with them the laws of their native land, and whatever difference of opinion there may be with [67] re-

* Present: Lord Brougham, the Vice-Chancellor [Sir Lancelot Shadwell], Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

spect to the introduction of some of those laws, the right of exemption from personal violence, by any authority, but that of the law, is clear and undoubted. "No man shall be imprisoned but by the lawful judgment of his peers, or by the law of the lands" (Magna Charta, and see 28 Ed. III. c. 3), is the great charter of liberty, applicable alike to Colonists as to Englishmen.

It is necessary in the first instance to ascertain the powers of the House of Assembly. Newfoundland, is one of the earliest of our Colonies, it is a dependency of the Crown of England, by right of occupancy. Possession was taken in the year 1583, when the laws of England were introduced, and amongst them, freedom from personal violence, and continued in force, without alteration, down to the year 1832. In that year, the present Legislative Assembly was constituted by Letters Patent from the Crown, to the Governor, authorising him to convoke a Legislative Assembly for the Island, to consist of fifteen members. The qualification and method of the election of its members were regulated by a Proclamation of the Crown, of the 26th of July 1832 [see Printed Cases *ubi sup.* Appx. to Respondents' Case, No. 2]. Previous to this period the sole power of making laws for the Government of Newfoundland, was in the Legislature of this country. Any law, custom or usage for the justification of the act now complained of, has existed therefore, only, since the year 1832. It is attempted to support this privilege of committing for contempt, by analogy between the House of Commons and this Colonial Assembly. No such analogy exists. The House of Commons possess the power of commitment as part of the *lex et consuetudo parliamenti*. In Coke's 4th Institute, 15, it is laid down that matters of Parliament, are not to be decided by the Common [68] Laws, but *secundum legem et consuetudinem parliamenti*. The same doctrine is stated in 3 Hawkins P.C., book 2, c. 15, s. 73, and by Blackstone, 1 Com. 164. It is monstrous to suppose for an instant, that there can be a *lex et consuetudo* of an Assembly like Newfoundland, whose constitution existed only since 1832. The principles on which the English Parliament rests its rights and privileges cannot be extended to Colonial Assemblies. Their constitutions necessarily differ. Colonial Assemblies derive their powers from the Crown, and are regulated by their respective charters. Parliament stands on its own laws, the *lex et consuetudo parliamenti*, which are founded on precedents and immemorial usage. The Crown has no power, by virtue of its prerogative, to confer on the Legislative Assembly such powers as are possessed by the House of Commons, for it does not possess such authority itself. The only grounds on which the power of committal is exercised by the House of Commons, are thus stated by Lord Ellenborough, C.J., in *Burdett v. Abbott* (14 East, 136): "The privileges that belong to them seem at all times to have been, and necessarily must be, inherent in them: independent of any precedent, it was necessary that they should have complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection." And again, "The right of self-protection implies, as a consequence, the right to use the necessary means for rendering such protection effectual. Independently, therefore, of any precedent or recognized practice on the subject, such a body must *à priori* be armed with a competent authority to enforce the free and independent exercise of its own [69] proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be, and is, authorized to remove any immediate obstruction to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and effectual protection: it must also have the power of protecting itself from insult and indignity, when offered, by punishing those who offer it:" and the learned Judge goes on again to say, "Would it consist with the dignity of such bodies, or, what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparative tardy result of a prosecution, for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies constituted for such purposes, and exercising the functions as they do, should possess the powers which the history of the earliest times shows that they in fact possessed and used." The House of Commons possess this power as a Court of Judicature, Coke's 4th Inst. 23; as part of the High Court of Parliament,

the *aula regia*. After the separation of the legislative body into two distinct houses, each retained, to this extent, at least, the power that was common to both, and this power has been recognized at an early period, confirmed by the highest authorities, sanctioned by unvarying usage, and recognized by Acts of Parliament. The question, whenever the privileges of the Commons have been disputed, has always been, whether the particular act was justified or not, by the *lex et consuetudo parliamenti*. Is the House of Assembly of Newfoundland a Court of Justice? Certainly not. Lord [70] Ellenborough expressly puts the right of arrest upon the ground that Parliament was part of High Court of Judicature (14 East, 1, 36-7), and that although that character was now divided by the two Houses, and exercised in fact by but one, yet that it was only as a Court that it was originally so possessed. Mr. Justice Bayley also held the privilege as an incident to a High Court of Judicature (*ib.* 159). Then if the House of Assembly at Newfoundland, is not a Judicial Assembly, it is impossible to apprehend upon what ground, the proposition that the privilege here claimed, is incident to it, rests. If it existed in the House of Assembly since 1832, it must have formerly existed in the Council. If the Crown had the power of constituting the Council as it pleased, and of assigning the number of the Legislative Assembly, it could also make a Council with all these powers without a House of Assembly. Such a position might lead to the exercise of the most frightful tyranny, for the Council, consisting of a few individuals, might commit any one who, in their opinion, was guilty of any offence, or, by suspending any member of their body, introduce a more pliant one in his stead. How could the Crown delegate to an Assembly like that of Newfoundland such powers as it does not itself possess? The Crown may, no doubt, incorporate a body of persons in the Colonies, or at home, and invest them with power to legislate for themselves; but in doing so, it can give them no power to commit and imprison for contempt. Indeed, there exists no necessity for such power in an Assembly of this nature. It has not supreme power even in the Colony, for its acts are liable to disallowance by the Crown. No assembly has supreme power but the Imperial Parliament. The [71] East India Company possessing legislative powers over a territory more vast than our House of Commons, has not such a power. The Corporation of the City of London has no such power. There are only two instances of such a power, namely, the House of Commons and the Courts of Justice. *Beaumont v. Barrett* (1 Moore's P.C. Cases, 59) is the only authority which can be cited on the other side. That was an Appeal from a judgment of the Court of Error at Jamaica, affirming a judgment of the Supreme Court, overruling the general demurrers of the Appellant, to the pleas of justification pleaded by the Respondent, to an action of trespass and false imprisonment, brought against them by the Appellant, such imprisonment having taken place for a libel which had been resolved by the House of Assembly to be a breach of the privileges of the House. In delivering the judgment of their Lordships, Mr. Baron Parke said (*ib.* 76), "Without adverting for the present to what has been done by the Assembly from the time its constitution was given to it in the year 1680, or relying upon the precedents laid before us, it would appear I think to be inherent in every Assembly that possesses a supreme legislative authority, to have the power of punishing contempts; and not only such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as Courts of Record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice by disparaging and weakening their authority;" and after adverting to, and quoting the language of Lord Ellen-[72]-borough in *Burdett v. Abbott* (14 East, 137), the learned Judge proceeds, "Now if we apply that principle to the Legislative body which appears to possess supreme legislative authority over the whole of the island and its dependencies, we must in like manner say that they have incidentally the power, not only of punishing direct impediments to their proceedings, but indirect obstructions, such as are caused by libels reflecting on their conduct, and tending to bring their authority into contempt, and that independently of any precedent for its exercise. But if we look into the authorities adduced in this case, we shall see that this power has been exercised without dispute, so far as relates to the imprisonment of persons for contempt, from that period (1680) down to the present day: " and after citing the precedents produced from the year 1686 to 1709, of the

exercise of the authority by the House of Assembly and the Act of the Colonial Legislature, 1 Geo. II., c. 1, passed in 1728, which directed that "all laws and statutes of England as have been at any time esteemed, introduced, and accepted, or received, as laws in the island, should, and were thereby declared to be, and continue, laws of Her Majesty's Island of Jamaica for ever," observed that, "on this the legality of the power in question might be supported, if it did not belong to the Assembly, as we think it did by law, as a necessary incident to its legislative authority." The decision in that case may be supported upon the ground of usage since the year 1680. It cannot affect or govern the present case. The course adopted to justify the claim made here, has been to refer to instances of the exercise of a similar power by other Houses of Assembly. Precedents have been brought forward from the Journals of the [73] Houses of Assembly of Barbadoes, Antigua, Montserrat, the Bahamas, Nova Scotia, New Brunswick, and Prince Edward's Island (these precedents were printed in a Supplemental Appendix [Printed Cases in Privy Council Appeals]). The earliest period of the exercise of this power by any of these bodies was by the House of Assembly of Prince Edward's Island, in the year 1812. Barbadoes was founded in the year 1649, but the first instance of the exercise of this power by the Assembly is in 1821. If the power of committal existed as a necessary incident to the House of Assembly from 1649, how came it that it was never exercised till 1821? With respect to Antigua, that colony was settled in 1631, but no instance of committal for contempt could be found till 1819, and that was against a member of the House of Assembly. In Montserrat, there was no instance of committal of a person who did not appear to be a member of the House. In Nova Scotia, the earliest instance was in 1818, and in New Brunswick in 1832. But the usage in one colony, even if it existed, is no authority for the power being in another. If the doctrine in *Baumont v. Barrett* [1 Moo. P.C. 69] is to be applied, the power is just as incident to the Council composed of three persons, as the whole Legislative Assembly.

II. The mode in which this supposed right has been exercised.—The whole proceedings were irregular. The Appellant was taken into custody without being summoned, and convicted without being heard, or the deposition of a single witness taken on oath. It appears that a Committee of the House of Assembly having resolved, on the complaint of one of its members, that a breach of privilege was committed, ordered the individual so transgressing into custody, kept him in custody for two days, ordered him to be brought to the Bar of the House to make an apology, and, this [74] latter command not being complied with, directed that he should be committed until such apology was made. There was no adjudication. The warrant was not under seal, and does not record that any adjudication or conviction had taken place: and moreover, it contains matter not justified by the previous proceedings. When the Appellant was brought to the Bar of the House of Assembly, he was detained two days, though the warrant on which he appeared was spent, and a resolution of the House for detaining him until he made an apology was no more operative than a judgment of a Common Law Court would be without a writ. Supposing the power of commitment to exist, the manner of exercising it in the present instance was illegal, and contrary to every principle of natural justice and positive law. Neither can the second warrant be sustained—it is bad in law on two grounds: *first*, it does not follow the resolution of the House; and, *secondly*, according to law, it is void, being for an indefinite period. *Burdett v. Abbott* (14 East. 149-50), *Stockdale v. Hansard* (9 Add. and Ell. 1), and the authorities there cited, show the extent to which this power can be exercised. Privileges of the House of Commons are as much a part of the law of the land as the Statute, Ecclesiastical, or Admiralty laws—all of which are noticed and determined by Courts of Common Law.

III. The plea is no justification.—The rule of law is that the plea must justify the act complained of. *Gregory v. Hill* (8 Term. 299), *Duppa v. Maya* (1 Saunders. 286, Note), *Smith v. Nicholl* (5 Bing. N.C. 208; S.C. 7 Scott, 147), *Greene v. Jones* (1 Saunders, 297). The judgment complained of must fail, even on this ground of objection. [75] The pleas are bad, as they purport to justify without confessing a battery.

Mr. M. D. Hill, Q.C., and Mr. Fleming, for the Respondents.

I. The power of committal for a violation of privilege is necessarily inherent in every Legislative Assembly. *Baumont v. Barrett* [1 Moo. P.C. 59]. Such authority

is absolutely essential, as well for the due exercise of the functions of a Legislative body, as for enabling those who compose it, efficiently and independently to perform the duties imposed upon them. It is an essential incident to the constitutional functions of a House of Assembly. The House of Assembly of Newfoundland is a Legislative body convoked by Commission and instructions from the Crown. They have the power of making local ordinances not repugnant to the law of England (1 Blackstone, Com. 108). It cannot be disputed that the Crown has the power of creating a local jurisdiction, *Dutton v. Howell* (Showers, Par. C. 24), or of following its subjects, by granting a local Legislature in the country to which they have emigrated, which should exercise supreme authority so far as is consistent with their dependence on the mother country. We admit, the argument of the Appellant, that English settlers carry with them their rights according to the English Law, varied only by local circumstances. They have, as a consequence, the right to Courts of Justice for the purpose of administering the law, and it cannot be questioned that those Courts have the same power of committing for contempt as the Courts of England. Settled colonies have a right to a Legislature *ex necessitate*; for Acts passed in the mother [76] country subsequently to the settlement do not bind the colony unless the colony is expressly named. As a colony, therefore, requires new laws, it follows that it has a right to a Legislative Assembly, and one as like to the Houses of Parliament as circumstances admit. The Canada Act, (31 Geo. III., c. 31,) which established the Legislative Assembly there, provided also for an hereditary House and titles of nobility. It is true, this was never acted upon, but it shows that the intention was to assimilate it as nearly as possible to the Legislative body in this country. This right to a Legislature, is an inchoate right in every colony, requiring no Charter or Act of Parliament to call it into existence: the mere will of the Sovereign, expressed in a letter of instructions to the Governor, is sufficient. As regards the right of convoking a Legislative Assembly, no distinction exists between a settled or conquered colony (Chalmers' Opinions [1], 222-3). No authority can be produced to overrule the universal principle that a House of Assembly was not as powerful in a settled as in a conquered country. It has been admitted that this power has been exercised in Jamaica, but then the Appellant's Counsel account for that fact by saying that it was not a privilege incident to a popular Assembly, but exercised in virtue of the full and complete Legislative power of the Crown over a conquered country; but they should have gone further, and shown in what respect the House of Assembly of Jamaica was gifted with powers not possessed by Newfoundland. The Act of 1832 established the present House of Assembly; but it was not a new institution—it had been in action for centuries; its powers known and its attributes settled by long experience. [77] The question, then, is narrowed, to what are the incidents of a General Assembly. In Mr. Burke's account of European America (2 Vol. 296-7), it is said that the first colony which was settled was that of Virginia, which was governed at first by a President and Council appointed by the Crown. The colonists were, however, afterwards "empowered to elect representatives for the several counties in which the province is divided, with privileges resembling those of the House of Commons in England." Again, in Edwards' History of the West Indies (2 Vol. 344), a work of considerable reputation, it is laid down "that Provincial Parliaments or Colonial Assemblies being thus established and recognized, we shall find that in their formation, mode of proceeding, and extent of jurisdiction within their own circle, they have constantly copied, and are required to copy, as nearly as circumstances will permit, the example of the Parliament of Great Britain." He goes on further to say, "They commit for contempts; and the Courts of Law have refused, after solemn argument, to discharge persons committed by the Speaker's warrant." Now, this authority to commit for contempt has been invariably exercised by all the Colonial Houses of Assembly whenever they may have been called upon to exercise it. It does not rest merely upon principle. In the American Archives in the course of printing, by the order of the Congress (Vol. I. p. 1119-20, Brit. Mus.), under the date of the year 1775, the Journals of the House of Assembly in New Jersey, ~~one~~ Murdock was committed by the House for contempt, in sending a challenge to one of the members. Another case—that of Cook and Macnaughten—occurred [78] in Jamaica in 1776 (2 Edwards' Hist. of West Indies, 422), of a committal for contempt by the House of Assembly. The powers possessed and exercised by the

Houses of Assembly in the West Indies have been equally enjoyed by similar bodies in whatever colonies they were erected. The extracts from the Journals of the Houses of Assemblies of New Brunswick, Nova Scotia, and of Prince Edward's Island, which are printed in the Supplemental Appendix, prove the exercise of the same authority by the Legislative Assemblies in those colonies. Evidence of usage cannot be stronger or more conclusive. The precedents of the exercise of the power to commit in the colonies are not numerous, but they are satisfactory. In *Regina v. Patty* (2 Ld. Ray, 110-9), which was the case of an inquiry by the Court of King's Bench into the proceedings of the House of Commons, Justice Powys says, "The reason why there were no precedents of that kind was very obvious, viz., that it would be unreasonable to put the Judges upon determining the privileges of the House of Commons, of which privileges they have no account nor any footsteps in their books: that the House of Commons have the records of them." It is contended, on the other side, that the power in the House of Commons to commit for contempt is derived from the ancient *aula regis*. This cannot affect our argument; the House of Commons is no further a Court of Justice than is a Colonial House of Assembly. The principle that the power of commitment for contempt is incident to high deliberate Assemblies, is fully recognised in *Burdett v. Abbott* (14 East, 137), *Beaumont v. Barrett* (1 Moore, P.C. Cases, 76). This [79] latter case was adopted by Lord Denman in *The Queen v. Gossett* (3 Per. and D. 362), and the same principle is recognised in Ferrier's case (1 Hats. Pre. 56, 57), *The King v. Faulkner* (2 Cron. M. and R. 525). The whole of the authorities upon this point are collected in *Stockdale v. Hansard* (9 Add. and Ell. 1). The case of *Anderson v. Dunn* (Wheaton, 204, N.S.) was a commitment by the Congress, of a stranger for contempt. By the American Constitution, the Congress have no power but that specially delegated to it, the residuum of power remaining in the separate Sovereign States. By that Constitution, power to arrest and commit for contempt was expressly given to it over its members, but no such power was given over strangers: yet it was held in *Anderson v. Dunn*, that such power was necessary and incident to the functions of Congress. No act of Parliament ever gave the House of Assembly of Jamaica the power to commit, yet they exercised the power as being inherent in the Supreme Legislative authority. *Beaumont v. Barrett* [1 Moo. P.C. 59]. *Burdett v. Abbott* [14 East, 137]. An attempt, however, has been made to distinguish *Beaumont v. Barrett* from the present case, by reason that Jamaica was a conquered colony, and Newfoundland a settled colony. This objection is untenable. It has been expressly held by Lord Mansfield, in *Hall v. Campbell* (Cowpers, 213; S.C. Lofft, 655; 20 State Trials, 326-7), that Jamaica was not a conquered colony. That learned Judge said, that after the conquest, and before the settlement of the colony by the English, "all the Spaniards having left the island, or having been killed, or driven out of it, the first settling was by an English colony, who, under the authority of the King, planted a vacant island belonging to him in right of his Crown," and [80] that it was, therefore, to be considered as a planted colony. It must be put upon the same footing as Newfoundland. Neither is this power confined to Legislative Assemblies or Courts of Law. Justices of Peace commit for contempt. *Cropper v. Horton* (8 D. and R. 166), *Beaune v. Watson* (3 M. and S. 1), *Mayler v. Lamb* (7 Taunt. 63). 2 Hawkins, B. 2, S. 3. 2 Hales, P.C. 122. Courts of Equity—*Wellesley v. Duke of Beaufort* (2 Russ. and Myl. 639), *In the matter of the Ludlow Charities* (2 Myl. and Cr. 316)—and the Ecclesiastical Courts—*Barlee v. Barlee* (1 Add. Ecc. Rep. 301)—not being Courts of Record, also commit for contempt. It is not denied that the House of Assembly, by its constitution, has Supreme Legislative power in the island. Why, then, if it possess the greater power, should it not possess the less, and that one so necessary to the due performance of its duties and independence of its members? The power in question is not likely to be abused; it is subject to the checks of prorogation and dissolution. There is no analogy between Corporations and Legislative Assemblies. Corporations have no power to preserve their independence from the Crown; but Houses of Assembly stand between the Crown and the people, as the House of Commons does. A House of Assembly cannot perform its functions without the same powers as the House of Commons; and from the tenor of the Royal instructions (Clark's Colonial Law, 435) to the Governor of Newfound-

land accompanying the Commission, it was manifestly the intention of the Crown to confer similar powers upon the House of Assembly.

II. This power has been well exercised. If only irregularly exercised, the objections urged are of no weight, [81] because each Court judges of its own proceedings. Was it meant to be said that there was no jurisdiction in the House of Commons to commence by taking a party into custody? It is true that, in the exercise of their discretion, this is seldom done; but that is not the question; the question is, whether they have jurisdiction or not. Suppose there should be a riot, or a disturbance, at the door of the House, and a messenger should go out to arrest the parties, would it be necessary that he should first ascertain the names of the rioters, and summon them? No; they would be brought in immediately. If a contempt were committed in a Common-Law Court, they would order the transgressor into custody without a warrant of commitment. *King v. Clerk* (1 Salk. 349). If the House have a right to commence by arrest, it is only matter of discretion whether they exercise that right in the first instance or not. Courts of Law could make a rule, if they pleased, that a party be attached in the first instance without showing cause. The Respondent was brought up in custody—not in execution: the House resolved itself into a committee, that is equivalent to reporting to the House. The warrant is good. *Beaumont v. Barrett* (1 Moore, P.C. Cases, 80). Lord Mansfield, in *Burdett v. Abbott* (4 Taunt. 447), said, on an objection to the Speaker's warrant, that it was enough if the warrant stated it to be for contempt. In Lord Shaftesbury's Cases (6 How. St. Tri. 1269, 1271; S.C. 1 Mod. Rep. 144), the warrant was general. Warrants need not be under seal. *Reg. v. Paty* (2 Ld. Ray, 1105). Instances are numerous in the Journals of the Houses of Lords and Commons, of parties being obliged to apologise. In *Money v. Leach* (19 How. St. Tri. 1002; S.C. 3 Burr. 1742, and 1 Wm. Bl. 554), a list of general warrants is set forth. The form of at-[82]-tachments used in the superior courts of Westminster, which are upon mesne process, are general (Tidd's Pract. Forms, p. 63). Admitting that the last warrant did not follow the resolution of the House, yet it is immaterial, as it was merely for the regulation of their own proceedings. When the Respondent refused to make an apology, the Speaker did what he had a perfect right to do—directed the Sheriff to take him into custody until he made an apology. By an Act of Parliament of Canada, Courts of Justice had the power to transport for life. In the late case of The Canadian prisoners (5 Mee. and Wel. 32), the Court transported certain persons for fourteen years, to commence from their arrival in Van Dieman's Land. Now, this was for an uncertain term; yet it was held that, as the Court could transport for life, the lesser power was included in the greater.

III. The point of pleading is subordinate to the important point really at issue. If the pleadings are insufficient, why was not such objection taken in the Court below? where, if sustained, we should have moved to amend.

Mr. Pemberton replied.

The Appeal was, by the direction of their Lordships, re-argued by one Counsel on each side (23rd May 1842); by Mr. Henderson, for the Appellant, and Mr. M. D. Hill, Q.C., for the Respondent.

In addition to the authorities referred to in the previous argument, Calvin's Case (Coke's 7 Rep. [6]); 2 Halliburton's History of Nova Scotia, p. 324; Gordon's History of New Jersey, 337; Pownall's History of the Colonies, p. 60; Woodstock's Constitution of the British Colonies, p. 141; The Commission for establishing a Legislative Assembly in Newfoundland, 26th July 1832, and the instruc-[83]-tions from the Colonial Office thereon [see Printed Cases, Appx. to Respondent's Case, No. 2]; Clark's Colonial Law, p. 435; and the case of Upper Canada, Parliamentary papers, 1828,—were cited and relied upon.

Mr. Baron Parke (Jan. 11, 1843). —The great importance of the principal question in this case induced those of their Lordships who heard the first argument, to request that a second might take place before themselves and other members of the Judicial Committee. The case has been again argued before the Lord Chancellor, the Lords Brougham, Denman, Abinger, Cottenham, and Campbell, the Vice-Chancellor of England, the Lord Chief Justice of the Common Pleas, Mr. Justice Erskine, the Right Hon. Dr. Lushington, and myself; and I have been instructed by their Lord-

ships to state the reasons for the advice which they will give to Her Majesty to reverse the Judgment of the Court below.

That Judgment was given in favour of the Defendant upon a demurrer to several special pleas to an action of trespass for false imprisonment, by which the acts complained of were justified by the Defendant Carson, as Speaker of the House of Assembly of Newfoundland, by other Defendants as Members of that House, and by one as messenger in aid of the Serjeant-at-Arms, upon an arrest and commitment for an alleged breach of privilege of the House.

Several objections were taken of a formal nature to these pleas, which it is unnecessary to state, as the opinion of their Lordships is not founded upon any of those objections. The main question raised by the pleadings, and applying equally to the case of all the Defendants, was whether the House of Assembly had the power to arrest and bring before them, with a view [84] to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege. It is indeed stated in the plea of the Defendant Carson, and that of the other Defendants, members of the House, that something occurred which might amount to a contempt, committed in the face of the Assembly, by the use of the violent and threatening words to one of the members then present in his place; but each plea also justified the original arrest of the Plaintiff below upon a warrant issued by the Speaker, founded on the complaint of a breach of privilege committed out of the House: and if the House of Assembly had not a power to issue that warrant, this part of such plea is bad; and as each plea is entire, the whole is bad. The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise in this case.

Their Lordships are of opinion that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors, and consequently that the judgment of the Court below must be reversed.

In order to determine this question, and to ascertain what the legal powers of the Assembly were, it is proper to consider first, under what circumstances it was constituted, and what was the legal origin of its powers.

Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament): and on the other hand, the Crown possesses the same prerogative and the same powers of Government that it does over its other subjects: nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign had not merely the right of appointing such magistrates and establishing such Corporations and Courts of Justice as he might do by the Common Law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants. This latter power was exercised by the Crown in favour of the inhabitants of Newfoundland in the year 1832, by a Commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department: and the whole question resolves itself into this,—whether this power of adjudication upon, and committing for, a contempt, was by virtue of the Commission and the instructions legally given to the new Legislative Assembly of Newfoundland. For under these alone can it have any existence, there being no usage or custom to support the exercise of any power whatever.

In order to determine that question, we must first consider whether the Crown did in this case invest the local Legislature with such a privilege. If it did, a further question would arise, whether it had a power to do so by law.

If that power was incident as an essential attribute [86] to a Legislative Assembly of a dependency of the British Crown, the concession on both sides that the Crown had a right to establish such an Assembly, puts an end to the case. But if it

is not a legal incident, then it was not conferred on the Colonial Assembly, unless the Crown had authority to give such a power and actually did give it.

Their Lordships give no opinion upon the important question whether, in a settled country such as Newfoundland, the Crown could by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority, not incidental to it, of committing for a contempt—an authority, materially interfering with the liberty of the subject, and much liable to abuse. They do not enter upon that question, because they are of opinion, upon the construction of the Commission and of its accompanying document, that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland; and if it did not pass as an incident, by the creation of such a body, it was not granted at all. This appears to be clear from the consideration of the Instruments.

By the Commission for the establishing the Legislative Assembly, dated the 26th July 1832. His late Majesty King William the Fourth authorized the Governor, with the advice and consent of the Council of the Island, from time to time, to summon and call General Assemblies of the freeholders and householders within the Island, in such manner and form, and according to such powers, instructions and authorities as were granted or appointed by the general instructions accompanying the Commission, or according to such further powers, instructions or authorities as should at any time thereafter be granted or appointed under His [87] Majesty's sign manual and signet, or Order in Council, and that the persons thereupon duly elected should take the oaths, and should be called, and declared the General Assembly of the Island of Newfoundland; and the Governor, with the advice and consent of the Council and Assembly, or the major part of them respectively, should have full power to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of the Island and its dependencies, and the people and inhabitants thereof, and such other as should resort thereto, which laws, etc. were to be as near as might be to the laws and statutes of the United Kingdom, and subject to the approbation of His Majesty and to the negative voice of the Governor.

Accompanying this Commission was a despatch from Viscount Goderich (now Earl of Ripon) containing instructions (see Clark's Colonial Law, 435) to the Governor for the regulation of his conduct, upon which some reliance was placed on the argument at the Bar, as affording evidence of the intention of the Crown to confer the power in question upon the House of Assembly. The Commission itself where such an authority would naturally be expected to be found if the Crown had intended to confer it, is entirely silent upon this subject, nor does it grant any of the privileges of the British Parliament; and the terms used by the Earl of Ripon's letter have probably reference to the mode of conducting business and the forms of procedure, which are to be assimilated to those of the British House of Commons—at all events, terms so vague and general could never have been used with the intention of giving the powers of commitment, and other privileges of so important a nature, [88] if the authority of the Crown was required to bestow them by a special grant.

The whole question then is reduced to this,—whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature.

The Statute Law on this subject being silent, the Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. "*Quando Lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*" In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the

Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. [89] All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make bye-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.

It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favour of the assumption by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly—a claim for which there is not any colour of foundation.

Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts [90] of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

Their Lordships, therefore, are of opinion, that the principle of the Common Law, that things necessary, pass as incident, does not give the power contended for by the Respondents as an incident to, and included in, the grant of a subordinate Legislature.

It was however argued that in other colonies, the Legislative Assemblies exercise the power of committing for breach of privilege without objection, and that the usage in this respect was good evidence that such power was an incident attached by the Common Law, though not on the ground of necessity. And no doubt this argument would have had much weight, if there had been many Legislatures situate precisely as this is, and the usage to exercise the power of committal for breach of privilege had been frequent, and the acquiescence in its exercise long and universal, and that usage could have been explained only on the ground that the power was a legal incident. But no such usage has been proved, and the constitution and practice of different colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another. In some, the very exercise of the power, with the sanction of the [91] tribunals, and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law. But in this case, we have the simple question to decide, without any usage, any acquiescence, or any sanction of the Courts of Law, except in the very case in which we are now called upon to affirm or reverse the Judgment of the Court below. It remains to be considered how the question stands on express authority; and unless there be that satisfactory authority expressly in favour of the power, we must hold that the Common Law does not confer it.

There is no decision of a Court of Justice, nor other authority, in favour of the right, except that of the case of *Beaumont v. Barrett* [1 Moo. P.C. 59], decided by the

Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett v. Abbott* [14 East, 137], which *dictum* we all think cannot be taken as an authority for the abstract proposition, that every Legislative body has the power of committing for contempt. The observation was made by his Lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further.

We all, therefore, think that the opinion expressed [92] by myself in the case of *Beaumont v. Barrett* [1 Moo. P.C. 59] ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the Common Law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient Law of England has annexed to the House of Parliament.

The Judgment will be reversed, and there must be a Writ of Inquiry of damages, unless the parties can agree among themselves upon some sum—they had better do that. They ought to consider that it was a mere question of right to be tried, and, therefore, probably they will be able to do that. All we can do is to remit the record back to the Court below for inquiry.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 6. *Legislatures*; also tit. PARLIAMENT, A. INTERNAL MANAGEMENT, 2. *Powers of*. Followed in *Fenton v. Hampton*, 1858, 11 Moo. P.C. 347; and *Doyle v. Falconer*, 1866, L.R. 1 P.C. 328, 4 Moo. P.C. (N.S.) 203, on point as to committal by Colonial Legislature: and see *Phillips v. Eyre*, 1870, L.R. 6 Q.B. 1; Forsyth's *Cas. Const. Law*, 25; and charge of Blackburn J. in *Reg. v. Eyre*, 1868, p. 66.]

ON PETITION FROM BRITISH GUIANA.

IN RE BUTTS * [June 20, 1842].

Ex-parte.

In ranking Creditors under an execution sale, the Court of British Guiana declared by definitive sentences, the Petitioner's constituents' claim preferential. Appeals were interposed from these sentences. Pending the Appeals, the Petitioner filed a Petition in British Guiana, praying the Court to proceed to judgment of *prae et concurrentiae*, and to award the monies to be paid to him, *sub cautione de restituendo*: this the Court refused. The Petitioner then applied *ex-parte* to Her Majesty in Council, to reverse the order of refusal, and for an order upon the Judges in British Guiana, directing them to entertain the Petitioner's application. Held by the Judicial Committee, that an *ex-parte* Petition, under such circumstances, could not be entertained.

This was a Petition, presented by Richard Grosvenor Butts, as attorney in the colony of British Guiana, for [93] George Milne and others, Trustees under a deed of Trust of John Feering and wife, and also as attorney for Robert James Grant, of London, creditors, claiming under an execution sale of the plantation Vrees en

* Present: Lord Wynford, Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Hoop, in the said colony, praying that Her Majesty in Council would reverse the order of the Judges of the Supreme Court of British Guiana, bearing date the 5th March 1812, refusing to proceed to sentence of *prae et concurrentia* (a) in the net proceeds of the said sale, pending two appeals from definitive sentences of the Court, which declared, in the ranking of creditors of the insolvent plantation, the claims of the Petitioner preferent to the other creditors appealing, and also praying that an order might issue, directing the said Judges to pass such sentence, and to allow the Petitioner to receive the money which the sentence might award, on giving security, in the event of the sentences in the matters of debate being reversed on appeal.

The Petition alleged, that the Supreme Court having adjourned, soon after making the order of the 5th March 1812, the Petitioner had no opportunity of praying the Court for leave to appeal from the said order, nor could he do so, until the next session of the Court in the month of May following; that to wait for this would be a grievous waste of time, in a case in which the Petitioner's constituents had already suffered much from delay, and where there did not ap[94]-pear to be any need for the further interference of the Court, inasmuch as there was no opposing party to whom the order for appeal could be intimated, or to whom security could be given for the due prosecution of the appeal. The Petition then set forth the article of the ordinance of the 20th May 1777, providing for the manner of proceeding in cases of *præferentia et concurrentia*, and alleged that the order made by the Court was not in conformity therewith, according to the law and usages of the colony.

Mr. Burge, Q.C., for the Petitioner.—The object of the Petition is to get your Lordships to reverse the order of the Supreme Court, refusing to proceed to sentence of *prae et concurrentia*. Such a course would have been beneficial to all parties, if the money had been awarded to the Petitioner's constituents, and paid out to them *sub cautione de restituendo*. This course could have injured no one. The refusal of the Judges was contrary to the practice of the Courts laid down in the 6th article of the *Placaat* of 20th May 1777 (a) which expressly provides for applications of this sort. If the Judges had proceeded to judgment in *prae et concurrentia*, we might have appealed; but as the case now exists, the only substantial relief the Petitioner can get, is for your Lordships [95] to order and direct the Judges to proceed to judgment in *prae et concurrentia*.

Lord Brougham.—Their Lordships entertain no doubt that this question should not be decided *ex-parte*. You should have given notice to the parties in British Guiana, of your intention to apply here. This Court will not reverse an order of a Colonial Court, without giving the other party an opportunity of appearing and being heard in opposition. Besides this objection to your being heard, your position is most untenable, to come here and say, because you cannot appeal, that you can petition *ex-parte*, and get the same relief. You cannot in Scotland appeal from an interlocutor of the Outer House to the House of Lords, without going, in the first instance, before the Inner House of the Court of Session. What power have we got over the Judges of the Supreme Court, upon your *ex-parte* Petition, to direct and order them to entertain your application? We have no such jurisdiction.

The petition stood over. No report was made by their Lordships to Her Majesty in Council.

See the cases *In re Muir*, and *In re the Assignees of Manning*, *ante*, vol. 3 [Moo.

(a) As to the practice under the Dutch Roman Law of Judgment of *prae et concurrentia*, or ranking of creditors, see Vander Linden's *Institutes of the Law of Holland*, pp. 493, 503.

(a) The 6th Article of the *Placaat* ordains "That further the sentence *in causa prae et concurrentia* to be passed by the Court in the before-mentioned respective rivers shall have due effect, and that consequently the proceeds of said estate shall be distributed, notwithstanding revision of said sentence might have been interjected, provided the respective creditors, on receipt of the monies, give sufficient security, justified by the Court, for the restitution of the money received by them by *judicium prae et concurrentia*, in so far as it should be found to appertain by definitive sentence in revision."

P.C.], pp. 150, 154, as to the power of this Court to issue a mandamus to Judges of Colonial Courts.

[96] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

FISKE GOODEVE FISKE HARRISON,—*Appellant*: JANE HARRISON,—

Respondent * [June 22 and July 6, 9, 1842].

A party in contempt for not obeying a monition, whose contempt has been signified under 53 Geo. III., c. 127, and a writ *de contumace capiendo*, extracted against him, is not precluded from appealing from the principal sentence, though pronounced *in panam*. Protest against permission to appeal, under such circumstances, overruled [4 Moo. P.C. 99].

Sentence of nullity of marriage, *causa impotentia*, pronounced on confession of non-consummation, and refusal to undergo inspection [4 Moo. P.C. 103].

A medical certificate of the competency of the party in a suit *impotentia causa*, not in evidence in the Court below, refused to be admitted on Appeal [4 Moo. P.C. 100].

This was originally a suit for nullity of marriage, commenced in the Consistory Court of London, by the wife against the husband, *impotentia causa*. The Appellant (the husband) was pronounced in contempt, for non-compliance with a monition to undergo inspection, and his contempt was directed to be signified pursuant to the Stat. 53 Geo. III., c. 127. A *significavit* was accordingly issued to the Court of Chancery, and the writ *de contumace capiendo* was extracted: but the Appellant having absented himself from home, and evaded service of the monition, the further proceedings were carried on *in panam* to the hearing of the cause, when a sentence of nullity was pronounced. The Appellant appealed from this sentence to the Arches Court of Canterbury, and upon his petition, an inhibition, citation, and monition were decreed. The Respondent appeared under protest, alleging the matters above-mentioned, and she prayed that the inhibition might be relaxed, and the protest sustained.

On behalf of the Appellant, it was contended that all the proceedings subsequent to the contempt being signified were null and void, and that the contempt was therefore [97] waived; and he alleged that he was willing to obey all lawful commands of the Court.

The learned Judge of the Arches Court (Sir Herbert Jenner Fust) was of opinion that the Appellant was not in contempt, when the sentence was pronounced; and that he was not precluded from prosecuting the Appeal, and overruled the protest, assigning the Appellant to appear absolutely (reported 3 Curteis, 1). From this sentence the present Appeal was brought.

Dr. Addams, (with whom was Mr. Hope,) for the Respondent, in support of the Protest (June 23).—The sole question is, whether the Appellant can be let in to appeal from the sentence pronounced *in panam*, he being at the time in contempt. It is urged on the other side, that as we proceeded by *significavit*, we have waived the contempt. This is not the case; the waiver, if any, was only so far as the proceeding upon the *significavit*, not as to the contempt itself. No instance can be cited of a sentence being appealed from, which has been pronounced in pain of contumacy. In matrimonial causes, resort is necessary, at times, to compulsory process to allow the wife alimony, and if the husband does not pay it, he is in contempt, and may be imprisoned. That however does not impede the proceedings—the principal cause still goes on. But where a definitive sentence, as in this instance, has been pronounced in contempt, that party loses his right by his contumacy, to appeal from such sentence. He cannot be heard upon any matter, except as to clearing his contempt. [Lord Brougham:—Your argument proceeds upon the principle, that [98] when a

* Present: The Lord President (Lord Wharncliffe), Lord Wynford, Lord Brougham, and the Right Hon. Dr. Lushington.

party is in contempt, he must purge his contempt before he can be heard, as in the Court of Chancery; that however is only in the cause itself. The Judge of the Court of Arches held that the contempt was waived by your own conduct.] That is, he construed the proceeding upon the *significavit* as a waiver. A party in contempt is incompetent to appeal. Maranta (*Præ, de contumacia*, part 6, sec. 19), Oughton's *Ordo Judiciorum* (lib. 1, tit 303, *de inhibition*). The principle thus laid down has been acted upon in all instances where it has been brought in question. Thus in *Herbert v. Herbert* (2 Phill. 430. S.C. Con. Rep. 263), a party in contempt for non-appearance, was refused leave to appeal. *Fitzgerald v. Fitzgerald* (2 Lee's Cases, 263) shows the course the Appellant should have pursued. The question there, was the admission of an allegation by the husband, who was in contempt and excommunicated for not paying alimony and costs. In order to purge his contempt, he filed an affidavit of his inability to pay alimony by reason of poverty. The Court, as it appeared that the contumacy was not voluntary, suspended the decrees against him. Here the Appellant offers no exculpatory affidavit to account for his contempt, but interposes an appeal before his contempt is purged.

The Queen's Advocate (Sir John Dodson) and Dr. Harding, for the Appellant, were not called upon to address their Lordships.

Lord Brougham.—Their Lordships think that the sentence of the learned Judge of the Court below is well founded, and that the Appellant ought to be allowed to Appeal: [99] they think also, that the principal cause ought to be heard with as little delay as possible, and for that purpose will advise Her Majesty to retain the cause.

In accordance with this opinion, an order was made retaining the cause, and an absolute appearance having been given for the Respondent, a monition issued to the Judge and Registrar of the Consistorial and Episcopal Court of London, to transmit the proceedings heard before them in the cause: and the Proctor for the Appellant was assigned to bring in his libel in the cause of Appeal, on the 4th of July then next ensuing.

The Appellant accordingly brought in an allegation on the day above mentioned, wherein he traversed the fact of impotency, as alleged in the libel given in the Court below by the Respondent, and pleaded a medical inspection, the certificate whereof he appended.

The Queen's Advocate [Sir John Dodson] (July 6 *) now moved for leave to bring in this allegation and certificate. He admitted he had no authority for the admission of such a certificate upon an Appeal, but submitted that as it was without the mischief of the rule, that after publication you cannot plead that which you might have done before the response, which was intended to prevent perjury, by allowing witnesses to wait till after publication of the evidence, and which could not happen in a case of personal inspection, it being immaterial whether such was made before or [100] after publication, but essential that it should take place before a sentence of nullity could be pronounced. He cited, *Greg.* Dec. lib. 9, tit. 7; *Sanchez*, lib. 7, disp. 100, *et passim*; *The Duchess of Kingston's Case* (20 State Trials, 355); *Sabell's Case* (2 Dyer, 179 (a)); *Stafford v. Mangey* (cited 4 Vin. Abr. 221); and *Poynter on Marriage and Divorce*, 158, Ed. 1824.

Dr. Addams and Mr. Hope, *contra*, insisted on the universal rule against the admission of evidence after Appeal in Ecclesiastical causes, and cited *Morris v. Morris* (not reported), and *Dick v. Dick* (not reported).

Their Lordships expressed their opinion, that the safest way was to proceed to hear the cause upon the evidence taken in the Court below, and refused the application.

July 9 †.—The principal cause now came on to be argued upon the merits, and the real question was, whether the Appellant having, as it appeared from the pleadings, admitted the non-consummation of the marriage, but denied his inability, the evidence was sufficient, taking into consideration that the marriage had been

* Present: Lord Wynford, Lord Brougham, Lord Campbell, Mr. Justice Erskine, Sir Herbert Jenner Fust, and the Right Hon. Dr. Lushington.

† Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and Sir Herbert Jenner Fust.

celebrated in 1826, and the parties cohabited and lived together as man and wife, from that period to 1833, when a separation, by mutual consent, took place, and his refusal, in the first instance, to undergo inspection as required and admonished by the Court. There was a medical certificate of inspection of the wife, but [101] though it inferred the fact, it did not state her to be *virgo intacta* (the libel, pleadings and proofs, are reported in 3 Curteis, p. 16).

The Queen's Advocate [Sir John Dodson] and Dr. Harding for the Appellant.—There are two grounds of objection to this suit. First, there is nothing but the confession of the parties, which will not satisfy the Canon; and secondly, there has been no inspection of the husband, which is essential, before such a sentence as is prayed can be pronounced. The 105th Canon declares, that “Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greatest caution when they come to be handled in judgment, especially in causes wherein matrimony, having been in the Church duly solemnized, is required, upon any suggestion or protest whatsoever, to be dissolved or annulled: we do strictly charge and enjoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the depositions of witnesses, and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, however taken on oath either within or without court.” It is clear that according to this Canon, the sole confession of the parties cannot be considered sufficient, that is all that exists here, there is no extrinsic evidence, the answers and confession of the party only amount to the admission of the party in court and out of court. [Lord Brougham.—The meaning of the Canon is, that the confession alone of one of the parties is not [102] to be sufficient without other proofs. What should the other proofs be? What should be the evidence of non-consummation, if the Appellant refuses in the first instance to undergo inspection? but having obtained a medical certificate of competence, which their Lordships refused to admit, he now thinks that an examination will not injure his case, and professes himself ready to submit to it.] In *Cumyngs v. Cumyngs* (2 Phill. Rep. 10) there was a certificate of inspection, besides the confession of non-consummation. If the case is one of frigidity, there must be a triennial cohabitation (Greg. Dec. 4, tit. 15; Sanchez, lib. 7, disp. 111), that is, a matrimonial cohabitation (Sanchez, lib. 7, *De impedimentis Matrimonii*, disp. 108; Oughton, tit. 217, s. 7, *de Causis Matrimonialibus*), and unless the Court is satisfied that there has been a triennial cohabitation, it will not decree inspection, *Aleson v. Aleson* (2 Lee's Cases, 576). The length of time since the marriage is also a bar to the suit, *Guest v. Guest* (2 Hagg. Con. Rep. 323), *Brown v. Brown* (1 Hagg. Ecc. Rep. 523).

Dr. Addams and Mr. Hope for the Respondents.—The intention of the 105th Canon was to prevent collusion (Anon. 2 Mod. Rep. 314); it cannot mean that the confession of the party is not sufficient, and that there must be inspection; for if the woman had been a widow previously, what evidence could there be of non-consummation, if the husband, as in this case, was contumelious, and refused to obey the monition? In *Pollard v. Wybourn* (1 Hagg. Ecc. Rep. 725), the Court pronounced in [103] favour of the nullity of the marriage without inspection of the husband: all it required was to be satisfied that there was no collusion between the parties. *Impotentia non certa* may be pleaded generally (Sanchez, lib. 7, disp. 107, 103), and proved by an attainable evidence (Sanchez, lib. 7, disp. 109). Confessions are, therefore, not only admissible, but often the only available evidence: The Countess of Essex's Case (2 State Trials, 785), *Owen v. Owen* (4 Hagg. Ecc. Rep. 261).

Lord Brougham.—Their Lordships are of opinion that the Decree of nullity of marriage pronounced by the Consistory Court ought to be affirmed. It has been insisted by the Counsel for the Appellant, that the confession of non-consummation is not sufficient to satisfy the 105th Canon, and that there must be some extrinsic proof, and for this purpose, proof by inspection is said to be essential. Their Lordships give no opinion on this construction of the Canon; for if adminicular proof is requisite, they think that the circumstance of the Appellant's having taken a legal opinion on the validity of the marriage, which he admits in his answer, coupled with the confession of non-consummation, and his refusal in the first instance to undergo

inspection, is sufficient extrinsic proof; and being satisfied that there is no collusion between the parties, they affirm the decree of nullity, *causa impotentia*.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, g. *New Evidence*; tit. CONTEMPT OF COURT, 8. *Practice*, d. *Purging Contempt*; tit. ECCLESIASTICAL LAW, XXVIII. *Practice and Procedure*, 9. APPEAL; tit. HUSBAND AND WIFE, I. MARRIAGE, 5. *Suit for Nullity*, b. ii. S.C. 6 Jur. 899. On point (i.) as to presumption of impotence from refusal to undergo inspection (4 Moo. P.C. 103), see *T. v. M.*, 1865, L.R. 1 P. and D. 31; *F. v. P.*, 1896, 75 L.T. 192; *B. v. B.* (1901), P. 39; (ii.) as to reception of evidence not before Court below (4 Moo. P.C. 100), see *Hughes v. Porral*, 1842, 4 Moo. P.C. 51, n. *; (iii.) as to retaining cause in Privy Council (4 Moo. P.C. 99), cf. *Head v. Sanders*, 1842, 4 Moo. P.C. at p. 197.]

[104] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Rev. THOMAS SWEET ESCOTT. *Appellant*; FREDERICK GEORGE MASTIN. *Respondent* * [June 23 and 24, 1842].

A child baptised with water in the name of the Trinity, by a layman (a Wesleyan Methodist) not authorised to administer the rite of baptism. Held not to be "unbaptised" within the meaning of the rubric for the burial of the dead in the Common Prayer Book, as incorporated into the Uniformity Act, 13th and 14th Car. II., c. 4.

A clergyman of the Church of England having refused to perform the office of interment, after due notice of the death, of a parishioner so baptised, suspended from the ministry for three months, under the 68th Canon of 1603.

Construction of the rubrics of the Common Prayer Books of the years 1603 and 1661. Held to be cumulative and not substitutionary, of the rubric in force anterior to 1603, and not to affect the validity of lay baptism [4 Moo. P.C. 131, 137].

The admission of a witness that he is a member of a religious sect who hold a certain principle as a body, which, if acknowledged individually, would subject him to excommunication *ipso facto*, by the 12th canon of 1603. Held insufficient to disable him from giving evidence in the suit [4 Moo. P.C. 120].
And

Quære. If excommunication *ipso facto*, (if not absolutely abolished by Statute 53 Geo. III., c. 127,) disables a party from being a witness until absolved.

This was an Appeal from the Arches Court of Canterbury, in a suit of the office of Judge, promoted by the Respondent, a parishioner and inhabitant of the parish of Gedney, in the county and diocese of Lincoln, against the Appellant, a minister of the Church of England, and vicar of Gedney, for refusing to bury the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah his wife.

The proceedings commenced in the Arches Court of Canterbury, by virtue of Letters of Request from the Chancellor of the diocese of Lincoln.

[105] The circumstances of the case were pleaded in the articles in the following manner.

The first three articles pleaded the incumbency of the Appellant, and his obligation as a priest or minister of the Church of England, to observe the laws, canons, and constitutions ecclesiastical of this realm.

The *fourth* article pleaded that by the 68th Canon, entitled, "Ministers not to refuse to christen or bury," it is decreed, ordained and contained as follows:— "No minister shall refuse or delay to christen any child, according to the form of the book of Common Prayer, that is brought up to the church to him on Sundays or holydays to be christened, or to bury any corpse that is brought to the church or

* Present: Lord Wynford, Lord Brougham, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the said book of Common Prayer; and if he shall refuse to christen the one, or bury the other, (except the party deceased were denounced excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance,) he shall be suspended by the Bishop of the diocese from his ministry the space of three months."

The *fifth* article pleaded, that notwithstanding the premises, and in contempt of the law and canon aforesaid, the Appellant did, on two several occasions, happening respectively on the 16th and 17th of December 1839, expressly declare his intention not to bury, in the churchyard of Gedney aforesaid, the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah Cliff his wife, of the parish of Gedney aforesaid, if brought for burial to the said church or churchyard; and that accordingly, and in pursuance of such declared determination, the Appellant, on the [106] 17th day of December, did, contrary to his duty, refuse to bury, in the churchyard of Gedney, the corpse of Elizabeth Ann Cliff, then brought to the said churchyard, convenient warning having been given him thereof.

The *sixth* article pleaded, that the said Elizabeth Ann Cliff, the infant aforesaid, died within the parish of Gedney, and that such infant being the daughter of Thomas Cliff and Sarah his wife, who were Protestants of the class of people commonly called or known as Wesleyan Methodists, and who were, in the month of December in the year 1839, and had been for some time previous thereto, in the habit of frequenting or resorting to a chapel or place of religious worship, established by, or for the use of, a congregation of the said class of people, situate within the said parish of Gedney, had been first, to wit on or about the 1st day of October 1839, baptised according to the rite or form of baptism generally received and observed among the said class of people commonly called, or known as, Wesleyan Methodists, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Bailey, a minister, preacher, or teacher of the said class of people. That of the aforesaid fact of baptism, the said Thomas Sweet Escott was informed, as well on the 16th day of the said month of December 1839, by the said Thomas Cliff, as on the morning of the said 17th day of the said month, by the Rev. Robert Bond, also a minister of the said class of people commonly called, or known as, Wesleyan Methodists, when they respectively urged and entreated him, on such two several occasions, to consent to bury the corpse of the said infant; and that by means of such information, as well as by other means, [107] the said Thomas Sweet Escott was, previous to, and at the time of, his refusal to bury the said corpse, well and sufficiently apprised and aware of such fact of baptism, and that on each of the two several occasions aforesaid, as also subsequently on the said 17th day of December, when the corpse of the said infant having been brought to the churchyard of the said parish, application was made to him for the burial thereof, in the said churchyard, in the manner and form prescribed by the book of Common Prayer, he did make or assign the aforesaid fact of baptism expressly as the pretext or ground of refusing to comply with such entreaties and application.

The seventh, eighth, ninth, and tenth were merely general articles; stating the offence was one which subjected the Appellant to ecclesiastical proceedings, and that he ought to be canonically corrected and punished.

These articles, with the exception of the fifth, sixth, and seventh, were admitted without opposition, and witnesses were produced and examined to substantiate the truth of the allegations contained in them. The effect of so much of this evidence as relates to the admission of the testimony of the material witnesses is stated in the Judgment.

The Appellant filed a defensive allegation, pleading:—

First, that in forming his determination not to bury the corpse of Elizabeth Ann Cliff, and in refusing to read the burial service at its interment, he did not act in contempt of the laws, canons, and constitutions ecclesiastical of the Church of England; but that, on the contrary, he acted in obedience to, and in conformity with, the obligations by which he bound himself when [108] he became an ordained minister of the Church of England.

Second, that in the preface to the *Form and manner of making deacons*, as

established by the liturgy of the Church of England, it is expressly set forth and provided, "that none shall be accounted or taken to be a lawful bishop, priest, or deacon, in the united Church of England or Ireland, or sufficient to execute any of the said functions, except he be called, tried, examined, and admitted thereto according to the form hereafter following, or hath had formerly episcopal consecration or ordination."

Third, that whereas it is pleaded in the sixth article that the deceased had been baptised by a minister, preacher, or teacher of the class called Wesleyan Methodists, such minister was unordained; and that any rite or form of baptism performed by him is to all intents and purposes null and void, in the sense of, and according to, the articles, canons, and rubrics of the Church of England.

Fourth, that from and after the conferences holden at Hampton Court in 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under license from the bishops of their respective dioceses, and which practice had up to that period been tolerated by the reformed church of England, was repudiated by the ecclesiastical authorities of this realm, assembled at the said conferences; and in order to give effect to such repudiation, King James I. directed an alteration to be made according to the Liturgy of the Church of England, and from that period the liturgy has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary.

[109] *Fifth*, that in the liturgy "imprinted by the deputies of Christopher Barber, printer to the Queen's Most excellent Majesty, A.D. 1595," in the part entitled, "Of them that be baptised in private houses," the rubric directs as follows:—"First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in water, or pour water upon him, saying these words,—'I baptise thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

Sixth, that the liturgy of the Church of England, entitled, "The Book of Common Prayer, with the Psalter or Psalms of David, of that translation which is appointed to be used in churches, imprinted at London by Robert Barber, printer to the King, 1606, *cum privilegio*," in the part entitled, "Of them that are to be baptised in private houses in the time of necessity by the minister of the parish, or any other lawful minister that can be procured," the rubric enjoins as follows:—"First, let the lawful minister, and them that be present, call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then the child being named by some one that be present, the said lawful minister shall dip it in water, or pour water upon it, saying these words,—'I baptise thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

Seventh, that in the rubric of the book of Common Prayer, which is a part and parcel of the Statute 13 and 14 Car. II., c. 4, in the order for burial of the dead, it is enjoined, that such office is not to be used for any that die unbaptised, or excommunicated, or have laid violent hands upon themselves.

[110] *Eighth*, that the 68th Canon of 1603, referred to in the fourth of the Articles, can only be taken and construed in conjunction with, and in reference to, the other canons promulgated in the same code: and that by the 9th Canon it is decreed, that "whosoever shall hereafter separate themselves from the Communion of Saints, as it is approved by the Apostles' rules in the Church of England, and combine themselves together in a new brotherhood, accounting the christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane, and unmeet for them to join with in christian profession, let them be excommunicated *ipso facto*, and not restored but by the Archbishop after their repentance, and public revocation of such their wicked errors;" and by the 12th Canon it is decreed, that "whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and anabaptistical errors;" by the 5th Canon it is decreed, that "whosoever shall hereafter affirm that any of the Thirty-nine Articles, agreed upon

by the archbishops and bishops of both provinces, and the whole clergy, in convocation holden at London in 1562, for avoiding diversities of opinions, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as may not, with a good conscience be subscribed unto, let him be excommunicated *ipso facto*, and not restored, but only by the archbishop, after his repentance and public revocation of such his wicked errors."

Ninth, that by the 23rd of the Thirty-nine Articles it is decreed, that "it is not lawful for any man to take upon him the office of public preaching, or ministering the Sacraments in the congregation, before he be lawfully called and sent to execute the same; and those we ought to judge lawfully called and sent, which be chosen and called to the work by men who have public authority given to them in the congregation, to call and send ministers into the Lord's vineyard."

Tenth, that by the 25th of the Thirty-nine Articles it is decreed, that "there are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord;"—that Elisha Balley never was, and is not, a lawful minister, and never hath received episcopal ordination or consecration, and that, by reason of the premises, Elizabeth Ann Cliff was not in fact baptised by him; but the said pretended baptism, if performed as alleged, was altogether invalid, and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions and rubrics hereinbefore set forth.

The remaining articles pleaded and set forth the duties and office of a Methodist Preacher or Minister, as taken from the works of the Rev. John Wesley, the founder of the sect, and from which it was urged and insisted, that it was no part of the Preacher's or Minister's office to administer the Sacraments, and that in fact he was expressly excluded from so doing.

It was admitted that Elisha Balley, mentioned in [112] the 10th article of the allegation, never had received episcopal ordination or consecration, and was not a lawful minister of the Church of England.

The Judge of the Arches Court, by his decree, bearing date the 8th of May 1841 (reported 2 Curteis, Ecc. Reps. 692), pronounced in favour of the promovent, and declared that the Reverend T. S. Escott, clerk, (the Appellant,) had acted contrary to law, in refusing to bury the corpse of Elizabeth Ann Cliff, spinster; and that he had thereby incurred the penalties of the 68th Canon, in that case made and provided, and he ordered him to be suspended for the space of three months from the time of the publishing of the said suspension.

The present Appeal was brought from that decision.

The Appellant's Counsel at the opening of the appeal, took a preliminary objection to the admissibility of the evidence of three of the promovent's witnesses, Elisha Balley v. Robert Bond, and Thomas Overton, upon the ground that, as members of the Wesleyan Methodist Church, they were excommunicated *ipso facto*, by the 12th Canon, and incompetent to give evidence until absolved. This Canon was pleaded and set forth in the Eighth Article of the Appellant's defensive allegation (*ante* [4 Moo. P.C.], p. 110).

Dr. Phillimore and Dr. Harding in support of this objection.—This is a criminal proceeding against a clergyman. The sixth article, which contains the gravamen of the charge against him, ought to be construed as an Indictment at Common Law. The Appellant's admission of having refused to bury the corpse ought not to put us on the proof, if the witnesses are incompetent and [113] cannot be heard. It is apparent that the witnesses, Balley, Bond, and Overton, are violators of the express terms of the 12th Canon (see extract *ante* [4 Moo. P.C.], p. 110),—indeed, Balley in his evidence admits that he is a class leader. This incapacitates him. He is without the pale of the Church. *Scrimshire v. Scrimshire* (2 Hagg. Con. 395, 399) is in point. There it was held that persons who were excommunicated *ipso facto*, from being present at a clandestine marriage, were incompetent witnesses till absolved. *Grant v. Grant* (1 Lee's Cases, 592) is in our favour. Sir George Lee there said, that though the court did not think it necessary that a party should be absolved to enable him to sue, yet that persons excommunicated *ipso facto*, could not be allowed as witnesses, until they were absolved *ad testificandum* in that court where they were produced as witnesses. It is said by Ayliffe (Parergon, Jur. Can. Excom., p. 156), that "Ecclesiastical censures are twofold—one inflicted by law, the other

by man. A censure inflicted by law, is said to be that which is pronounced by the legislator, with an intent of making a law or general statute perpetual: and is *ipso facto* inflicted on transgressors thereof by way of punishment. But a censure *ab homine* is said to be that which is pronounced by some judge, or superior, commanding something, not with a design of making a law or statute perpetual, but for the purpose of enacting some temporal and transitory precept: and is inflicted on contumacious and disobedient offenders." And this doctrine is recognised by Lord Coke, (1st Inst. 133, 6. B. II. c. 2.) who admits two kinds of excommunication, by sentence or by canon. The words of the 12th Canon are "*ipso facto*." It does not require a [114] sentence. *Baker v. Brent* (Cro. Eliz. 680). If the words had been, let him be excommunicated, then we admit a sentence would be necessary. Under this Canon the witnesses are *ipso facto* excommunicated. Lyndwood, lib. 4, tit. 3. *De Claud. Despons*, p. 276. These authorities, and the case of *Scrimshire v. Scrimshire* [2 Hagg. C.R. 395], show that the practice of excommunication still exists. The statute 53 Geo. III., c. 127, does not apply. The excommunication there alluded to is not excommunication *ipso facto*, but such as is pronounced by the Ecclesiastical Court. We submit, therefore, that the admission of the witnesses that they are Wesleyans is sufficient to bring them within the letter of the 12th Canon. The Toleration Act, 12 and 13 Car. II., c. 4, affects only the Civil *status*, not the Ecclesiastical.

The Queen's Advocate (Sir John Dodson), and Mr. F. Kelly, Q.C., *contra*.—This is a new objection, and ought to have been taken in the court below. The same question was there raised as to the competency of the party promovent in the cause, under the 9th and 12th Canons, but that was overruled after solemn and deliberate argument. No objection was then made to the competency of these witnesses. It is now too late to be entertained; but even if it could be entertained, such objection must fail, because there is no proof of incompetency: *first*, we submit that the 12th Canon is not binding upon the laity; and, *secondly*, though the Wesleyans may, as a body, hold that it is lawful for persons to make rules, etc., contrary to the 12th Canon, yet it is necessary for the other side to show how these persons, who are now sought to be [115] made incompetent witnesses under an obsolete Canon, repugnant to the spirit of the times, are disqualified and excommunicated *ipso facto*. The general effect of excommunication in times back was to prevent a man making a Will: he was cut off from all communication with his fellow men, and put out of the pale of Christianity. In order to establish a disqualification, the fact should clearly appear that these witnesses have so expressed themselves, and individually held the principles, which disable them. The plain meaning of the Canon is, that the affirmative of such principles must be broadly acted upon, not that merely holding an opinion is to incapacitate *ipso facto*. Any one of these witnesses may differ upon this very question with the Wesleyans as a body. A body in strictness cannot affirm. Watson's Clergyman's Law, 349. And though in the same work, mention is made of the statute 5 and 6 Edw. VI., c. 4, against smiting in Church, the punishment provided for which is *ipso facto* excommunication, the effect of that statute, and the penalties it incurs, are very accurately stated in a note to the Ed. of 1712, which says, p. 647, "Although this statute doth say that he who smites another, etc., shall be deemed excommunicated *ipso facto*, etc., yet there ought to be a declaration in the Ecclesiastical Court of the excommunication, otherwise a person excommunicated for an offence against this statute could not be absolved from such excommunication, nor receive absolution from the ordinary. Pasch. 4 Car. C.B. *Viner v. Eaton* (Hetley, 86). Also, he that smites another, doth not stand excommunicated until he be convicted thereof at law, and this transmitted to the ordinary. Trin. 23 Car. II. *Dyer v. East*" (Ventriss, 246). It is clear, therefore, that even [116] were these witnesses within the operation of the Canon, there must be a sentence against them before they could be disqualified: such sentence however could not be pronounced, but upon some definite act of violation of the Canon, which is neither pleaded nor proved in this case. *Scrimshire v. Scrimshire* [2 Hagg. C.R. 395], relied upon by the other side, cannot be maintained—it is a mere *obiter dictum*. But the 53rd Geo. III., c. 127, sec. 2 and 3, is a complete answer to the objection, for that statute abolished excommunication, except in certain cases where the Ecclesiastical Courts might in definitive sentences, or in interlocutory decrees, having the force and effect of definitive sentence, pronounce

the persons excommunicated. There ought to be a sentence of the Spiritual Court before excommunication, *Forman v. Mounson* (3 Dyer, 275, *b*), and that ought to be certified under the seal of the Court.

Their Lordships directed the Appeal to be argued on the merits, reserving their opinion upon this objection, until their final judgment was pronounced. Accordingly,

Dr. Phillimore and Dr. Harding for the Appellant, and

The Queen's Advocate (Sir John Dodson) and Mr. F. Kelly, Q.C., (with whom were Dr. Haggard and Mr. Matthews,) were heard for the Respondent.

For the Appellant it was contended that the true construction of the word "unbaptised" in the rubric of the Common Prayer Book for the burial of the dead, subsequent to the year 1603, meant unbaptised [117] according to the form of the Church of England, and by a minister of the Church of England, lawfully ordained: that a contrary construction would be pregnant with serious consequences, as the Clergy of the Church of England might be compelled to bury any person, although baptised by persons incompetent from character and station in life. That there was no instance in Ecclesiastical History, of the Church of England being compelled to administer her rites to persons holding opinions in open defiance of her principles—separatists and schismatics. That the Act of Uniformity, 12th and 13th Car. II., c. 4, must be read and construed as if the Book of Common Prayer was incorporated into it—*Gale v. Lawrie* (5 Barn. and Cress., 156), *Martin v. Ford* (5 Term, 101),—that Act being declaratory; from which it would appear that a lawful minister was necessary for the performance of the baptismal service, even in the case of private baptism.

In support of these propositions, the following authorities and works were cited: --*Andrews v. Cawthorne* (Willes. Rep. 536), *Ree v. Coleridge* (2 Barn. and Ald. 806), *Kemp v. Wickes* (3 Phill. 264); 4 Geo. IV., c. 52 (forbidding the burial service being said over suicides). *Attorney-General v. Pearson* (3 Mer. 405). 1 Gib. Codex Juris Ecc. 367, 537-8. 2 Gib. Cod. Jur. Ecc. 1481. Lyndwood 278. Jeremy Taylor's Ductor Dubitantium, B. iii. c. iv. Rule 15. The Acts of Uniformity of Edw. VI., and Eliz.; Common Prayer Book of Elizabeth's time (as to the form of baptism to be observed in private houses); Wheatley on Common Prayer, 357-359; Convocation in 1575 (6 Collier's Church History, 561); Hampton Court Conferences (7 Collier's Church His-[118]-tory, 273, 298, 301). Rubric confirmed by 13th and 14th Car. II. c. 4, s. 1, 2); 1 Burns' Ecc. Law, p. 115 (on private baptism and lay baptism); Calvin's Institution of the Christian Religion (b. 4, c. 15, s. 20); 1 Quick's *Synodicum*, in *Galliâ Reformatâ introducta*, p. 46, and Chap. vi. s. 13.

On the part of the Respondent, it was argued the word "unbaptised," as prefixed to the order for the burial of the dead, meant, not baptised in any sense; the plain meaning being those who were never received into the church of Christ. That the injunction in the 68th Canon as to burial contained only one exception, namely, of persons excommunicated *majori excommunicatione* for some grievous and notorious crime. That in no sense could the child baptised by Mr. Balley be said to be excommunicated *majori excommunicatione*, as she had committed no great or notorious crime; indeed, that the word excommunicated could only in strictness apply to persons who had been admitted to the church, and been subsequently expelled. Fleetwood, 518. That lay baptism had not only been tolerated by the Reformed Church of England from the earliest time, but even enjoined in certain instances. They cited and relied upon the Hampton Court Conferences, 1549-52; the Liturgy as corrected in Edward VI.'s time; Cardwall's *Synodicum*, 337, 341; Johnson's Ecc. Laws; Cardwell's two Liturgies, temp. Edw. VI., p. 337-8, 341; Cardwell's Hist. of Conferences on the Common Prayer, p. 131-8; Barlow's Hist. of Confer. on C. P., *ib.*, p. 172-4, 356; Burnet's Hist. of his own times, fo. Ed. vol. 2, p. 603-4-5; Watson's Clergyman's Law, Ed. 1713, p. 318, ch. 31; Bingham's Scholastic History of Lay Baptism, p. 1, ch. 3, sec. 5; Aycliffe's Parergon, p. 102; Palmer's Antiquities of the English Ritual, ch. 5, s. 9; [119] Life of Archbishop Sharp, Ed. by Newcomb, vol. i. 369, 375; Archbishop Sharp on the Rubric, 33. The Act 48 Geo. III., c. 75 (providing for the burial of persons whose bodies are driven on shore). They commented also on the 12th Canon of 1575, (against private baptism,) which however appeared not to have been confirmed by convocation, or adopted by the Church. Gib. Cod. vol. i., p. 367-9. Bishop Wilkin's *Concilia Magnæ Britanniae et Hiberniae*, 135,

and note (a); Lawrence's Case, pub. A.D. 1709; Fleetwood's Judgment of the Church of England on Lay Baptism, p. 318-9; Waterland's Works, Ed. by Van Mildert, B. of Durham, 10 vol. p. 185; Opinions of Archbishop Tennison, A.D. 1712, 1 Sharp's Life; Talbot, Bishop of Oxford's, charge to the Church of Geneva, p. 13, 14; Hooker's Ecc. Polity, Book v., s. 62; 1 Documentary Annals of the Church, by Cardwell, 206; Statutes 1 W. and M., c. 18, s. 10-13; 6 and 7 Will. III., c. 6; 19 Geo. III., c. 44; 48 Geo. III., 75; 3 and 4 Vict., 92.

Lord Brougham (2nd July 1842).—An objection was, in opening this case, taken, and for the first time taken here, to three of the witnesses, Balley, Bond, and Overton, who it was contended were rendered incompetent by the 12th Canon of 1603, which ordains that "Whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Ana-[120]-baptistical errors." This objection ought clearly to have been made in the court below. However, it is unavailing whensoever made. First, it would not dispose of the cause if it were allowed; and next, it is unfounded, and cannot be allowed. That it would leave the case unaffected if allowed, is plain both from the pleadings and the evidence. This is plain from the pleadings, because the first article of the responsive allegation admits the Appellant's refusal to read the Burial Service; and the third article, referring to the promovent's allegation that the child had been baptised by a Wesleyan Minister, alleges such baptism to be null and void, while the tenth alleges its invalidity on a similar ground, and the seventh pleads the rubric forbidding the office for the dead to be used for any that are unbaptised; so that the refusal to read the service being admitted, the ground of that refusal is pleaded—namely, that if the child had, as is alleged by the promovent, been baptised at all, it was by a person unauthorized, and that, therefore, there was no valid baptism; and thus the only material facts of the case are admitted by the pleadings, and the whole question is raised on the pleadings, without any evidence being required. But, suppose the objection to prevail, it can only affect the three witnesses who have been named, Balley, Bond, and Overton, and has no application to Thomas and Sarah Cliff, who prove the whole case on the provoment's part.—We are, however, of opinion, that the objection has no foundation. No one of the three witnesses is asked any questions, his answers to which could bring him within the description in the 12th Canon; no one of them admits that he is a person who affirms the competency of any minister or layman, without Royal authority, to make orders or con-[121]-stitutions in ecclesiastical causes, and that he submits himself to be governed by such orders. All they say is, that the Wesleyans, as a body, do so; and that they, the witnesses, are Wesleyans. Suppose (what is not admitted, however,) that the so affirming, and so submitting, would operate as excommunication without sentence, such effect could only follow from the individuals, as individuals, doing that which incurred this penalty.

It becomes, from these considerations, unnecessary to inquire how far the dictum of the Learned Judge, in *Grant v. Grant*, (1 Lee's Cases, 593,) bears out the position contended for. But it is fit that we add our opinion, that the words in Lyndwood, p. 276, "*incurrit sententiam excommunicationis ipso facto*," compared with those of the Canon, and Statute 5 and 6 Edward VI., would make it very difficult to maintain this position; while the Toleration Acts, 1 Will. and Mary, and still more the 53 George III., cap. 127, passed long after the date of *Grant v. Grant*, appears to leave no doubt that the incapacity, if it ever existed, is now removed.

The objection taken below to the competency of the party promovent, on similar grounds, seems wholly untenable. Indeed, the Appellant's counsel did not rely much on it here, feeling, probably, that the authority of the decision in *Grant v. Grant* was not to be got over. In that case, the point was expressly raised and determined; nor does the decision appear to have been called in question since. The learned Counsel, therefore, relied rather on the objection to the witnesses, as one which it was supposed that the *obiter dictum* in that case in some sort countenanced.

The ground is thus cleared for examining the main [122] question between the

parties; and this resolves itself into the construction of the Rubric to the Burial Service. The 68th Canon is clear and distinct, attaching the penalty of suspension to a refusal of that office in any case except one,—that of a person having been “denounced, excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.” But the Act of Uniformity, 13 and 14 Charles II., cap. 4, having incorporated, as part of its provisions, the office for the Burial of the Dead, and the Rubric for that office forbidding the use of it for such as die unbaptised, it will be a sufficient defence to the charge, under the 68th Canon, if the child died unbaptised. The whole question, therefore, is reduced to this,—does baptism, by a person not in holy orders, possess the character of that sacrament according to the laws of the Church?—in other words, can any one, other than a person Episcopally ordained, baptise so that the ceremony may be effectual as baptismal, though the performing it may be irregular, and even censurable? Is the solemnity performed by a layman, sprinkling with water, in the name of the Trinity, valid as baptism in the view of the Church, although the Church may greatly disapprove of such lay interference without necessity, as she disapproves even of an ordained person performing the ceremony in a private house without necessity, and yet never scruples to recognise the rite so performed as valid and effectual? Nothing turns upon any suggestion of heresy or schism; the alleged disqualification is the want of holy orders in the person administering the solemnity, and it is as unqualified and not as heretical and schismatical—heretic without, or schis-[123]-matic within the pale of the Church—that any one’s competency to administer it, is denied.

The 68th Canon being that upon which this proceeding is founded, it is necessary to consider what the law was at the date of the Canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the Rubric of 1661, adopted into the 13th and 14th Charles II., cap. 4, made, and in what state it left the law on this head; because it is very possible, that the same enactment of a Statute, or the same direction in a Rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the Common law that comes in question, as well as the Statute.

The Book of Common Prayer was adopted and prescribed by the Statute of 2nd and 3rd Edward VI., cap. 1, and more fully by the 5th and 6th Edward VI., cap. 1, which the 1st Elizabeth, cap. 2, revived, after it had been repealed by the 1st Mary, s. 2, cap. 2; and it was further prescribed and enforced by the same Act of Elizabeth, and by another made in the eighth year of her reign (8 Elizabeth, cap. 1, sec. 3). It is certain, then, that the Liturgy established during the interval between the first and the last of these Statutes,—that is between 1548 and 1565,—was in force by Statutory authority down to the year 1603, (sometimes [124] called 1603 and sometimes 1604, which is owing to the style, the date, if I recollect, being January,) when the Canons in question were made, no alteration whatever having been effected during the interval. It is equally certain, that no authority existed to make any alteration inconsistent with Statutory provisions, during that interval; and this consideration seems to dispose of the question which has been argued both below and here, upon the 12th Canon of 1575. That Canon is to be taken either as professing to make an alteration of the Rubric which the Statute had sanctioned, in which case it can have no force, or as declaratory of the sense of the Rubric; but neither would any such declaration be binding, because the Legislature having adopted the Rubric, and made it parcel of a Statute, no other authority than a declaratory Act can give it a new meaning; add to which, that the plain intentment of the Rubric appears to have been adhered to, after and notwithstanding the Canon of 1575, and not the sense which that Canon seems to give the Rubric, and which we must indeed admit that Canon purports to give it. The Canon of 1575 appears never to have excited any attention, and if it ever received the Royal assent, (which is doubtful,) it certainly

was not cited on either side during the controversy on the subject of baptism at the Hampton Court Conferences.

We are, therefore, to see what the Rubric prescribes at, and prior to, 1603, this being the Statutory provision then in force; and adopting the Common law prevailing for 1400 years over Christian Europe.

In the first place, no prohibition of the Burial Service for unbaptised persons, or indeed for any class of [125] persons, is to be found in the Liturgies of Edward and of Elizabeth. The exception of unbaptised persons and suicides first occurs in the Rubric of 1661, and consequently first received the force of law from the Uniformity Act of 1662, after the Restoration—the 13th and 14th Charles II., cap. 4). The Statutes of Edward VI. and Elizabeth recognised the right of every person to burial with the Church Service; and the 68th Canon, enforcing the civil statutory right, only excepting persons excommunicate and impenitent. Unbaptised persons, therefore,—persons baptised in no way whatever,—would have had the right of burial according to the service of the Church, if they were not excluded by those portions of the service which appear to regard Christians alone. Those portions would probably exclude persons not Christians; but if an unbaptised person could be regarded as a Christian, then would he not be excluded prior to the Rubric and Statute of 1661 and 1662.

But, secondly, and what is much more material to our present inquiry, it is clear that the Rubric, and consequently the Statute, down to 1603, and indeed to 1662, the date of the Uniformity Act, authorised lay baptism, and placed it on the same footing with clerical baptism in point of efficacy. The Rubric, after setting forth that baptism ought to be administered publicly, and on Sundays and holydays, in order to approach as near as might be to the practice of the primitive Church, which confined it to Easter and Whitsuntide, nevertheless adds, that, if necessity require, children may at all times be baptised at home. A further warning is required to be given to the people against baptising privately, “without great cause and necessity,” and this Rubric is retained in the subsequent forms of prayer down to the present time. The Rubrics of Edward and Elizabeth then proceed to lay down the rules for administering the baptismal sacrament when it is privately performed: and herein those Rubrics materially differ from the subsequent ones of 1603 and 1661. They require “them that be present to say the Lord’s Prayer, if the time will suffer;” and the Rubrics add, “then one of them (that is, any one of them that be present) shall name the child, and dip him in water, or pour water upon him, saying these words, ‘N., I baptise thee in the name of the Father, and of the Son, and of the Holy Ghost. Amen.’” We may observe, in passing, that there is contemplated a great hurry in the ceremony, because the expression is, “if the time will suffer.” This of itself indicates that the circumstances are, or at least may be such, as to prevent the sending or the waiting for a Minister. The Rubric goes on to declare the sufficiency of baptism so performed.—“And let them not doubt but that the child so baptised is lawfully and sufficiently baptised, and ought not to be baptised again in the Church.” Nevertheless, the expediency is set forth of afterwards bringing the child to the Church, and there presenting him to the Minister, that it may be ascertained whether or not the ceremony had been lawfully performed. For this purpose, six questions are to be asked of them that bring the child:—Who baptised it?—Who was present?—Whether they called on God for his grace?—With what matter the child was baptised?—With what words?—And whether they think he was lawfully and perfectly baptised? If the answer to these questions prove that “all things were done as they ought to be,” then the Minister is to say, “I certify you that in this case ye (not you, the minister, but [127] ye, the people) have done well, and according to due order,” and he declares the child to have been received into the number of the children of God, “by the law of regeneration in baptism,” that is, by the sacrament previously administered in private. If, however, they which bring the child “make an uncertain answer, and say they cannot tell what they thought, said, or did, in that great fear and trouble of mind, as oftentimes it chanceeth,” then the child is to be baptised publicly, but, as it were conditionally or provisionally, with this reserve, that the minister shall say, “If thou be not baptised already.” This portion of the Rubric is demonstrative, if the former part left any doubt, that the presence of a Minister at the private ceremony was not

contemplated: for, if it were, what they thought, or said, or did, would be immaterial; and what the Minister said or did would have formed the only subject of inquiry; not to mention, that no fear or trouble of mind at the time of the ceremony could prevent those who bring the child from recollecting whether there had been a Minister present or not. Indeed, the questions would have been differently framed, had the presence of a Minister been as essential as the water and the words. It would have been asked, not merely "by whom, and in whose presence," but "was he baptised by a minister?" There can, therefore, be no doubt whatever, that, by these earlier Rubrics, the baptism is deemed valid if performed with water, and in the name of the Trinity, though by lay persons. Assuming, then, that there is no Minister present, the Rubric declares the baptism to be without any doubt lawfully and sufficiently administered, though in private.

The same doctrine was held, and the practice formed [128] upon it, in the Roman Catholic Church, from a very early period. It prevailed from the beginning of the third century, and though it formed the subject of controversy between the Eastern and Western Churches, during the succeeding period, it had become universally admitted by both, in the time of St. Austin, who flourished in the latter part of the fourth century. In England, as elsewhere, it was held valid. The Constitutions of Archbishop Peccham, in Lyndwood's Collection, bearing date A.D. 1281, though severely denouncing a layman who shall intrude himself into the office without necessity, yet declare the baptism valid which is celebrated by laymen, and state that it is not to be repeated. Whoever did so intrude, was denounced as guilty of "mortal sin:" nevertheless, his act was pronounced to be valid and sufficient, and that it was not necessary the ceremony should be repeated. Now, in all these positions, the necessity can make no kind of difference, unless in excusing the intrusion. If the rite can only be administered by clerical hands,—if it be wholly void when administered by a layman,—no necessity can give it validity. The consecration of the elements, for the purpose of giving the Eucharist to a dying person, may be as much a matter of urgent necessity, as the baptism of an infant in extremities: but, neither in the Roman Catholic, nor in the Reformed Church, was it ever supposed, that any extremity could dispense with the interposition of a priest, and enable laymen to administer the sacrament of the Lord's Supper.

The position, therefore, being undeniable, that, previous to the year 1603, and at the time the 68th Canon was made, lay baptism, though discountenanced and even forbidden, unless in case of necessity, [129] was yet valid if performed, and this being the Common Law,—not the Law made by Statute and Rubric, but by Statute and Rubric plainly recognized and adopted.—we are to see if any change was made in that law as it thus stood.

In the Burial Service, the Rubric of 1603 made no change, but that of 1661 forbade the Burial Service in cases of suicide, excommunication, and persons unbaptised. A right formerly existing was thus taken away, at least in some cases. This makes it fit that we construe the word "unbaptised" strictly, or, which is the same thing, that we give a large construction to "baptised." And, after the change in the Burial Service, it becomes the more necessary to see that there is a clear and undoubted change in the Rubric relating to baptism, before we admit the baptism to be invalid, which was held valid even when the Rubric of the Burial Service had not as yet taken away the rite from all who were unbaptised.

The Rubric of 1603, instead of directing "those present," in the case of private baptism, as the former Rubrics had done, directs "the lawful Minister," to say the prayer, if time permit, and to dip or sprinkle the child, and repeat the words. The Rubric of 1661 explains what shall be intended by "lawful Minister," substituting for that expression the words, "Minister of the parish, or, in his absence, other lawful Minister that can be procured." It there prescribes a prayer to be used by the Minister, which prayer is not to be found either in the Liturgies of Edward VI. and Elizabeth, or in that of 1603. We may pass over the Rubric of 1603, both because its substance is more completely contained in that of 1661, and because, until 1662, there was no Statutory authority for any [130] change of the law which had been established at the date of 1603 (or 1604), when the Canon in question was made, even if it had been quite clear that the Rubric of that date had changed the former Rubrics. But as, in 1662, the present Uniformity Act of 13 and 14 Charles

II., cap. 4, was passed, and gave force and effect to the Rubric of that date, it becomes necessary to see whether or not that Rubric changed the former ones, those of Edward and Elizabeth.

Now it does not appear that any such change was effected as the case of the present Appellant must assume, in order to prevail. The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new Rubric of 1661, there is nothing in that Rubric to invalidate it. Generally speaking, where anything is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old: else both will be understood to stand together if they may. But, more especially, where the Common Law is to be changed, and, most especially, the Common Law which a Statutory provision had recognised and enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place, between affirmative and negative words, giving more effect to the latter (Coke, Littleton, 115 a), has sometimes been denied, at least doubted (W. Jones, 270, Lovelace's case, before the Windsor Forest Court, in 1632, in which there is a *dictum* of Lord Chief Justice Richardson), Mr. Hargrave thinks upon [131] a misapprehension. (Note 154.) But the rule which is laid down in 2nd Inst. 200, has been adopted by all the authorities, that "a Statute made in the affirmative, without any negative expressed or implied, doth not take away the Common Law." So Comyn's Digest, Parliament R. 23; and he cites the case *De Jure Ecclesiastico*, in 5th Rep. 5, b, which lays down the rule in terms. That case decides that the penalty attached by the Uniformity Act of Elizabeth, for not reading the Common Prayer, on the second offence, does not take away the same Common Law penalty on the first offence. Now here, the former law being this—"Let lay baptism be valid, but let Ministers only perform the rite, unless in case of great necessity;"—and the new law being—"Let lawful Ministers baptise;"—it must be taken as an addition to, and not a substitution for, the former, unless the intention plainly appear to make it substitutionary, and not cumulative. The proof is on those who would make it substitutionary and abrogatory. But the circumstances and the context seem, on the contrary, to show that the intention was to make the new Rubric cumulative, and to leave the validity of lay baptism unaltered. The private baptism is expressly confined to cases of "great cause and necessity," and the want of time is expressly referred to, as being great enough possibly to prevent saying the Lord's Prayer. How then can it be expected that time should be given to send for the Minister of the parish, and, if he be absent, to procure some other Minister? Doubtless it is required that a Minister shall perform the ceremony if he can be procured; but the possibility of there being none, must be understood to have been contemplated. Again, it is directed, that if any lawful minister, other than the [132] Minister of the parish, performed the ceremony, then the Minister of the parish, when the child is brought to him, shall examine how the ceremony had been performed. The questions prescribed by the former Rubrics are materially changed. Two are left out: that respecting calling for grace, and that respecting their opinion of the ceremony having been completed. But an important preamble is inserted, before the question as to the matter and the words:—"Because some things essential to this sacrament may happen to be omitted, through fear or haste, in such times of extremity, therefore, I demand further, 'With what matter and with what words was this child baptised?'" Now it is remarkable, that the essentials here spoken of are the water, and the reference to the Trinity; nothing whatever is said of the Minister being essential. The questions as to who baptised and who were present, are given without any preamble at all, indicating that the water and the invocation of the Trinity are essentials, while the presence of a Minister is only expedient; a matter to be inquired into for the purpose of correction or censure if it was omitted without necessity—but not essential, as those things wherein consisted the very rite itself, the water and the words. The water and the words are afterwards again stated to be "essential parts of baptism," in the Rubric which provides for the case of a doubtful baptism, sometimes called conditional. If it were assumed that in every case a lawful Minister was necessary, and that there

could be no baptism without his presence, the only necessary question to be answered by those who brought the child, would be, whether such Minister officiated or not, for it might be assumed that he used the matter and the words prescribed, inasmuch as he would be punishable if he did not.

[133] The whole direction as to conditional baptism is very material to be regarded, and no part more so than the last Rubric relating to it. If the answers are uncertain, the baptism is to be made, but provisionally or conditionally. What kind of uncertainty is contemplated? If a minister had been essential, surely any uncertainty as to who performed the ceremony would have been specified as a ground of conditional baptism. But nothing of the kind is to be found in the Rubrics of 1603 and 1661, any more than in those of Edward and Elizabeth. Nay, the uncertainty is more specifically confined to the water and the words in the later than in the earlier Rubrics:—"If it cannot appear that the child was baptised with water, in the name of the Father, and of the Son, and of the Holy Ghost," which (adds the Rubric) "are essential parts of baptism," then, and then only, is the child to be baptised, and conditionally.

The question directed to be put, as to who baptised the child, clearly proves nothing as to the necessity of a Minister: for another question immediately follows, which relates to a matter that must on all hands be admitted to be anything rather than essential, namely, "Who were present at the ceremony?" And if it be said that this might be asked, not as a substantive question, the answer to which is essentially necessary, but as a question the answer to which may tend to facilitate other inquiries, and to explain other answers: in the same way it may be said, that the answer to the first question, "Who baptised the child?" may be used simply for the purpose of explanation as to the really essential matters—the water and the words.

The changes made in the Rubric, touching uncertain and conditional baptism, are mainly relied upon to show that the Rubrics of 1603 and 1661 invalidated [134] lay baptism, and certainly those changes afford the only countenance lent to the negative argument. But they are wholly insufficient to work an abrogation of the former law. The omission of the question, "Whether they (the people) called for grace and succour in that necessity?" is said to show that the people were no longer to officiate, but only the Minister, who had no occasion for that succour. Yet, beside that, this seems a very gratuitous position, the persons present were inquired of, and they surely were not material. The question as to the opinion of the party bringing the child is also omitted. But it is not omitted in the Rubric of 1603, which, nevertheless, is supposed to negative the validity of lay baptism as much as the Rubric of 1661. Perhaps the most material change in this part of the service is in the certificate, which is no longer that "Ye have done well," but "that all is well done." But this, though in the direction of the Appellant's argument, and lending colour to it, is manifestly too slender a foundation on which to ground any inference. We must always bear in mind, that it was the intention of those who framed the new Rubric to discountenance all baptism, except by a Minister, and to assume, as far as possible, that it should by a Minister be performed; and the omission of whatever was not quite necessary, and what needlessly contemplated a lay administration of the rite, was a natural consequence of this design. But if it had been the intention of those who framed the Rubric to declare lay baptism ineffectual, some express declaration to that effect would have been introduced.

It is unnecessary to give instances of the difference between positive directions, nay, express prohibitions, and such prohibitions as make the thing forbidden to [135] all intents and purposes void. If it were necessary to point out instances of such distinctions, the kindred subject of the marriage rite affords one too remarkable to be passed over. There is hardly any country where some solemnity is not required by the directions of the law: there are many in which a departure from the order prescribed by the law is strictly forbidden, and under penalties; but in most Protestant countries the irregular marriage is valid: and in Catholic countries also, up to a comparatively recent date—that of the Council of Trent—though it might be censurable, was valid, without the interposition of a priest, and without any ecclesiastical solemnity whatever. England, before the Marriage Act, (the 26th of George III., cap. 33.) commonly called Lord Hardwicke's Act, affords one instance of

this; Scotland to this day affords another; nay, the existing Marriage Act of 4th George IV., cap. 76, presents us with an instance still more remarkable, and bearing more closely upon our present argument; for some of the marriages, to prevent which was the main object of this as of the former Act, are allowed by this latter Act to be valid, and are only valid because they fall not by express declaration within the 22nd section, which certainly confines the invalidity to the cases specified in that section. But if it be said that baptism is a sacrament, which marriage is not, let it be remembered that in the Romish Church marriage too was a sacrament, and retained its character as such though performed without the intervention of a priest or any solemnity of the church. *Dalrymple v. Dalrymple*, (2 Hag. Con. Rep. 64,) and the authorities there cited.

The opinions and practice of the Church, from the date of the Canon, 1603, down to that of the Uniformity Act of Charles II., and afterwards till near the end [136] of Queen Anne's reign, appear to have been clear upon this head. The validity of lay baptism, notwithstanding the change in the Rubric, was not questioned until about 1712, when the controversy arose, and some eminent divines took part against its validity. It is unnecessary to examine the authorities in detail. We may observe, that there seems no comparison between the number and the weight of those who espoused the opposite sides of the question. There are very few indeed who can be said to give a clear and explicit opinion against validity, while those who maintain it lay down the doctrine with the most perfect distinctness. The substance of the conclusions to which they come, and the testimony which they bear to the practice, may be well given in the words of a writer no less renowned for his learning and judgment than his eloquence. "Sith the Church of God," says Hooker (Ecclesiastical Polity, book v., sec. 62), "hath hitherto always constantly maintained that to re-baptise them which are known to have received true baptism, is unlawful; that if baptism seriously be administered in the same element and with the same form of words which Christ's institution teacheth, there is no other defect in the world that can make it frustrate, or deprive it of the nature of a true sacrament; and lastly, that baptism is only then to be re-administered when the first delivery thereof is void in regard of the forealleged imperfections, and no other (that is, the words and the matter)—shall we now, in the case of baptism, which, having both for matter and form, the substance of Christ's institution, is by a fourth set of men (he had mentioned with more or less censure, the errors of some in the primitive Church, of the Donatists, and of the Anabaptists), voided for the only defect of ecclesi-[137]-astical authority in the minister, think it enough that they blow away the force thereof with the bare strength of their very breath, by saying, 'We take such baptism to be no more the sacrament of baptism than any other ordinary bathing, to be a sacrament?'" And he then goes on to show how "many things may be upheld being done, although in part done, otherwise than positive rigour and strictness did require."

The clear and unqualified opinion upon the point, and *post litem motum* of the two Metropolitans and fourteen other prelates, has also been properly referred to; and is no doubt of great weight. But the question is not to be decided by a reference to the opinions, however respectable, of individuals, eminent for their learning, or distinguished by their station in the Church; and these authorities are chiefly valuable as bearing testimony to the fact, that the construction of the Rubrics of 1603 and 1661 was acted upon, which construction assumed no change to have taken place in the former law, the common law of all Christendom, before the Reformation of the Anglican Church, and both before and after that happy event, the law of the same Church up to the date of the canons of 1603—a law which was recognised by the Statutes of Edward and Elizabeth, and which, as nothing but express enactment could abrogate, so we might the rather expect to find contemporaneous usage confirm, when no abrogation had been effected.

Nor is it necessary that we should strengthen the conclusions to which a strict construction of the law has led, by pointing out the inconsistent or even absurd consequences which would follow from an opposite doctrine. If only a lawful minister can baptise, then, as it is also contended that this description only [138] applies to those who are regularly and episcopally ordained, it will follow, that none can be capable of clerical functions who have not themselves been baptised by

ministers so ordained; and hence some of the greatest lights of the Church have held her highest offices unbaptised, have administered that sacrament invalidly, and have had no right to the offices of the Church at their interment. A doctrine which would lead, and inevitably lead, to the inference that Bishop Butler and Archbishop Secker were never baptised—that the latter in baptising George III. acted without authority, and that both were disentitled to the Burial Service, as unbaptised persons, is at least well calculated to make us pause before we admit it to be the law of the land, and of the Church.

But it is not less fitted to excite doubts of its soundness before examination, when we reflect that another inevitable consequence would also flow from its admission,—the exclusion from the Church's pale, of all Dissenters, and of all foreigners who have been baptised otherwise than by ministers of Episcopal ordination. No *lex loci* is set up, or can be pretended, to work any exception in their favour. The Rubric, if it applies to any, applies to them; and unless they shall have been re-baptised, they can neither be ordained, should they embrace our tenets, nor buried with the rites of our Church, should they depart this life within our territory. All these topics are, however, superfluous, when the question has been sifted upon its true merits, and brought to the test of a more rigorous examination, as was done both in the present case by the Court below, and in the former instance before the late learned and able Judge of the Arches Court, Sir John Nicholl.

[139] The case of *Kemp v. Wickes* in 1809, (3 Phill. 264,) was in every respect, as regards the facts, similar to the present. It underwent a full discussion; the only difference was in the course pursued by the Defendant in his pleading, which was more commendable than that adopted in this case; and the Learned Judge pronounced an elaborate judgment upon the point now before the Court, as to the merits, neither of the preliminary objections having been taken. That judgment does not appear to have given any dissatisfaction in the profession; on the contrary, it is believed to have carried along with it the opinion of lawyers in both the Courts Christian, and the Courts of Common Law. We can hardly avoid attaching great weight to a decision pronounced by such an authority, so long acquiesced in, so little objected to, and, generally speaking, so much respected, although no decision has hitherto been given on the same question in any Court of the last resort.

The Court below justly held, that if the penalty of the canon has been incurred, no discretion is left in awarding its infliction. It appears to us, also, that the costs were properly directed to be paid. The Appellant had taken a course which was wholly unnecessary for raising the question of lay baptism, upon which alone his defence was rested, as far as the merits were concerned, or for raising the preliminary objection to the promovent's rights. Both the one and the other of these points were distinctly raised upon the articles, and might have been disposed of by meeting that allegation alone, and disposed of at a comparatively trifling expense. In *Kemp v. Wickes* [3 Phill. 264] that better course was pursued. The articles, there as here, had detailed the circumstances offered to be proved, and the Defendant [140] at once opposed the admission of them, contending that, be the facts all true as alleged, he had acted lawfully, and was guilty of no offence. This might have been just as easily done in the present case; but it has not been done; on the contrary, a proceeding has been resorted to greatly increasing both the delay and expense, and wholly unnecessary for raising the only questions intended to be discussed between the parties.

The sentence appealed from must, therefore, be affirmed, in all its parts, and the Appellant must further pay the costs of this appeal.

[Mews' Dig. tit. ECCLESIASTICAL LAW, XIX. RUBRICS: XXXI. BURIAL, 1, 2; tit. EVIDENCE, VI. EXAMINATION OF WITNESSES, 8 b. S.C. 6 Jur. 765; and, below, 2 Curt. p. 692; 1 N. of C. 552; and see Special Report, by Curteis, 1841. On point as to construction of rubrics, discussed in *Martin v. Maconochie*, 1868, L.R. 2 Ad. and E. 197; and *Jenkins v. Cook*, 1875, L.R. 4 Ad. and E. 489; distinguished by the Archbishop of Canterbury (Temple) in his Opinion on the Reservation of the Sacrament (London, Macmillan and Co., Lim., 1900), p. 7; and see MacColl, Reformation Settlement, 10th ed. pp. 663, *et seq.*]

ON APPEAL FROM THE EQUITY SIDE OF THE SUPREME COURT OF CALCUTTA.

THE BANK OF BENGAL, —*Appellants*; RADAKISSEN MITTER, —*Respondent* *
[June 28, 1842].

A. drew five Bills in favour of B. on Fergusson and Co., who accepted the same, and got them discounted by the Bank of Bengal, and on their becoming due, procured their renewal. Fergusson and Co. subsequently drew three Bills on the Bank of Bengal; and, for securing as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of Chili copper, of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorized, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, Fergusson and Co. failed, and assignees of their estate and effects were appointed under the Indian Insolvent Act [9 Geo. IV., c. 73]. On presentation to A. of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The Assignees of Fergusson and Co. redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by Fergusson and Co. All the Bills drawn by A. were dishonoured, and the Bank of Bengal brought an action against A. for their amount. On a Bill filed by A., the Bank were restrained by Injunction from proceeding with the action at law. Held on Appeal by the Judicial Committee, discharging the Injunction and reversing the Decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A. as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills.

This was an Appeal from a decree in a cause instituted by the Respondent against the Appellants, and [141] others, to restrain the Appellants from proceeding to enforce the payment of certain Bills of Exchange drawn by the Respondent on, and accepted by, the firm of Fergusson and Co., and discounted on their behalf by the Appellants, the Bank of Bengal.

In 1832, the Appellants having agreed to discount Bills to the amount of S. R. 450,000 on account of Fergusson and Co., five Bills were drawn by the Respondent, on behalf of that firm, upon one Durponarain Gangooly, a sircar or manager in their employ, by whom they were indorsed, and accepted by the Appellants.

The Bills were severally made payable three months after date, in accordance with the provisions of section 15 of the Charter of Incorporation of the Bank of Bengal, which prohibits the Bank from discounting any negotiable securities that have a longer period to run.

[142] These bills being, as it was alleged, merely accommodation Bills for the firm of Fergusson and Co., and drawn by the Respondent, upon an understanding with them that he should run no risk on their account, were, with one exception, never paid, but from time to time, and as they became due, were renewed by the

* Present: Lord Brougham, Mr. Baron Parke, Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington. Privy Councillors. —*Assessors*. —The Right Hon. Sir E. H. East and the Right Hon. Sir A. Johnston.

Respondent; other Bills being substituted in their stead, the five last of which bore date respectively the 2nd, 6th, and 28th days of September 1833, and were collectively for the sum of S. R. 400,000; S. R. 50,000 having been paid on their account.

Besides the Bills thus drawn and renewed by the Respondent, the Bank of Bengal were in possession of three Bills of the same dates drawn by Fergusson and Co. in their own names, and accepted by the Appellants, together with a quantity of copper, deposited as collateral security for the payment thereof.

Each of these Bills was similar in form, varying only in the amount and value of the collateral security. The first, dated the 2nd September 1833, was as follows:

“ Bank of Bengal, 2nd September 1833.

“ Three months after date, we promise to pay to George Haley, Treasurer of the Bank of Bengal, on account of the said Bank, the sum of sicca rupees (245,600) two hundred and forty-five thousand and six hundred, with interest at the rate of four (4) rupees (4) four per cent. per annum, and for securing the repayment, as well of the said principal sum, and interest, at the rate aforesaid, as of all and every sum or sums which the said Bank of Bengal, or the Treasurer of the Bank for the time being, or any other person or persons on account of the said Bank, have already advanced or paid, or have en-[143]-gaged to advance or pay, or shall or may at any time or times hereafter advance or pay, or become engaged to advance or pay to, or on our account, or to or on account of us, or any or either of our executors or administrators, or representatives, or any or either of them together, with interest for the same sum or sums of money respectively at the rate of twelve per cent. per annum: we, the said Fergusson and Co., have deposited in the said Bank as collateral security, Chili copper, 10,000 maunds (a measure of weight amounting in Bengal to about 80 lbs.—Hamilton's E. I. Gazetteer), at 30 current rupees, valued of sicca rupees (327,500) three hundred and twenty-seven thousand and five hundred; and in default of payment at the period above mentioned, we, the said Fergusson and Co., hereby authorize the Treasurer of the said Bank for the time being, absolutely to sell or dispose of the said Chili copper for the reimbursement to the said Bank, as well of the said principal and interest at the rate aforesaid, as of all and every such other sum or sums of money, together with interest as aforesaid, on or before the expiration of the said period, by public or private sale, the said Treasurer rendering to us, the said Fergusson and Co., any surplus which may be forthcoming from such sale, and we being bound to make good to him whatever deficiency there may be below the amount of the said principal sum and interest as aforesaid, and the sale price of the said Chili copper to be made on the price to be calculated at the premium or discount of the Chili copper on the day on which the said Chili copper shall be so sold; but if the said [144] Treasurer shall not proceed to sell or dispose of the said Chili copper at such period, we, the said Fergusson and Co., shall and will pay and allow to the said Bank of Bengal, interest at and after the rate of twelve per cent. per annum on the said sum, and on all and every such sums as aforesaid, up to the day on which the said sum shall be paid off and liquidated, or up to the day on which the said Treasurer of the said Bank of Bengal shall, in pursuance of the power hereinbefore contained, sell and dispose of the said copper so deposited as aforesaid, as the case may happen.

(Signed)

“ FERGUSSON AND Co.”

Witness, Radananth Bose.

The second Bill, which bore date the 6th of September 1833, was for the sum of S. R. 73,700, for which eleven hundred slabs of copper weighing 3000 maunds and upwards, of the value of S. R. 98,275, were deposited in like manner as collateral security: and the third Bill, dated the 28th of September 1833, was for the sum of S. R. 35,100, for which 560 slabs of copper weighing 1500 maunds and upwards, of the value of S. R. 47,200, were deposited as collateral security.

It was alleged and insisted by the Respondent, that he was induced to execute the renewed Bills of the 2nd, 6th, and 28th of September in consequence of the deposits of copper so made by Fergusson and Co. with the Bank of Bengal.

In the month of October 1833, Fergusson and Co. received from the Bank of

Bengal a further loan of S. R. 490,000, the repayment whereof was secured by a Promissory Note, similar in form, for the amount, and a mortgage or pledge of 3500 maunds of [145] indigo, the property of the firm, which was then of the value of S. R. 800,000, or thereabouts.

On the 26th of November 1833, Fergusson and Co. presented their petition, under the Act for the Relief of Insolvent Debtors in the East Indies (9 Geo. IV., c. 73) [see now Indian Insolvent Act 1848 (11 and 12 Vict. c. 21)], and were adjudged and declared insolvent, and assignees appointed of their estate and effects.

The first of the renewed Bills drawn by the Respondent having become due, and having been dishonoured by the acceptors, the Bank of Bengal caused the same to be presented, on the 10th of December 1833, to the Respondent, for payment; which was refused, and on the 27th of the same month the following notice was served by his attorney, on his behalf, upon the Secretary of the Bank:—

"We are instructed by Radakissen Mitter, the drawer of several Notes or Bills, accepted by Messrs. Fergusson and Co., and payable to the Bank of Bengal, to give notice, that if you part with or pay over to the Assignees of the said late firm of Messrs. Fergusson and Co. any security or securities, and sum or sums of money which may be realized upon any such security or securities which the Bank of Bengal holds of the said late firm as deposits and pledges for loans made by the said Bank to the said late firm on the said several Notes or Bills, you and the Bank of Bengal will be held responsible for the same to our client, as our client derived no benefit from the said Notes and Bills, and became a party to them upon the express understanding that the whole of the said several securities, so deposited and pledged by the said late firm with the said Bank, were ample for the payment of the said Notes and [146] Bills, and were in the first instance to go towards liquidation thereof."

On the 10th of February 1834, Durponarian Gangooly, who was the indorser of each of the Bills drawn by the Respondent, obtained (at the instance, as it appeared, of the Assignees of Fergusson and Co.) from the Appellants a loan of S. R. 300,000, upon the pledge and deposit of negotiable Paper of the East India Company to the amount of S. R. 318,200. This loan was secured by the Promissory Note of Gangooly, in the same form as those previously drawn by Fergusson and Co.

Early in the same month, the Assignees applied to the Appellants to redeem the several parcels of copper held by them as collateral security for the Bills drawn by Fergusson and Co. in September 1833; and after a short delay, for the purpose, as was stated by the Appellants, of ascertaining whether such deposits were applicable for the general liabilities of the Insolvent firm, and also the amount for which the copper could be sold, they permitted such redemption, and delivered up the whole of the copper so deposited, to the Assignees upon payment of the sum of S. R. 366,109, and a fraction, being the total amount of principal and interest then due to the Appellants upon the loans made upon such specific deposits.

On the 22nd of February 1834, before the last mentioned Promissory Note of the 10th of February 1834 became due, the Assignees of Fergusson and Co. applied to the Appellants to redeem the Company's Paper deposited by Durponarian Gangooly, alleging such Paper to have been part of the assets of Fergusson and Co., and consequently vested in them, and that Gangooly acted in the matter merely as their agent, [147] and was himself a person of no property or substance. The Appellants upon these representations permitted the redemption by the Assignees, and delivered over the Company's Paper on the receipt of S. R. 300,000, with interest; and in the following month the Appellants permitted the Assignees of Fergusson and Co. to redeem the maunds of indigo, upon payment by them of the sum due on the Promissory Note of October 1833.

At the time of the failure of the firm of Fergusson and Co., there was one share in the Bank of Bengal held by that firm, but registered in the name of William Frederick Fergusson, as the proprietor thereof, and which was then of the value of S. R. 16,000, or thereabouts. After the failure of the firm, the Appellants, according to the provision of the Act for incorporating the Bank, No. VI. of 1839, s. 39, and the proviso in the 21st section of the Charter, appropriated and transferred the dividends on the same share, amounting altogether to S. R. 600, towards and in part payment of the first of the five discounted Bills drawn by the Respondent,

in the hands of the Appellants at the time of such failure, and in further reduction of the liability of the Respondent thereon.

On the 12th of August 1833, the Appellants commenced an action of *assumpsit* on the plea side of the Supreme Court against the Respondent, for the purpose of recovering the balance due on the five Bills drawn by him and discounted by the Bank as above stated.

In consequence of these proceedings, the Respondent, on the 8th of November 1834, filed a Bill in the equity side of the Supreme Court, against the Appellants, their Secretary, and the Assignees of Fergusson and Co. The Bill set forth the circumstances above stated, and [148] insisted that the terms on which the Respondent consented to become the drawer of the Bills in question were well known to the Appellants; the Complainant also insisted that the Appellants were bound to proceed in the first instance against the Assignees of the Insolvent Estate; that the several collateral securities held by the Bank were liable as well for the debts due from the firm previous to their deposit, as for those incurred at the time; and that the Appellants, by permitting the redemption of the same after the notice served on them on behalf of the Respondent, and without his assent, had relieved him from all liability in respect of the several Bills of Exchange, or at least to the extent of any surplus value thereof, beyond the amount for which the same were specifically pledged and deposited, and prayed that the Appellants, and the Assignees, and all persons claiming under them, might be perpetually restrained by injunction from taking any further proceedings against the Respondent to enforce payment of the said five Bills whereon such action had been brought.

The Appellants by their answer admitted the fact of the transactions set forth in the Bill, and stated the several Bills drawn by the Respondent to have been successively indorsed to and discounted by the Appellants in the ordinary course of their business, and denied that the same had been drawn or recovered by the Respondent on any such assurance or representation of the firm of Fergusson and Co., or of the Appellants, as alleged by him, or upon the faith and credit of the several deposits and pledges of copper and indigo, which they insisted were only liable for the sums for which they had been respectively deposited, and for which they had been redeemed by the Assignees: and they denied the several grounds of equitable relief [149] claimed by the Respondent, and insisted on their right to proceed with their action at law for the recovery of the balance due on the several Promissory Notes.

The assignees also put in their answer, in which they admitted the facts as generally stated by the Bill, and also that subsequent to the redemption of the copper, they had sold the same at a profit, but contended that the rise in the value thereof was accidental and unexpected, and that at the time of redemption, the sum for which the same was redeemed was the full value. The Defendant, the Secretary of the Bank of Bengal, also put in his answer to the Respondent's Bill.

The cause being at issue, witnesses were examined, and the same came on for hearing on the 13th of July 1838, before Sir Edward Ryan, Chief Justice of the Supreme Court, and Sir Peter Grant, who at the time were the only two Judges of the Court; when it was ordered (Mr. Justice Grant dissenting) that the Respondent's Bill should be dismissed with costs.

The Respondent being dissatisfied with this decree, presented his Petition for, and obtained, a re-hearing of the cause on the 30th of November 1838, before the Judges by whom it was originally heard, and Sir Henry William Seton, who had been appointed one of the Judges of the Court since the former hearing.

On the 31st of January 1839, the Judges gave Judgment, when Mr. Justice Seton was of opinion that the injunction prayed for should be perpetual, in which Mr. Justice Grant concurred; but the Chief Justice adhered to his former opinion, that the Bill should be dismissed with costs. The decree, therefore, was, that the injunction to restrain proceedings at law should be made perpetual, each party paying his [150] own costs, except the Defendant, the Secretary of the Bank, whose costs the Respondent was directed to pay.

From this Decree the Appellants appealed to Her Majesty in Council.

Mr. Griffith Richards, Q.C., and Mr. Greenwood, for the Appellants, The Bank of Bengal.

The allegation that the Bills drawn by the Respondent were mere accommodation Bills, and were drawn upon the understanding with Fergusson and Co. that the Respondent was not to be held liable for their amount, is unfounded in fact, and unsupported by evidence. The averment is expressly denied by the Appellants' answer, and no proof is tendered by the Respondent to support such allegation. It was said indeed in the Court below that the circumstance of Fergusson himself being a Director of the Bank, and a registered holder of Company's Paper, affected the Appellants with notice of the agreement between him and the Respondent; but if there were evidence of such an agreement, it could not affect the Appellants, since notice to one of the members of a corporation in his private character, and as a partner of a firm not members of the corporation, could not be held notice to the corporate body, who must necessarily all be strangers to the private affairs of their individual members. Were such the law, there would be no limit to the liabilities of a corporation.

Again, it was argued in the Court below, that the Respondent was a surety, and on the ground of his having been released as such, by the conduct of the Appellants, the Judgment on the re-hearing proceeded. But in what did his suretyship consist? He is the [151] original drawer of the notes. Now at the time of their being drawn, no security was given by Fergusson and Co. to the Appellants, nor were any securities ever given by Fergusson and Co. for the amount of the Respondent's Bills. It is alleged by the pleadings, that the copper and indigo deposited by Fergusson and Co. with the Appellants, was for all sums due from the former, and that the Appellants had a general lien on the same, beyond the amount for which the deposits were respectively made. But the terms on which the deposits were made are explicit; they are redeemable for the several amounts specified: the Assignees had, therefore, a right to redeem the same on payment of each specific sum and interest. *Young v. The Bank of Bengal* (1 Moore's P.C. Cases, 150). The debt contracted by the Bills was on the personal security of the Respondent, and the nature of the contract does not imply that he ever contemplated being held merely a surety. *Wright v. Simpson* (6 Ves. 714-26). There was no dealing with the original Bills, or those renewed in their place, which could release the Respondent as the drawer: the only claim for such release is founded on the deposit Bills; there is no evidence of the agreement stated by the Respondent. The dishonour of the original Bills drawn by the respondent, and the demand made on him for payment, was notice to him, that the Appellants held him liable; he was also cognizant of the deposit Bills, and the securities pledged therewith; this he stated himself. Now in order to entitle him to their benefit, he ought to have paid the debt and required the transfer of them to himself; the notice given on his behalf was not to [152] part with the deposits, but they were pledged for specific sums, redeemable on their liquidation, and if the surety desired to have the benefit of them, he ought to have paid the principal due on them, and then taken an assignment; that is the only ground on which he could claim equitable relief: the payment of the debt, or the placing himself in the situation of the principal debtor; that is the principle of all the decisions. *Law v. East India Company* (4 Ves. 821), *Boulthée v. Stubbs* (18 Ves. 20), *Mayhew v. Crickett* (2 Swan. 185), *Browne v. Carr* (2 Russ. 600), *Spears v. Hartley* (3 Esp. 81). In *Wade v. Coape* (2 Sim. 155, 160), the Vice-Chancellor, in stating the rule of law, said, "The doctrine is, that where a man becomes surety for a debtor for the payment of a debt, he has, if he pays the debt, a right to avail himself of all the securities which the creditor has. But that doctrine never applies to a person who becomes surety at one time, and a security is given to the same creditor, either for another debt, or, what is the same, for a distinct portion of the debt for which the first security was given;" and he continues, "I have not found any such case: on the contrary, all the notion I have of the law is, that the doctrine has always been stinted to the particular contingency of the debt being one, and the surety being given for the same debt, at the time when the person became surety for it." Without payment of the debt, therefore, the Respondent had no right to the deposits, and the redemption by the Assignees for their market value was according to the terms upon which they were made, and in no way prejudicial to the Respondent.

[153] The Attorney-General (Sir F. Pollock), Mr. Bethell, Q.C., and Mr. T. B. May, for the Respondent.

That the Bills originally drawn by the Respondent were accommodation Bills there can be no doubt. They were accepted by Fergusson and Co., and the renewed Bills were in all respects similar to those drawn in the first instance. It is not pretended that the Respondent ever derived any benefit from them. This circumstance is sufficient evidence of the agreement that he should be held harmless. The Respondent was to all intents and purposes a surety. What then is the contract made with his principal, by the deposit Bills? The deposits are stated to be made for security as well of the principal sums and interest thereby secured, "as of all and every sum or sums which the said Bank of Bengal, or any other person or persons, on account of the said Bank, have already advanced or paid, or have engaged to advance or pay, or shall at any time hereafter advance or pay to or on our account, or of our executors, etc." That this contract was made with the privity of the Respondent, the notice served by him on the Bank of Bengal shows; but notwithstanding such notice and the term of the contract, the Appellants permit the Assignees to obtain possession of the deposits on payment of the principal and interest due upon Fergusson and Co.'s Bills, thereby giving up securities pledged for all sums which the Bank had already advanced. It is said that the surety is only entitled to the benefit of securities deposited by the principal, upon payment to the creditor; but the authorities cited do not bear out that position. The true principle is, that the creditor is a trustee for the surety, not merely from the fact of payment, but [154] from the relation that subsists between them; and consequently, whether the surety has paid or not, the creditor can do no act to his prejudice. This is the doctrine established in *Mayhew v. Crickett* (2 Swan. 185), and the authorities there cited. In that case the surety sought his discharge through the medium of the same equity as is contended for here; and it appears from what fell from Lord Eldon, that, but for a subsequent promise, he would have been held discharged both at Law and in Equity. The case of *Broune v. Carr* (2 Russ. 600; S.C. 7 Bingh. 508) rested on peculiar circumstances: the surety disputed his liability at law; he had been guilty of laches in not availing himself of his legal remedies, and there were other grounds peculiar to the nature of the certificate, which took the case out of the general principle. In *Boulton v. Stubbbs* (18 Ves. 20, 21), cited on the other side, Lord Eldon expressly lays it down, that the creditor agreeing with the principal debtor to postpone his remedy, the effect is, that in equity the right against the surety is gone. It is in vain to say the indulgence may be for the benefit of the surety: another person has no right to judge what are the surety's remedies; the original implied contract being, as far as the nature of the original security will admit, that the surety paying the debt shall stand in the place of the creditor. No payment here by the Respondent could have placed him in the situation of the creditor; for the deposits were redeemed, not at a price ascertained by public sale, but at the sum for which the deposit notes were drawn.

Suppose, however, such sum to have been the market value of the copper at the time of such [155] transfer, the securities were for advances made prior to as well as at the time of their deposit; the Bank of Bengal ought, therefore, at least, to have applied their proceeds, *pari passu*, to the discharge of the Respondent's Bills, as well as those of Fergusson and Co.; they did so with respect to the indigo and Company's Paper, which showed they were cognizant of the Respondent's equity. It is upon these principles that the Respondent was held entitled to the relief he sought by his Bill in the Court below, and we submit that this Appeal must be dismissed with costs.

The Right Hon. Dr. Lushington (28th July 1842).—This is an Appeal from the Supreme Court of Judicature at Fort William, and was brought under the following circumstances.

In the year 1832, Radakissen Mitter drew several Bills in favour of Durponarain Gangooly on Messrs. Fergusson and Co., Merchants in Calcutta, who accepted the same. Those Bills being indorsed by Durponarain Gangooly, were discounted by the Bank of Bengal, and the value was paid to Fergusson and Co. The whole amount for which those Bills were originally given was S. R. 450,000. Those Bills were

renewed from time to time, and, save a sum of S. R. 50,000, no money was paid in discharge of them.

In the month of November 1833, Fergusson and Co. failed. At that time the Bank of Bengal held five renewed Bills for S. R. 400,000, which became due and payable in December 1833, and January 1834.

On the 2nd of September 1833, the Bank advanced to Messrs. Fergusson and Co. the sum of S. R. 245,600, on a deposit, as a collateral security, of 10,000 maunds of Chili copper, valued at S. R. 327,500. The terms [156] upon which this copper was deposited will require to be more particularly noticed.

On the 6th of September 1833, a further advance was made by the Bank to Radakissen Mitter of S. R. 73,700, on the security of 1100 slabs of copper, valued at S. R. 98,275. This copper was deposited as a security upon precisely the same terms, with respect to Radakissen Mitter, as the copper deposited on the 2nd of September was with respect to Fergusson and Co., and the advance was for the benefit of Fergusson and Co.

On the 28th of September 1833, a further advance of S. R. 35,400 was made to Messrs. Fergusson and Co. by the Bank, on the deposit of 568 slabs of copper, valued at S. R. 47,200, and such deposit was made in the same terms as that on the 2nd of September.

On the 26th of November 1833, Messrs. Fergusson presented their Petition to the Court for the Relief of Insolvent Debtors, and Assignees were appointed of their estate and effects. The first of the Bills drawn by Radakissen Mitter became due on the 10th of December 1833, and was presented to him for payment.

On the 27th of December 1833, Radakissen Mitter caused a notice to be served on the Bank to the following purport, that if the Bank should part with or pay over to the Assignees of Fergusson and Co. any securities or proceeds of securities held by the Bank for loans made to Fergusson and Co. on the Bills of Exchange drawn by Radakissen Mitter, the Bank would be held responsible, as Radakissen Mitter had derived no benefit from the Bills, and had become a party to them on the express understanding that the securities were ample, and should be applied in the first instance to the liquidation of the Bills.

On the 12th of February 1834, the Bank, upon [157] the application of the Assignees, delivered up the three parcels of copper so deposited with them, upon payment by the Assignees of S. R. 366,109, being the amount of the principal and interest of the three sums advanced upon the security of the copper.

On the 12th of August 1834, the Bank brought their action against the Respondent, as drawer of the five Bills, for the balance due to the Bank, viz. the amount of the Bills, less the dividends, on a share in the said Bank, which had been held by Fergusson on behalf of his partnership, and less also S. R. 99,552 1 a. 2 p., received on account of an order addressed in September 1833, to the Government Loan Committee by Messrs. Fergusson, and accepted by such Committee. This order required the Loan Committee to pay to the Bank of Bengal S. R. 130,000 from proceeds of indigo pledged to the Committee: and the Bank were to hold this money as a security for the five Bills, and also for a Bill drawn by Mr. Colville, accepted by Messrs Fergusson, and discounted by the Bank.

In November 1834, the Respondent filed his Bill on the Equity side of the Supreme Court against the Bank and the Assignees of Fergusson and Co., and prayed a perpetual Injunction against any further proceedings at law to enforce payment of the said five Bills. An Injunction till further order, was obtained on the 9th of February 1835.

The Defendants to the Bill having appeared, and the cause gone through the ordinary stages, it was heard on the 13th of July 1838, before the Chief Justice and one of the Puisne Judges, there not being any other at that time in Calcutta. The Court was divided in opinion, and in such case the opinion of the Chief Justice being entitled to prevail, a Decree on the 13th [158] of August was made conformable to his opinion, and the Bill was dismissed with costs, as against the Bank of Bengal.

A Petition for rehearing having been presented, the cause was reheard on the 30th of November before the Chief Justice, Sir John Peter Grant and Sir Henry W. Seton, who, in the interval, had arrived in Bengal, and taken his seat.

By the Decree on the hearing, dated the 31st of January 1839, the Decree of the

1st of August was reversed, and the Injunction made perpetual; and the Bank was left to pay its own costs. From this Decree the Chief Justice dissented, and the Bank of Bengal brought the present Appeal.

In these proceedings there are very many other circumstances set forth; but as their Lordships are of opinion that their decision must be chiefly governed by the view they take of one question, this short summary may suffice to bring out so much of the case as they deem necessary.

It is perfectly clear that the Respondent, by drawing these Bills of Exchange, undertook, if the acceptors failed to pay, to make payment himself. Of the averment contained in the Bill, that the Respondent, by an understanding with the Bank, was to be relieved from all responsibility on account of his being the drawer of the Bills, there is no proof whatever; and, therefore, any inference arising from such fact, if true, must be wholly dismissed from the case. At the time the Bills were originally drawn, it does not appear that the Bank held any security from Messrs. Fergusson, and, therefore, the engagement entered into by the Respondent to pay the amount of the Bills, if the acceptors did not, was wholly unconnected with any [159] question of security. At a period, however, long subsequent to the drawing the first Bills, the Bank did take certain securities; and it is on account of the manner in which the Bank dealt with those securities that the Respondent claims to be relieved from his liability to pay those Bills.

It will be necessary presently to advert to the terms of the documents whereby those securities were acquired, and afterwards the mode in which the Bank dealt with them.

It is unnecessary to consider how far the Respondent obtained a right to the securities subsequently acquired,—securities neither given nor agreed to be given till a long time after the first Bills became due,—and whether he could acquire such securities without paying the debt. This may or it may not be, as far as the present question is concerned, because, assuming the affirmative of the proposition, the securities were, we think, justly dealt with.

Supposing the Respondent to have acquired a right to the benefit of the security, what was the extent of that right? We apprehend that the Respondent could in any view only take a right to the benefit of the security subject to the power which the creditor by the terms of the security was entitled to exercise. And this condition is no injustice to the surety, for whatever be the quantum of benefit he derives from the security, it is a benefit beyond that which he stipulated for when he originally became surety.

This security is given by a document to the following effect, in the form of a Promissory Note signed by Fergusson and Co., dated 2nd September 1833. That firm, three months after date, promise to pay the Bank of Bengal S. R. 245,600, with interest as stated; and [160] the document states, that they have deposited in the Bank, as a collateral security, Chili copper valued at S. R. 327,500; "and in default of payment at the period above mentioned, we, Fergusson and Co., hereby authorize the Treasurer of the Bank for the time being, absolutely to sell and dispose of the said Chili copper, for the reimbursement to the said Bank, as well of the said principal and interest at the rate aforesaid, as of all and every such other sum or sums of money, together with interest, as aforesaid, on or after the expiration of the said period, by public or private sale."

There were two other parcels of copper deposited in September by documents similar in effect.

There is no apparent difficulty in the construction of this Instrument; it is simply an obligation to repay a certain sum then advanced by the Bank, and the deposit of a certain quantity of copper to secure the payment of that debt and all other sums of money which might be then due, or might be advanced in the interval. The Instrument did not direct that the copper or the proceeds thereof should be applied preferentially in payment of any particular debt.

Such being the Instrument by which the security was given, the next consideration is, how did the Bank of Bengal deal with the security?

On the 26th of November 1833, Fergusson and Co. became Insolvent, and the Bills drawn by the Respondent became due in December and January following. On the 27th of December 1833, the Respondent gave notice to the Bank to retain the

securities, claiming a right to have them first applied in payment of the Bills. The Bank retained the copper till the 12th of February 1834, when they delivered it over [161] to the Assignees of Fergusson and Co., on the payment of S. R. 366,000, which was the amount, with interest, of the special loans made by the Bank at the times of receiving the three parcels of copper.

The Respondent says that this copper was not sold, but was redeemed contrary to the terms of the Instrument, and that too, at less than its real value; and that, therefore, the security to which he has a claim has been diminished in value, and that the conduct of the creditor has relieved him from his obligation as surety.

We are of opinion, that returning the copper to the Assignees on payment of its full value (assuming that fact for the present) is a disposition of it fairly within the terms of the Instrument, which gives to the Bank the right to sell or dispose of the copper by public or private sale. Such a disposition of the copper is a sale of it in all essential particulars. The Assignees are purchasers for a full consideration, and the Respondent, by this mode of dealing with the copper, does not suffer the slightest injury, nor are any of his rights infringed.

That the copper was sold for less than its value, there is no evidence whatever. The answer of the Bank was read, which distinctly states the contrary; nor is there any probability of the security being so sacrificed, for it was clearly the interest of the Bank to obtain the full value of it. It is true, indeed, that the copper was afterwards sold by the Assignees for a larger amount; but such sales took place at distant periods, and when the market had altered. On this ground we are of opinion that the Respondent is not entitled to relief.

It has, however, been further contended, that the [162] Bank, having received the value of the copper, was bound to have applied it *pari passu* towards the liquidation of all the debts due from Fergusson and Co. to the Bank, including the five Bills. But we think that the Instrument creating the security, not directing it to be applied preferentially in payment of any debt, nor *pari passu* in payment of all debts, and the Assignees of Fergusson and Co. not requiring it to be appropriated in liquidation of any demand, the Bank had a perfect right to apply it towards the payment of the special loans. We think so upon the ordinary principle which entitles a creditor, in the absence of any direction from the debtor paying, to apply the monies he receives to whichever of several debts arising he pleases. But it may be well to consider what would be the result if the proposition of the Respondent was true; it would be this, that the Respondent would be relieved *pro tanto* by the *pari passu* application of the produce of this security acquired after he became surety; and in the same proportion the Bank would be left without security for payment of a loan advanced by them long after the Bills were discounted, and on the faith of this very security. The Bank would to this extent be deprived, as to the Bills, of the benefit of the security they originally possessed. It is difficult to find any principle of Law or Equity which could support a proposition fraught with such consequences.

With respect to the share which Fergusson himself held in the Bank, the dividends were applied in liquidation of these Bills—the share became the property of the Assignees. We see no reason to conclude that it was illegally dealt with, to the prejudice of the Respondent.

[163] Their Lordships, therefore, are of opinion that the Decree appealed from must be reversed, and the Bill dismissed, but without costs; thus leaving each party to pay their own costs.

It is right that I should add, that upon the present occasion, His honor the Vice-Chancellor entertains some doubt with respect to this Judgment, and thinks that it would perhaps be more expedient that further inquiry should be instituted into the circumstances.

Decree reversed.

[Mews' Dig. tit. BILLS OF EXCHANGE, O. APPROPRIATION OF SECURITIES, 1. *Consignments*; S.C. 3 Moo. Ind. App. 19. As to expression of existence of unanimity or divergence of opinion among members of Judicial Committee (4 Moo. P.C. 163), see O. in C. of 4th Feb. 1878; and authorities collected in Phillimore, *Eccl. Law*, 2nd Ed. p. 975.]

[164] RE SIMISTER'S PATENT * [July 15, December 7, 8, 1842].

Extension of the term of Letters Patent refused, although the profits derived from the patent article was less than the expenditure incurred upon the patent; the utility of the invention being small.

The fact of an invention, when known, not getting into general use, is a presumption against its utility.

This was an application for an extension of the term of Letters Patent granted to the petitioner, bearing date the 18th of December 1828, for "improvements in weaving, preparing, or manufacturing a cloth or fabric, and the application thereof to the making of stays and other articles of dress, which improvements are also applicable to other purposes."

The petitioner stated, that at the time of granting the said Letters Patent, the cloth or fabric used for stays was woven or manufactured according to the usual and well-known methods of weaving; and stays were made by placing two surfaces of such cloth together, and sewing or stitching by the hand, in such manner as to leave the requisite spaces for the introduction of the whalebone or other article with which stays were or might be fitted. The petitioner then stated the expenses incurred, and difficulties encountered, in making and introducing the invention, the opposition of the trade, and infringement of the invention, and the litigation and expense incurred in protecting the patent; that no profits had been received for some time, and that the profits during the last six years had not equalled the petitioner's losses; so that on the whole there had been a loss on the invention. A disclaimer had been inrolled as to so much [165] of the invention as did not relate to the making of stays.

Caveats were entered, and notices of objection given by several parties, to the validity, the novelty, and the specification of the patent, and alleging, among other things, that the petitioner had compromised certain legal proceedings taken to protect the patent, which were particularly referred to in the petition, by the payment of money, with a view of prejudicing and deterring other parties known to the petitioner to be infringing the patent; that in consequence of the petitioner's not interfering to stop such infringements, the opponents had embarked a large capital in machinery for manufacturing the stay fabric by steam power, and that it was not until the fabric so woven by steam power, drove out of the market the fabric woven in the loom, that the petitioner thought of amending his patent by disclaimer, with a view to the present application.

The petitioner examined witnesses to prove the novelty and utility of the invention, the expenses incurred in perfecting, and the small profits hitherto obtained from the sale of the manufacture, by which it appeared that the profits derived from the sale were £1278 less than the expenditure incurred, exclusive of interest. The petitioner did not appear to have had knowledge of the opponents being the parties engaged in infringing his patent, though it was certain that stays of a fabric made by power weaving were in the market without any legal proceedings being taken. The short portion which remained of the term of the patent, after inrolment of the disclaimer, was suggested as the cause of this.

[166] Mr. M. D. Hill, Q.C., and Mr. Webster, for the petitioner.

The Solicitor-General, (Sir Wm. Follett,) and Mr. Cowling, for the opponents, cited *Erard's Patent* ([1] *Webster's Pat. Cases*, 557).

Their Lordships expressed an opinion, during the argument, that the fact of an invention, when known, not getting into general use is a presumption against its utility, that one of the considerations for extending the term of Letters Patent, is, that the public will be benefited after the term has expired, which did not appear here; and they held that there was not sufficient grounds shown for reporting to Her Majesty that the patent ought to be renewed. Petition dismissed.

[*Mews' Dig. tit. PATENT, F. CONFIRMATION, etc. 2. a. S.C. 7 Jur. 451. On point*

* Present: Lord Campbell, Mr. Justice Erskine, Sir Herbert Jenner Fust, and the Right Hon. Dr. Lushington.

as to fact of patent not getting into general use, cf. *Pinkus Patent*, 1848, 12 Jur. 233; *Bakewell's Patent*, 1862, 15 Moo. P.C. 385; *Allan's Patent*, 1867, L.R. 1 P.C. 507, 4 Moo. P.C. (N.S.) 443; *Herbert's Patent*, 1867, L.R. 1 P.C. 399, 4 Moo. P.C. (N.S.) 300; *Hughes' Patent*, 1879, 4 A.C. 174. The extension of letters patent for inventions is now regulated by s. 25 of the Patents Act 1883 (46 and 47 Vict. c. 57), and by rules scheduled to an O. in C. of 26th Nov. 1897 (Stat. R. and O. 1899, p. 1837).]

[167] ON APPEAL FROM THE VICE-ADMIRALTY COURT OF BARBADOES.

FRANCISCO FERNANDEZ GUIMARAENS,—*Appellant*; WILLIAM PRESTON, Esq., the Commander, and the Officers and Crew of H.M. Ship CURAÇOA, and the QUEEN,—*Respondents* * [July 13, 1842].

The Ship THIRTEENTH OF JUNE.

Seizure and condemnation of a Portuguese vessel under 2 and 3 Vict., c. 73, affirmed on appeal by the Judicial Committee.

Proceedings taken against a vessel seized under the 2 and 3 Vict., c. 73, are to be according to the rules and regulations, established under the 2 and 3 Will. IV., c. 51, and not according to the forms of the Civil Law.

The affidavit of a person present at the seizure, though not the seizer himself, is sufficient to ground a monition citing the master in particular, and all others in general, to appear, etc.

Evidence of the owners' claim not tendered in the Court below, received by the Judicial Committee on the hearing of the appeal.

This was an Appeal from a sentence of condemnation for a breach of the Act, 2 and 3 Vict., c. 73, for the suppression of the slave trade, pronounced on the 25th of June 1840, by the Judge of the Vice-Admiralty [168] Court of Barbadoes, against the vessel called the *Treze de Junho*, or *The Thirteenth of June*, her cargo, tackle, apparel, and furniture; whereof the Appellant, Francisco Fernandez Guimaraens, was sole owner.

The Statute 2 and 3 Vict., c. 73, after reciting, that it is expedient, among other things, that power should be given to the High Court of Admiralty, and to Courts of Vice-Admiralty, to adjudicate upon vessels and their cargoes captured for having been engaged in the Slave Trade, etc., and declaring that Her Majesty had been pleased to issue Orders to Her cruizers to capture Portuguese (a) vessels engaged in the Slave Trade, and other vessels engaged in the Slave Trade, not being justly entitled to claim the protection of the flag of any state or nation,—enacted “that it shall be lawful for any person or persons in Her Majesty's service, under any order or authority of the Lord High Admiral or of the commissioners for executing the office of Lord High Admiral of Great Britain, or of any one of Her Majesty's Secretaries of State, to detain, seize, and capture any such vessels, and the slaves, if any, found therein, and to bring the same to adjudication in the High Court of Admiralty in England, or in any Vice-Admiralty Court within Her Majesty's dominions, in the same way as if such ves-[169]-sels and the cargoes thereof were the property of British subjects.”

By the 3rd section it is enacted, “That it shall be lawful for the High Court of Admiralty of England, and for all Courts of Vice-Admiralty in any colonies or dominions of Her Majesty beyond the seas, to take cognizance of, and try, such

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, Sir Herbert Jenner Fust, and the Right Hon. Dr. Lushington.

(a) Such parts of this Statute as apply to Portuguese vessels have been repealed by the 5 and 6 Vict., c. 114, and vessels of that nation can now only be seized and made forfeit under the authority of the treaty between Great Britain and Portugal of the 3rd of July 1842. The jurisdiction of Her Majesty's Vice-Admiralty Court is superseded by the Mixed Commission Courts, established under that treaty, and the judgment of the Commission is declared definite and without appeal. (See Treaty, Annex, B., Art. III. VII. and IX.)

Portuguese vessel which shall be detained or captured either to the north or to the south of the equator, under any such order or authority, and any vessel which shall not establish, to the satisfaction of such Court, that she is justly entitled to claim the protection of the flag of any state or nation, and to condemn any such vessel, and adjudge as to the slaves found therein, in like manner and under such and the like rules and regulations (a) as are contained in any Act or Acts of Parliament in force, in relation to the suppression of the Slave Trade, by British-owned ships, as fully and effectually, to all intents and purposes, as if all the powers, authorities,

(a) The practice to be observed in suits and proceedings in the Courts of Vice-Admiralty abroad is governed by certain rules and regulations established by an Order in Council, under the 2nd and 3rd Will. IV., c. 51, printed and circulated by the Board of Admiralty. The rules and regulations are accompanied by tables of fees for the Courts of Vice-Admiralty in the various colonies, and contain a copious appendix of forms of pleadings, etc.: they are divided into separate sections, that referred to being section 25, headed "Prosecutions for a breach of the laws for the abolition of slavery."

"Foreign slave-vessels cannot be detained at sea except for a violation of treaty, and then only by such of His Majesty's ships of war as are provided with special instructions for that purpose, nor can the search of any such foreign slave-vessel be made by any officer holding a rank inferior to that of Lieutenant in the Navy of Great Britain.

"With respect to these seizures of foreign slave-vessels, the Vice-Admiralty Courts have no jurisdiction. The only tribunals which can legally adjudicate thereon are the 'Mixed Commission Courts,' established in pursuance of treaties with certain foreign powers.

"When a vessel engaged in the slave trade is seized for a violation of the Municipal Laws of the United Kingdom of Great Britain and Ireland, it is the duty of the captor to send her, with the slaves, if any, on board, for the purpose of adjudication, to the nearest and most convenient port in any colony or settlement where there is a Vice-Admiralty Court.

"Upon the arrival in port of the vessel and slaves seized, and also in case of a seizure of slaves on shore, an immediate representation of the seizure is to be made to the registrar of the Court of Vice-Admiralty, and the seizer is to make an affidavit (in the form prescribed), detailing all the circumstances connected therewith, and stating especially by what breach of the law the forfeiture of the slaves has been incurred. And, in the case of the seizure of a vessel, there are to be annexed to the affidavit, and verified therein, all original papers that may have been delivered up to the seizer, or, if the ship's papers shall have been concealed, thrown overboard, or otherwise destroyed, that fact is to be stated in the affidavit.

"The affidavit being duly sworn and exhibited before the Judge or Surrogate, he is to decree a monition to issue, returnable fourteen days after service, citing by name the owners or persons implicated, if known, and all others in general, to appear and show cause why the forfeiture should not be decreed and the penalties pronounced for.

"Where the owners or persons implicated are not known, the monition must only cite all persons in general. If the monition contain the names of the owners or others, from whom penalties are sought to be recovered, it should be personally served on the parties, in the manner of other instruments requiring personal service. In all cases the monition must be served on the Exchange or the Court-House or other public place, as before directed in derelict cases. If the monition issue against all persons in general, and not against any individual in particular, it need not be served in the manner last-mentioned.

"If, when the monition has been served, no appearance be given, the Judge, upon the return of the monition, is, immediately or on the next regularly adjourned Court-day, to proceed to pronounce, by Interlocutory Decree, for the forfeiture of the slaves (if any) and vessel, and for the penalties due by law, without requiring any further evidence.

"If it shall appear to the Judge, by affidavit, that personal service cannot be effected on the parties, if any, named in the monition, by reason that they have purposely absented themselves, to avoid service, the Judge is to pronounce his Decree;

and provisions contained in [170] such Acts were repeated and re-enacted in this Act, as to such High Court of Admiralty, or Courts of Vice-Admiralty."

[171] By section 4, it is enacted, "That every such vessel shall be subject to seizure, detention, and condemnation-[172]-tion, under any such order or authority; if in the equipment of such vessel there shall be found any of the things hereinafter mentioned, namely,—First—Hatches with open gratings, instead of the close hatches which are usual in merchant vessels:—Secondly—Divisions or bulk-heads in the hold or on deck, more numerous than are necessary for vessels [173] engaged in lawful

but if he has reason to believe that the parties are *bona fide* ignorant thereof, he ought to reserve his judgment, so far as relates to the penalties sued for, and also as to the slaves and vessel, if any doubt shall arise upon the evidence.

"In the case of a monition citing all persons in general, and not describing any person by name, no penalties against individuals can be pronounced for; but if the persons by whom the offence has been committed shall afterwards be discovered, a subsequent monition may issue in the same suit, against him or them, for recovery of the penalties.

"In order to move for the Interlocutory Decree, a case, together with a copy of the affidavit, must be placed in the hands of counsel, as in other cases.

"At any time before the Interlocutory Decree, a claim may be given on behalf of the owners, and the claimant may, if he think fit, require the seizer to proceed by plea and proof, and pray him to be assigned to give his information or libel, to which the claimant may give in a responsive plea or allegation.

"To the claim must be annexed an affidavit, containing the names, additions, and residence of the owners, and a detail of all the circumstances on which the claimant means to rely as the ground of his defence. The same course, in all respects, is to be pursued in giving in the claim as before directed in derelict cases.

"When a claim is given and no libel prayed, the Court may proceed to adjudge the case on the facts and circumstances stated in the affidavit of the seizer, exhibited on praying the monition, and in the claim and affidavit in support thereof.

"Should the Judge consider the case not sufficiently proved by such evidence, to enable him to proceed to sentence, he may direct a libel to be filed by the seizer, and witnesses to be examined thereon, to which libel the claimant's proctor may give a responsive plea or allegation, and in like manner examine witnesses. The proceedings will then be the same as directed in cases contested by plea and proof.

"In the event of the Judge not in the first instance condemning or restoring the slaves, he is required in certain cases, by the Act 5 Geo. IV., chap. 113, to order them to be valued: and, upon the valuation being approved by the Court, they are to be delivered over, pursuant to the Act, to persons specially appointed to receive, protect, and provide for them. The same course is to be followed when a Decree restoring or condemning slaves is suspended by appeal. And in no case whatever are slaves to be delivered to claimants on bail, to answer the adjudication.

"Where a seizure of several slaves, belonging to the same owner, is made by the same seizer, for one and the same cause of forfeiture, there is to be only one affidavit and one monition required to enable the Court to proceed.

"Where several slaves, whether belonging to the same or different owners, are seized for the same cause of forfeiture, but by different seizers, there must be a separate affidavit by each seizer, but the slaves may all be included in one monition.

"Where several slaves, belonging to the same or to different owners, are seized by the same seizer or by different seizers, for different causes of forfeiture, there must be as many affidavits and monitions as there are different causes of forfeiture: but the Judge may afterwards, in his discretion, consolidate the proceedings, so as to form but one suit to come before the Court for hearing.

"Care is to be taken, in consolidating proceedings, that the monition, and also the libel when that proceeding is required, be drawn conformably with the several circumstances, and that the different seizures be described in separate articles or counts of the libel or information.

"In order to avoid the injury which owners may sustain by the delay of the seizer to proceed, any claimant or owner may apply to the Court for a monition against the seizer, returnable in three days after service, requiring him immediately to proceed to the adjudication of any slave or slaves so claimed."

trade:—Thirdly—Spare plank fitted for being laid down as a second or slave deck:—Fourthly—Shackles, bolts, or handcuffs:—Fifthly—A larger quantity of water in casks or in tanks than is requisite for the use of the crew of the vessel as a merchant vessel:—Sixthly—An extraordinary number of water casks, or of other vessels for holding liquid, unless the master shall produce a certificate from the Custom House at the place from which he cleared outwards, stating that a sufficient security had been given by the owners of such vessel that such extra quantity of casks or of other vessels should only be used for the reception of palm oil, or other purposes of lawful commerce:—Seventhly—A greater quantity of mess-tubs or kids than are requisite for the use of the crew of the vessel as a merchant vessel:—Eightly—A boiler of an unusual size, and larger than requisite for the use of the crew of the vessel as a merchant vessel, or more than one boiler of the ordinary size:—Ninthly—An extraordinary quantity either of rice, or of the flour of Brazil, manioc or cassada, commonly called farinha, of maize, or of Indian corn, or of any other article of food whatever, beyond what might probably be requisite for the use of the crew, such rice, flour, maize, Indian corn, or other article of food, not being entered on the manifest as part of the cargo for trade:—Tenthly—A quantity of mats or matting larger than is necessary for the use of the crew of the vessel as a merchant vessel:—any one or more of these circumstances, if proved, shall be considered as *prima facie* evidence of the actual employment of the vessel in the transport of negroes or others, for the purpose of consigning them to slavery, and the vessel and cargo [174] shall thereupon be condemned to the Crown, unless it be established by satisfactory evidence on the part of the master or owners, that such vessel was, at the time of her detention or capture, employed on some legal pursuit, and that such of the several things above enumerated, as were found on board of such vessel at the time of her detention, or had been put on board on the voyage on which, when captured, such vessel was proceeding, were needed for legal purposes on that particular voyage" (this section is incorporated verbatim in the Treaty of 1842, Art. IX).

The *Treze de Junho* left the port of Rio de Janeiro on the 28th of March 1840, under Portuguese colours, commanded by José da Lomba, bound to the port of Benguella, on the coast of Africa. On the 31st of March 1840 she was seized by Her Majesty's Ship of War, *Curaçoa*, William Preston, Esq., commander, and dispatched to Rio de Janeiro, in charge of Mr. Roger Lucius Curtis, mate of Her Majesty's said ship, under instructions that proceedings should be instituted against the Master in the Mixed Commission Court there established. On her arrival at that port, a strict and careful survey was made, by order of T. B. Sullivan, Esq., commodore of the second class, and senior officer of Her Majesty's ships and vessels on the east coast of South America; and on the 26th of April 1840, she was, by the orders of the commodore, navigated to the Island of Barbadoes, in charge of the mate and an English crew (her master and commander, José da Lomba, being on board), to be proceeded against in the Vice-Admiralty Court of that Island.

[175] On the 3rd of June, and immediately upon her arrival at Barbadoes, an affidavit was made by Curtis, wherein he stated, "that on the 30th of March 1840, whilst cruising off Cape Trio, the *Curaçoa* fell in with the said brigantine or vessel, and Captain Preston sent a boat, with William Tead, his second lieutenant, and William Parker, master, to examine her, and that Deponent accompanied them, and was present at the said examination; and that upon the return of the said boat, William Tead informed the said Captain Preston, that there were on board of her a considerable quantity of farinha, stowed in bulk, not on the manifest, and in a much greater proportion than would be required for the use of her crew: that buried in the farinha were found several new water-suckers, two pumps, also a slave whip, and a rattle: that in her fore-hold were four leaguers and four hogs-heads: on deck, two pipes, seven half-pipes, and five quarter-pipes, all water-casks: the casks in the hold, one of which was nearly empty, were stowed underneath part of her cargo, and could not be required for the use of the crew on the voyage: that in the after-part of her hold, near the helm, were found four shackles, and in every part of the hold were considerable quantities of firewood, much more than requisite for her consumption on the voyage: that the main hatchway was of unusual dimensions for a vessel employed in fair mercantile traffic: that the long boat was need-

lessly large for a coast trader, besides a large canoe, and a jolly boat: the cook house, also, was of large dimensions, and the cabin had every appearance of having been used for slaves on a former occasion: whereupon the said Captain Preston seized the said brigantine as liable to forfeiture to Her Ma-[176]-jesty for having such articles on board, and directed Deponent to take her to Rio de Janeiro, to be brought before the 'Mixed Commission;' and Deponent further said, that having arrived at Rio de Janeiro, Thomas Bale Sullivan, Esq., commodore of Her Majesty's ships and vessels on the coast of South America, caused a survey to be had of the said brigantine, and at which survey Deponent was present, and the particulars thereof were set forth in a paper writing annexed, and that by the further orders of the said commodore Sullivan, he had brought the said brigantine into the port of Carlisle Bay, in that Island."

Appended to the affidavit was part of the ship's papers, and an account of the survey, as deposed to.

On the 4th of June the usual Monition issued under the seal of the Vice-Admiralty Court of Barbadoes, at the suit of the Crown, citing the said José da Lomba in particular, and all persons in general, having, or pretending to have, an interest in the said vessel or cargo, to appear on the fourteenth day after service, and show cause, if they had or knew any, why the brigantine should not be pronounced to have been equipped for the slave trade, contrary to the provisions of the statute or statutes in such case made and provided, and as such, or otherwise, subject and liable to forfeiture and condemnation, and why the penalties due by law should not be pronounced for, with the usual intimation.

The Monition was served personally on José da Lomba, but no claim or appearance was entered by him, or on his behalf, or on behalf of any other person. A commission of unlivery having been awarded, and the cargo unladen, it appeared that a quantity of farinha, [177] in bulk, in bags averaging one hundred and twelve pounds, or thereabouts, each, and not included in her manifest, was landed from her.

On the 25th of June the cause came on by special appointment, when affidavits and exhibits were read by the Registrar, according to the usual practice.

The affidavits included those already stated, with further depositions respecting the unlivery of the cargo.

The exhibits consisted of the ship's papers, the muster roll, register, and manifest, and comprised two letters of instructions from Guimaraens, the owner of the vessel.

The first (which related to other transactions) was addressed to Antonio Joaquim Fencira Torres, who appeared by the manifest to be one of the consignees of the present cargo, and was as follows:—

"St. John's Bar, 7th Dec. 1839.

"Sir.—By the brigantine *Umbellina*, Captain Antonio Jose Perreira (the super-cargo Francesco Jose), I was favoured with yours of the 2nd November, ultimo, accompanied with 31 volumes (slaves), marked A, which you had shipped on your account, in the said brigantine, to my consignment, which I sold to Jose Joaquim, a very worthy person, at six months' credit, the nett proceeds being reis 6365 dollars 680, as you will see by the annexed accounts, which sum, in conformity to your order, I passed into the hands of Manuel Perreira, by a bill drawn and indorsed by me and accepted by the said purchaser, but I render myself responsible for this sale, and for all others that you make of people which may come consigned to me.

[178] "Your people (slaves) arrived in very good order, and on that account I obtained higher prices than have been obtained for any others, hoping that you will be satisfied and continue your favours; the cargo of the brigantine *Umbellina* brought various prices, yours being the highest, and the lowest at 255 dollars, for which reason whenever you have to make a remittance on your account it must be a good one, because the difference in price obtained is worth while.

"6th March 1840.

"I confirm all I have said above, on the 7th of December, of last year, and of the 10th of January, of the present.

"Enclosed you will find the receipt of delivery, which I made to Manuel Perreira.

of the nett proceeds of the volume" (slaves) which you consigned to me by the brigantine *Umbellina*, according to your order.

"The brigantine on the 8th of December arrived here on the 14th of last month in safety, as also the 45 slaves, which, for your account, you shipped in the said brigantine, for which I congratulate you, etc.

(Signed) "JOSE JOAQUIM, Marques d'Abren."

The second was a letter of instruction, from the owner, addressed to the Master and Commander, with others, in the following terms:—

"Captain José da Lomba, in his absence (as to what relates to the brigantine) to the mate, Jose Joaquim Gomer Vianna, and the consignment of goods and merchandize to Jose Joaquim Teixeira, and in the absence of both to Antonio Joaquim Terreira Torres.

[179]

"Rio Janeiro, 27th March 1840.

"I have given to your command the brigantine *Thirteenth of June*, my property, which vessel being laden and cleared to-morrow, if the weather permits, you will sail direct for the port of Benguella with great caution, in order to make a good and sure voyage; with this I accompany a public form of writing, which proves that I have purchased the said vessel when she was rigged as a smack, in which she made four voyages from Benguella to this port, always laden with wax, honey, oil, and urzella, which is proved by the certificates of manifests taken from this Custom House, which I also deliver to you; which documents you must show in the event of your being boarded by any Portuguese or English cruiser.

"In the same brigantine I loaded the goods and merchandize, as will appear by bills of lading and invoice, amounting to dollars, to your consignment, which you will take charge of on your safe arrival, disposing of the nett proceeds in wax, ivory, and oil, to load the said vessel with, and any other cargo you may obtain on freight, when you will return to this port as soon as possible.

"The amount of freight will be 2320 dollars, 700 reis, as will be seen by the book of cargo, which I give you, which you will receive and apply to the necessary expenses of the vessel with the greatest economy. Your wages will be 700 dollars on your safe arrival; the mate 100 dollars; the boatswain 100 dollars; five seamen at 45 dollars; and seven slaves belonging to the vessel, with whom you must be very cautious, in order that they may not escape.

"I hope that you will avail yourself of the most ex-[180]-peditious means for the benefit of this transaction, and speedy arrangement for your departure for this place. As soon as you arrive, you must inform me, and continue to do so, of what occurs, whenever there is an opportunity, even by way of Angola. I have signed two letters of the same tenor, giving you one for your guidance, and another signed by you to avoid misunderstanding.

"I wish you a prosperous voyage, and good health, and am, Your obedient servant,

"FRANCISCO FERNANDEZ GUIMARAENS."

"For support of the crew, I have shipped 25 Bags of farinha."

The certificate of the Vice-Consul at Rio de Janeiro also bore date the 27th of March 1840, and stated that the master had verified his crew, consisting of fifteen persons, a list of which was given, containing the names of the master and others, their ages, country, condition and wages,—among them the cook was entered as José, a native of Africa, and in lieu of wages, "gratis" was written: and under the title of "Lads" there were six additional names entered, and their condition described as "slaves of Francisco Fernandez Guimaraens."

The cause came on for hearing before Mr. John A. Beckles, sole Judge of the Vice-Admiralty Court of Barbadoes, the Registrar, Marischal and sworn interpreter being present, on the 25th of June 1840,—when, upon the evidence produced, and upon motion of the Solicitor-General (no party appearing for the [181] owner or the master of the vessel), the ship, *Treze de Junho* (*Thirteenth of June*), was by Interlocutory Decree pronounced "to have been at the time of the seizure thereof illegally equipped for the transport of negroes and others for the purpose of conveying them to slavery, contrary to the provisions of the Acts 2 and 3 Vict., c. 73, entitled, etc., and as such or otherwise subject and liable to forfeiture," and condemned accordingly.

On the 20th of March 1841 an appeal was duly made and interposed on behalf of the Appellant, the owner of the vessel, and others, owners of the cargo, and brought into the Registry of the High Court of Admiralty.

The appeal being admitted and referred to the Judicial Committee, the Proctor, on behalf of the Appellants, brought in attestation and claim, with various exhibits, on behalf of the Appellants, and obtained the usual inhibition, citation, and monition.

The exhibits thus produced consisted of a certified copy of the terms of the deed of purchase of the brigantine *Treze de Junho*, by the Appellant, a copy of a protest made by the Appellant, and José da Lomba, the Master, taken and entered at the General Consulate of Portugal against the commander of Her Majesty's ship of war the *Curaçoa*, for the captain of the brigantine—copies of the manifests with which the said vessel entered and discharged at the Custom House at Rio de Janeiro after two several voyages in 1837 and 1838 from Benguella—and a certificate, together with the tenor of a Decree pronounced *ex parte* on the 30th of April 1840 by Nicholas de Silva Lisboa, the Judge Conservative of British subjects in Rio de Janeiro, notifying [182] that certain acts of justification had been commenced by the owner of the ship *Treze de Junho*, then detained by the British ship of war *Curaçoa*, and containing the proceedings thereon. These consisted of the protest of the owner against the seizure, and petitions for the examination of witnesses to prove the illegality thereof—the term of the privileges and immunities conceded by the Mixed Commission to subjects of the British nation,—the deposition of the witnesses thus tendered, and the judgment, affirming the matter thereof proved.

With this additional evidence, the appeal now came on to be heard.

Mr. Burge, Q.C., and Dr. Phillimore, for the Appellants.—The rules and regulations issued under the authority of the 2 and 3 Will. IV., c. 51, for regulating the practice of the Vice-Admiralty Courts abroad, are not applicable to a seizure of a Portuguese ship under 2 and 3 Vict., c. 73. The Statute of Victoria being a penal Statute, cannot be made more extensive than the words express; and the words in the 3rd section, for the trial of vessels engaged in the slave trade, do not so refer to the previous Statute of 2 and 3 Will. IV., c. 51, as to import the regulations made under that Statute into the Act of Victoria. These Rules and Regulations cannot be applied to the case of a foreign ship, for the effect would be to alter the form of proceeding provided by the civil law.—In the present case there was neither libel or information as required by the civil law, but the proceedings were wholly regulated by the rules under the 2 and 3 Will. IV., c. 51; but even these rules were not [183] adhered to, for the affidavit upon which the monition was grounded, was made, not by the seizer, as required by the 25th section of the rules, but by Curtis, who was a mere looker on. All the proceedings were *ex parte*, behind the back of the owner, and in his absence, and were consequently both illegal as well as informal. Even if the proceedings were regular, the evidence would not justify the sentence, since there was nothing either in the ship's appearance, her cargo, or manifest, from which it could be legally presumed that she was engaged or about to be engaged in the illegal traffic of the slave trade. There was no evidence of there being an extraordinary quantity of provisions, or more than was necessary for the crew.

The Queen's Advocate (Sir John Dodson) and the Attorney-General (Sir Frederick Pollock), for the Respondents.

By the 2 and 3 Vict., c. 73, Portuguese vessels were placed under the municipal law of Great Britain, and are to be proceeded against in the same manner "as if such vessels, and the cargoes thereof, were the property of British subjects;" the mode of proceeding is provided for by the 25th section of the rules for Vice-Admiralty Courts established under 2 and 3 Will. IV., c. 51 (*ante* [4 Moo. P.C.], p. 169). These regulations have been strictly complied with. The objection that the affidavit was not made by the commander, or seizer, but by Curtis, the mate of the ship of war, *Curaçoa*, is untenable. Curtis accompanied the second lieutenant and the master upon the search, and was in fact one of the seizers: he was also in charge of the vessel when she arrived at Barbadoes. The object of the affidavit is to ground the subsequent process of [184] a monition, and it is not the party making it, but the matter contained in it, that is essential. In the margin of the form appended to the rules, it is stated that it must contain a full and specific account of the facts

constituting the breach of the law, and that is amply complied with in this instance. Then the question resolves itself into one of a violation of the Act—that is sufficiently manifest both from the fittings of the vessel, as well as her cargo, provisions and manifest: she had more farinha than could under any circumstances be requisite for her crew; the articles too concealed were such as to lead to the evident conclusion that she was engaged for an illicit traffic, and justified both her detention and condemnation. There is nothing in the evidence produced for the first time here, on behalf of the owner, which can affect the sentence below.

Sir Herbert Jenner Fust.—Their Lordships are of opinion that the sentence of the Court below was right, and must be affirmed. The proceedings subsequent to the seizure of the vessel, taken at Barbadoes, were conformable to the Act 2 and 3 Vict., c. 73, and the rules prescribed under the 2 and 3 Will. IV., c. 51. The vessel being engaged in the slave trade was seized at Rio de Janeiro for a violation of the municipal law of Great Britain, and was sent in pursuance of the regulations, under the 2 and 3 Will. IV., c. 51, to the nearest and most convenient port where a Court of Vice-Admiralty was established: that port was Barbadoes. Upon her arrival she was proceeded against by monition, according to the practice established under the 25th section of the rules and regulations: and the monition, as appears by the certificate of the marshal to whom [185] it was directed, was served personally on José da Lomba, the master and commander: it appears that no proceedings against the condemnation were taken either by the owner, or by the master, though the latter had full notice of the proceedings; and that if no cause was shown, a judgment of condemnation would be pronounced. The sentence, therefore, which followed, though *ex parte*, cannot be said to have been made behind the back of the owner or without his knowledge, or the means being afforded him of resisting it. Still their lordships were of opinion that it would best conduce towards the ends of justice to allow the owner to produce before them such evidence as he thought material to his defence: and they have accordingly allowed him to bring in the documents contained in the supplemental appendix. They have considered the various documents he has produced, but do not think them sufficient to rebut the case proved in the Court below. The Appellant complains of the removal of the vessel from Rio de Janeiro to Barbadoes; but that was in conformity with the law: and he cannot say that the vessel was condemned behind his back, for José da Lomba his master was carried with the vessel to Barbadoes, and was sufficiently acquainted with the nature of the trade in which the vessel really was engaged, to have made any affidavit, or produced any evidence that could be favourable to his owner's case, if such had existed. But neither at Rio de Janeiro nor at Barbadoes does he make any such deposition, nor is there any evidence that the voyage which the ship was about to make when seized, was a legal mercantile adventure. Under these circumstances, their Lordships are of opinion, that the sentence of the Court below was right, and must be affirmed, with costs.

[Mews' Dig. tit. EVIDENCE, ix. EVIDENCE ON AFFIDAVIT, 12, h.; also tit. SLAVERY AND SLAVE TRADE. 2 and 3 Vict. c. 73, was repealed by the Slave Trade Consolidation Act, 1873. (36 and 37 Vict. c. 88). See note to *Muter v. Chipchase*, 1836, 1 Moo. P.C. at p. 3. A list of the existing slave trade treaties up to Dec. 31, 1899, within the Act of 1873, is given in Pulling's *Index to the Stat. R. and O.*, 3rd Ed., 1899, p. 631.]

[186] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Rev. ERSKINE HEAD, Clerk,—*Appellant*; RALPH SANDERS,—*Respondent* *
[Nov. 28, 1842].

By sec. 3 of the 3 and 4 Vict., c. 86 (the Church Discipline Act), the Bishop is empowered to issue a commission of inquiry respecting any charge or report against any clergyman within his diocese, "provided always that notice of the intention to issue such commission, under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and evidence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused, fourteen days at least before such commission shall issue;" and by sec. 13, it is provided that it shall be lawful for the Bishop, "if he shall think fit, either in the *first instance* or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by Letters of Request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court."

Held by the Judicial Committee, affirming the judgment of the Court below, that the service of notice of the intention to issue a commission by the Bishop, but upon which no commission issued, will not preclude the Bishop from sending the case to the Court of Appeal by Letters of Request, in the *first instance*.

This was an Appeal from an order or decree made by the Dean of the Arches, and was originally a cause of office, promoted under the Act, 3 and 4 Vict., c. 86, in virtue of Letters of Request under the hand and seal of the Bishop of Exeter, by Ralph Sanders, against the Appellant, the rector of the rectory and parish church of Feniton, in the county of Devon, in the diocese of Exeter, and province of Canterbury, to answer to certain articles to be exhibited against him touching his soul's health and the reformation of his manners; but more [187] especially for having, as alleged, openly affirmed positions in derogation and depraving of the Book of Common Prayer, contrary to the statutes and canons ecclesiastical, such offence being alleged to have been particularly committed by the writing and publishing a certain letter, entitled, "A view of the duplicity of the present system of episcopal ministration, in a letter addressed to the parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's circular on Confirmation, by Henry Erskine Head, A.M., rector of Feniton, Devon."

In the month of October 1841, Mr. Head received the following notice from the Bishop of Exeter: "To the Rev. Henry Erskine Head, Rector, etc. Whereas a certain letter, entitled, etc., was lately printed and published in a certain newspaper called the *Western Times*, dated 'Exeter, Saturday, August 21st, 1841,' in which letter it is openly affirmed and maintained that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' contained in 'the Book of Common Prayer' and administration of the Sacraments and other rites and ceremonies of the United Church of England and Ireland, contain erroneous and strange doctrine: and wherein are also openly affirmed and maintained, other positions in derogation and depraving of the said book, contrary to the Statutes 2 and 3 Ed. VI., c. 1; 5 and 6 Ed. VI., c. 1; 1 Eliz., c. 2; 13 Eliz., c. 12 and 13; and 14 Charles II., c. 4; (all, some, or one of them;) and to the constitutions and canons ecclesiastical treated upon by the Bishop of London, President for the convocations of the province of Canterbury, and the rest of the Bishops and Clergy of the said province, and agreed upon by the King's Majesty's licence in their synod, begun at London [188] A.D. 1603, and against the peace and unity of the Church; and whereas there was and is a scandal and evil report against you, the said Rev. H. E. Head, as the author and publisher of the said letter: and whereas we, Henry, by divine permission, Bishop of Exeter, rightly

* Present: The Bishop of London [Bishop Blomfield], Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

and duly proceeding under the authority and in conformity with the provisions of a certain Act of Parliament, to wit, the 3 and 4 Vict., c. 86, intituled, 'An Act for better enforcing church discipline,' of our own mere motion think fit and intend to issue a commission under our hand and seal, to five persons, of whom one shall be our Vicar-general, or our Archdeacon, or Rural Dean within our diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings in pursuance of the said last-mentioned Act of Parliament, as the case may require: We do therefore, by these presents, under our hand, give notice of such our intention to you, the said Rev. H. E. Head, and we do hereby intimate to you that such our commission as aforesaid, for the purpose aforesaid, will issue accordingly, at or after the expiration of fourteen days, from the day of your being served with these presents. Given under our hand the 11th day of October, A.D. 1841. Henry Exeter."

By the 3rd section of the above-mentioned Act, it is enacted, "That in every case of any clerk in Holy Orders of the United Church of England and Ireland, who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal, to five persons, of whom one shall be his Vicar-General, or an Archdeacon, or Rural Dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: provided always that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused, fourteen days at least before such commission shall issue."

By the 13th section of the Act it is provided "that it shall be lawful for the Bishop of any diocese within which any such clerk shall hold any preferment, or, if he hold no preferment, then for the Bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by Letters of Request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court."

On the 9th of November 1841 the Bishop of Exeter presented Letters of Request to the Dean of the Arches Court of Canterbury, at the promotion of the Respondent against the Appellant, setting forth the authority conferred by the above Act of Parliament, and specifying the charges contained in the notice already served on the Appellant, and citing him to appear and answer thereto: which Letters being duly accepted, the Judge [190] decreed, according to the tenor thereof, to proceed thereon.

The Respondent appeared under protest to this Decree, and Delivered in an Act on Protest, wherein he set forth the provisions of the Act 3 and 4 Vict., c. 86, as above stated; the notice served on him on behalf of the Bishop, which he alleged "was a sufficient and subsisting notice, under the third section of the said Statute, of the intention of the Lord Bishop to do and proceed in all things, as therein set forth and expressed, and that it hath never been in any manner revoked or annulled;" and he alleged "that the said Lord Bishop hath not sent the case by Letters of Request to this Court, in manner and form as in the said Statute is enacted or directed, according to the true intent and meaning thereof." And he further alleged, "that it did not appear either in, or by, the Citation or Decree, or in, or by, the Letters of Request, on whose application or on whose mere motion this cause or case was, in the first instance, commenced, or at the first began, or was originally proceeded in, nor by whom, nor on whose application or complaint, he was, in the first instance, charged with the said pretended offence, nor at whose request, nor on whose mere motion, the said Letters of Request were issued: nor did it therein or

thereby sufficiently appear that the several provisions, enactments and directions of the said Statute had been duly observed or complied with."

The cause came on for hearing before the Arches Court, on the 29th of January 1842, when the learned Judge (Sir Herbert Jenner Fust) overruled the protest, and assigned the Appellant to appear absolutely (reported 3 Curteis, Ecc. Reps. 32). From this decision the present appeal was brought.

[191] The Queen's Advocate, (Sir John Dodson,) and Mr. Cockburn, Q.C., for the Appellant.—The Act of Parliament provides two modes for the Bishop to pursue; either by a Commission of Inquiry or by Letters of Request. He must elect to proceed by one of these two processes, and cannot proceed by both at the same time. The 13th section declares that it shall be lawful for the Bishop, in any case, if he shall think fit, either in the *first instance*, or after the Commissioners shall have reported, and before the filing of the articles, but not afterwards, to send the case by Letters of Request to the Court of Appeal; and the previous section 3, which gives authority for the issuing of a commission, expressly provides that notice of the intention to issue such commission shall be served on the party proceeded against, fourteen days before the same shall issue.—The effect of such notice therefore is the same as a citation—it is the commencement of the proceeding by commission, and constitutes a *lis pendens*. *Sherwood v. Ray* (1 Moore's P.C. Cases, 353). Having issued such a notice, the Bishop has no power to proceed by Letters of Request until the Commissioners have reported that there is a *prima facie* ground for instituting proceedings, and consequently his Letters of Request having been sent improperly in point of time, are void, and could give the Court no jurisdiction. Again, under the provisions of this Act, the Bishop may proceed either upon the application of a party complaining, or of his own mere motion: but he cannot do both. Here the notice of the intention to issue a commission is at the mere motion of the Bishop, whereas the Letters of Request purport to be at the promotion of Mr. Sanders: [192] they are clearly several processes—no intimation of the abandonment of the commission has been given, and, the proceeding being of a criminal nature, the utmost strictness ought to be observed, and that construction given which is most favourable to the party accused. *In the Matter of the Dean of York* (2 Q.B. Rep. 1).

Dr. Addams, for the Respondent.—To constitute a *lis pendens* under the Statute, a commission must have issued; the preliminary notice is nothing more than an intimation that such commission will issue; it is not in the nature of a citation, for it requires nothing from the party served, and may be treated by him as a nullity: it is at most but an admonition—the issuing the commission is the step which precludes the Bishop sending the case to the Court of Appeal by Letters of Request: the Letters of Request acted as a supersedeas of the notice—no withdrawal of the notice was necessary: the Letters of Request must therefore be held to have issued in the first instance. The Act requires that the Letters of Request shall be according to the law and practice of the Court, but it does not require that it should appear upon whose information the original proceedings took place, nor does the practice of the Court of Arches require it.

Lord Campbell (Dec. 9).—This is an appeal from an order or decree made by the Dean of the Arches, in a cause of office, promoted under the Act of the 3rd and 4th of Her present Majesty [3 and 4 Vict. c. 86], in virtue of Letters of Request under the [193] hand and seal of the Bishop of Exeter, by Ralph Sanders, against the Rev. Henry Erskine Head, Clerk, Rector of the Rectory and Parish Church of Feniton, in the county of Devon, to answer certain articles to be exhibited against him, for having, within the diocese of Exeter, written and published, in a certain newspaper called the *Western Times*, a letter, entitled, "A view of the duplicity of the present system of Episcopal Ministration, in a letter addressed to the parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon:" affirming and maintaining that the "Catechism," the "Order of Baptism," and the "Order of Confirmation," in the Book of Common Prayer, contain erroneous and strange doctrine, and other positions in derogation and depraving of the said Book of Common Prayer, and against the peace and unity of the Church.

The Defendant being cited in the Court of Arches, appeared under protest, and

insisted that the Letters of Request were not in pursuance of the provisions of the Church Discipline Act [3 and 4 Vict., c. 86] and, therefore, that the Dean of the Arches had no jurisdiction to entertain the suit. The Judge below overruled the protest, and assigned the Defendants to appear absolutely.

The first objection is, that the Letters of Request are *ex facie* defective and void, on the ground that they do not show on whose application the cause was commenced, or at whose request they were granted. Their lordships, however, are of opinion that the Letters of Request are sufficient. The Statute does not require that they should be in any given form, and they clearly disclose that the cause is "at the voluntary promotion of Ralph Sanders, of the City of Exeter, gentleman." [194] The Bishop having authority by the Statute to issue Letters of Request in this proceeding, "if he shall think fit," there can be no necessity for stating, according to the old form, at whose request they are granted. For the reasons hereafter to be mentioned, their Lordships think that the Letters of Request need not make any reference to the notice before served by the Bishop.

The second objection, of a graver nature, is, that at the time when the Letters of Request issued, the Bishop had no authority to issue them, as he had made his election to proceed, in the *first instance*, by a commission of inquiry in his own diocese. The third section of the Act gives power to the Bishop, upon a clergyman within his diocese being charged with any ecclesiastical offence, or concerning whom there may exist scandal or evil report, to issue a commission of inquiry as to the grounds of such charge or report, "provided always that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue."

On the 11th of October 1841, the Defendant was in due manner served with a notice under the hand of the Bishop of Exeter, dated the same day, which, after reciting the letter in the *Western Times*, referred to in the Letters of Request, and that there was an evil report that Mr. Head was the author and publisher of the said letter, proceeded in these words, "And whereas we, Henry, by divine permission Bishop of Exeter, rightly and duly proceeding under the authority and in con-[195]-formity with the provisions of a certain Act of Parliament, to wit, the 3rd and 4th Vict., c. 86, intituled, 'An Act for better enforcing Church Discipline,' of our own mere motion think fit, and intend, to issue a commission under our hand and seal, to five persons, of whom one shall be our Vicar-General, or an Archdeacon, or Rural Dean within our diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings in pursuance of the last-mentioned Act of Parliament, as the case may require. We do, therefore, by these presents, under our hand, give notice of such our intention to you, the said Reverend Henry Erskine Head, and we do hereby intimate to you, that such our commission, as aforesaid, for the purpose aforesaid, will issue accordingly at or after the expiration of fourteen days from the day of your being served with these presents. Given under our hand this Eleventh day of October, in the year of our Lord One Thousand Eight Hundred and Forty-One."

On the 9th of November following, without anything being done to countermand or supersede this notice, the Letters of Request issued, by which the Defendant, without any commission of inquiry, was to be prosecuted in the Court of Arches.

It is contended that this was contrary to the 13th section of the Statute, which enacts that it shall be lawful for the Bishop in any such case, "if he shall think fit, either in the *first instance*, or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case, by Letters of Request, to the Court of Appeal of [196] the Province, to be there heard and determined, according to the law and practice of such Court."

It is contended, that, by reason of the notice, the Letters of Request were not sent, in the *first instance*, within the meaning of the statute; and if that were so, they would certainly be void, as their validity rests entirely upon the Statute.

But after much doubt and hesitation, their lordships have arrived at the con-

clusion that the notice may be entirely disregarded, and that, within the meaning of the Statute, the Letters of Request were sent in the *first instance*. The notice, although required by the Statute, intimates an intention to institute a proceeding; it cannot be considered a commencement of the suit: and when the Letters of Request issued, there was no suit depending in the Diocesan Court. The Letters of Request may either issue in the *first instance*, or after the report of the commissioners that there is a *prima facie* case against the accused: the Legislature probably meaning, either with or without a previous inquiry, instituted by the Bishop, and understanding that, without a previous inquiry, the cause would come, in the first instance, before the Court of Arches. Although the notice was served, there were no means of compelling the Bishop to issue the commission; and it seems to have been admitted that if, upon further information, his lordship thought it more expedient to send the cause at once to the Arches Court, he might have done so by superseding the notice. The Letters of Request may be considered such a supersedeas.

It has been urged before us, that the construction of the Act would subject the clergy to vexatious proceedings, both before the Diocesan Court and the Court of Appeal of the Province, but we cannot suppose that a [197] change of intention as to the mode of proceeding will ever take place, except for the interests of justice, and the good of the Church; and it is difficult to see how the party can be prejudiced by the mere service of a notice. If the commission had issued, and he had been cited to appear under it, then their lordships would have thought that the Letters of Request could not issue till the Commissioners had made their Report.

The Decree, therefore, will be affirmed, but without costs.

There is a prayer by the Respondent that the cause should be retained before the Judicial Committee of the Privy Council. Their lordships, however, are clearly of opinion that it ought to be remitted to the Arches Court. This is a Court of Appeal in the last resort, and their lordships think that, except under peculiar circumstances, such a Court ought not to decide any cause in the first instance, as it ought to have the benefit of the discussion and judgment in the Court below, and there ought not to be an original judgment pronounced, from which there is no appeal.

[Mews' Dig. tit. ECCLESIASTICAL LAW, XXVIII. PRACTICE AND PROCEDURE. 1. S.C. 6 Jur. 1071; and, below, 3 Curt. 32. See also 3 Curt. 565. Considered in *Reg. v. Oxford (Bishop of)*, 1879, 4 Q.B.D. 564; *Combe v. De La Bere*, 1881, 6 P.D. 173; *Martin v. MacKonochie*, 1882, 7 P.D. 102; and cf. *Sheppard v. Phillimore*, 1869, L.R. 2 P.C. 461. As to retaining or remitting appeal (4 Moo. P.C. 197), cf. *Harrison v. Harrison*, 1842, 4 Moo. P.C. 99.]

[198] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

JAMES EDWARDS,—*Appellant*; GEORGE FINCHAM.—*Respondent* *
[Dec. 9, 1842].

Will executed by a blind Testatrix established. The Will being in conformity with the instructions given by the Testatrix to her Solicitor, though not proved to have been read over to the Testatrix previous to execution.

Martha Yeomans, spinster, the Testatrix in the cause, departed this life on the 19th of June 1841, possessed of personal property to the amount of £1500, leaving three nephews, the Appellant, James Edwards, and two others, and one niece, her next of kin, her surviving. The Testatrix was considerably advanced in years, and

* Present: Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

nearly blind. By a Will, dated the 27th of October 1840, the deceased gave to each of her nephews and to her niece the sum of £100; to her servant Sarah Ball and her daughter Ann Ball £20 a-piece, and the furniture and fixtures of their bed-room; to her servant Mary Poole £5, to Rebecca Arnold £10 for a ring; to Mrs. Lydia Emma Lane £100, independent of her present or future husband; and she appointed John de Fleury sole executor of her Will, but did not make any bequest of the residue of her property. On the 5th of February 1841, she executed a further Will, in the following words and figures:—

[199] "This is the last Will and Testament of me, Martha Yeomans, of Wells Street, Hackney, in the County of Middlesex, spinster. I give and bequeath unto my niece, Mary Ann Dyer, late Edwards, and to my nephews, John Edwards, Thomas Edwards, and James Edwards, and to each and every of them, the sum of £50, free of legacy duty. I give unto my kind and faithful servant, Sarah Ball, the sum of £19 19s. Also I give unto Mary Poole, my servant, if she shall be with me at my decease, the sum of £5. Also I give unto Rebecca Arnold, now living with me, £10. Also I give, as a testimony of regard, unto my friend George Fincham, of, etc., the sum of £20, and I hereby nominate and appoint the said G. Fincham whole and sole executor of this my Will. All the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, I give and bequeath unto my dear friend, Mrs. L. E. Lane, now staying at my house; the same to be for her sole use and benefit, independent of her present or any future husband, and for which her receipt alone shall be a sufficient discharge. And I do hereby revoke all former Wills by me heretofore made, and declare this alone to be my last Will and Testament. In witness whereof I have hereunto set my hand, this 5th day of February 1841.—M. Yeomans.—Signed and declared by the said Martha Yeomans, the Testatrix, as and for her last Will and Testament, in the joint presence of us, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.—Hylton D. Hacon, surgeon, etc.; James Bennet Ashby, baker, etc."

A Caveat having been entered on behalf of the Appellant against this latter Will, the Respondent pro-[200]ceeded to propound the same on the Common Conditit in the usual way. The Appellant brought in an allegation consisting of twelve articles, impugning the Will propounded, as not having been duly executed by the deceased, and as having been obtained by undue influence and control, the deceased not being, at the time of its alleged execution, a person of sound mind, memory, and understanding.

Witnesses were examined on the several articles.

The circumstances regarding the instructions for, and execution of, the two wills, appeared from the deposition of the solicitor who prepared the instruments, and from the evidence of the attesting witnesses to the last Will. John Day Blake, the solicitor who prepared both Wills, deposed as follows: "I ascertained from the deceased herself, that it was her wish to make a new Will, and I then took the instructions for it from herself. I was particular in that, as she appeared to me to be totally blind, and was besides very old and infirm. I do not recollect that I took down any heads of instructions in writing. To the best of my recollection I wrote the draft Will off, receiving her instructions for it by word of mouth. When I had completed the draft, I read it over to her very carefully, and obtained her approval of it; and then I got her to execute it as a temporary Will, to serve till I could prepare a fresh one, and she and Miss Evans and I accordingly signed it as such." The witness then went on to say that he had a fair copy of the Will prepared, and that he attended the deceased with it on the 27th October 1840, when the same was duly executed by her. To the allegation respecting the blindness and incapacity of the Testatrix, the witness deposed: "I only saw Miss Yeomans, the deceased, once after the said 27th October, the day she had executed her said Will, [201] and that was on the 30th January following, when I had the interview with her, respecting which I shall presently depose. I was with her then, I dare say, not less than an hour. I cannot say that I remarked then any alteration in her, either as regarded her health or her mental powers; she was blind, undoubtedly, as it seemed to me, for she required to be assisted in every thing she did, but that was nothing more than had been the case on the last previous occasion of my seeing

her. I did not notice that she had lost her memory, but of that I had little opportunity of judging, for Mrs. Lane was present, and to her the deceased deferred, and Mrs. Lane spoke for her on every particular almost. When any question arose, she applied to Mrs. Lane, saying, in her usual gentle manner—"Well, Emma, shall I do so and so? but I cannot say that her manners had become, or were, childish, or that they were on that occasion different from what I had previously noticed them." To the allegation respecting the want of due instructions for the Will, and the influence exercised over the deceased by Mrs. Lane, the residuary Legatee, the same witness deposed: "The Will at issue in this cause, dated 5th February 1841, was also prepared by myself. The instructions for it consisted, for the most part, of alterations interlined with pencil in the copy of the previous Will. The only addition made to those instructions that I recollect, was the striking out the bequest to the deceased's servants of the furniture of their rooms. I do not think that alteration appeared in the copy as pencilled for the new Will. That I think was a suggestion of Mrs. Lane's. The said pencilled alterations or instructions for the new Will, were, I believe, in the handwriting of Mr. Fincham, the Executor; so, I think, I learnt from himself. Mr. Fin-[202]-cham, then a stranger to me, called on me on the 8th January 1841, and brought with him the copy of the deceased's said Will of the 27th October, containing the aforesaid alterations in pencil. There were several alterations. I do not bear them all in mind, but the principal ones were the substitution of himself, as Executor, and the bequest of the residue of the deceased's property, of which in the previous Will there was no disposition at all, to the said Mrs. Lane. Mr. Fincham left the said copy of the Will with me, desiring that I would draw a new Will for the deceased according to the form as altered in pencil. I told him I would look at it; and on the 14th of the same month, I returned it to him with a letter, in which I stated, that, as I had received from the deceased herself personally, the instructions for that Will, I must decline preparing the proposed new one, without having a personal interview with the deceased, and receiving instructions on the subject from herself. In consequence of a written communication I received from Mrs. Lane, I went down to Hackney on the 13th January aforesaid, and had an interview with the deceased. One of the subjects to which my interview with her had reference, was the proposed new Will. The copy of the previous Will containing the alterations in pencil was produced on the occasion, and I read it over to the deceased with a view of ascertaining her sentiments in respect to those alterations, and obtained her approval of them. In each instance (and there were I recollect two or three,) in which a question was raised as to the propriety of such and such a bequest in the Will, the deceased appealed to Mrs. Lane, and inquired of her if it should be so or not; and in each instance it was decided by the opinion [203] Mrs. Lane gave. One of the instances in which a question was raised as I read over the Will, was, I recollect, in reference to the legacy to the Edwards's, the deceased's relatives. The deceased herself suggested to Mrs. Lane, who was present throughout our interview, whether £20 a-piece would not be sufficient to leave them, instead of the legacy of £100, then in the Will; and she put the inquiry to Mrs. Lane, observing at the same time, that there was no reason that they, the Edwards's, should know that she originally left them a larger sum; but to this Mrs. Lane objected. She said to the deceased, 'No: let it stand as it does;' and the deceased at once acquiesced. Another instance was about the furniture in the servants' rooms; Mrs. Lane objected to that bequest, and the deceased assented at once to her suggestion, and it was struck out accordingly. It appeared to me throughout the interview, that the deceased was entirely under the influence and direction of Mrs. Lane. She never spoke her own mind so as to give a decisive opinion on any question that arose in respect of the Will, whether raised by herself or Mrs. Lane; but whatever Mrs. Lane suggested, that she at once assented to, as if she herself felt indifferent on the subject. Whether she was wholly incapable of forming a decisive opinion for herself, I cannot say; but undoubtedly, upon every point that was raised, she referred to Mrs. Lane for her opinion, and appeared to yield at once to every suggestion made by Mrs. Lane."

The witnesses to the Will of the 5th of February 1841 were Mr. H. D. Hacon, her medical attendant, and J. B. Ashby, a baker, and they deposed as to the manner of the execution of the Will. Mr. Hacon deposed that, upon receiving a message to

the effect that the Testatrix would thank him to call on her to see [204] her execute her Will, he attended, and she addressed him in her usual manner, and said, "I have sent for you, Mr. Hacon, to witness my Will;" that he then conversed with her until Mr. Ashby came in, when the Will in question was produced, if it was not already lying upon the table; and the deceased signed her name to it in his presence, and in the presence of Mr. Ashby, saying to them—"This is my Will, and I beg you to witness it," or words to that effect; that he treated the business as a matter of course, and only noticed that the deceased did execute the Will, but that he did not notice by whom the Will was produced, nor any more of the circumstances attending the execution of the same, beyond the fact of the deceased declaring that the paper which she signed was her Will; that he did not hear the said Will read over to her; that she did not declare that she understood the contents of the Will, but that she did declare that the paper which she so signed was her Will. The other witness, J. B. Ashby, deposed in similar terms as to the execution of the Will, and then stated—"I cannot recollect what preliminary conversation, if any, in respect of such execution, took place previous to her signing it; the deceased was nearly blind, and it was necessary, lest she should sign it in the wrong place, to fix her hand at the point where the signature was to be made; and it was so done, I believe, by Mrs. Lane. When the deceased had so signed her name, Mr. Hacon asked her whether the paper she had signed was her Will, or he put a question to her to that effect, to which she answered, 'Yes.' She certainly did acknowledge the paper, which she had so signed, to be her Will. I have no doubt of her having been, at the time of the execution of her said Will, capable of giving instructions for a Will, and of executing the same."

[205] Georgiana Egerton and Bailey, two other witnesses, deposed to the deceased's affection and intentions towards her nephews and nieces, of whom the deceased spoke in friendly terms, not as if she knew much of them personally, but as if she felt an interest in them arising from their blood relationship to her; that she had several times said that they should, at her death, have what little property she had.

The learned Judge of the Prerogative Court (Sir Herbert Jenner Fust), by his Decree, bearing date the 24th of February 1842, pronounced for the validity of the Will (3 Curteis, Ecc. Rep. 63). From this Decree the present Appeal was brought.

The Queen's Advocate (Sir John Dodson), and Mr. Edmund F. Moore, for the Appellant.—There is no satisfactory proof that the Will in question has been fully and fairly read over, prior to the execution thereof, to the Testatrix, who was, by reason of blindness, incapable of reading the same herself. Not having the Will read to her, it cannot be looked upon as her Will, as she had no knowledge of its contents. To be valid, the Will of a blind Testator must be read over to him in the presence of witnesses (1 Williams on Exors., 2 Ed. pp. 16, 263; Swinburn on Wills, pt. 2, sec. 11, 166; and 4 Burn's Ecc. Laws, 74). *Moore v. Paine* (2 Lee's Cases, 595), *Millett v. Fabrian* (2 Lee's Cases, 596), *Fawcett v. Jones* (3 Phill. 434, 455), *Barton v. Robins* (3 Phill. 455, 6), *Longchamp v. Fish* (2 Bos. Pull. N.R. 415). [Lord Campbell.—Is it necessary to prove that the Testatrix knew that the Will was drawn in accordance with the instructions given to her? Is it not sufficient to prove that instructions were given and afterwards to prove that the Will was prepared in accordance with those instructions?] Blindness *per se* is not a legal incapacity from signing a Deed or Will. *Duff v. Earl of Fife* (1 Shaw's Appeal Cases, 498), but the Will ought to have been read over to her before execution, as it might contain dispositions she was not aware of. [Mr. Baron Parke.—If the Testatrix knew the contents of the copy, and then the Will was proved to be a true copy of that copy, would not that be sufficient?] The Will in question is open to suspicion, from her previous expressed intentions in favour of her family. Undue influence has been exercised over the mind of the Testatrix by Mrs. Lane. These facts, coupled with the absence of satisfactory proof that the Will was read over to her before execution, are sufficient, we submit, to call upon the Court to pronounce against the validity of this pretended Will.

Dr. Addams appeared for the Respondent, but was not called upon by their Lordships to argue the case.

The Right Honourable Dr. Lushington. Their Lordships do not think it necessary to call upon the Respondent's counsel. The proofs in this case are quite sufficient; the two witnesses, Hacon and Ashby, prove the act of execution, and the sanity of the Testatrix. The instructions for the Will were taken by Blake, the same person who took the instructions for and drew the first Will, a very few months before. As to the objection that, the Testatrix being blind, the Will ought to have been read over to her, their Lordships are of opinion, that in the case of a blind person, there must be a clear knowledge of the [207] contents of the instrument; but that it is not necessary to produce evidence of the identical paper having been read over to the party. In this case the identical paper which the Testatrix signed as her Will, is proved by Blake to be the very Will which he constructed by the directions of the Testatrix. Their Lordships are of opinion that the Appeal must be dismissed with costs.

[Mews' Dig. tit. WILL, I. TESTAMENTARY CAPACITY, c. *Blind Persons*. S.C. below, 3 Curt. 63. See *Mitchell v. Thomas*, 1847, 6 Moo. P.C. 137; and cf. *Parker v. Felgate*, 1883, 8 P.D. 171.]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM CLARK,—*Appellant*; WILLIAM CARTER,—*Respondent* *

[February 18, 1843].

No general rule exists that a witness who is interested at the time of his examination cannot be re-examined after a release of his interest. But in granting leave to re-examine a witness, the Court will regulate itself by the peculiar circumstances of each case, and the nature of the interest of the witness.

A subscribing witness, produced by the executor, was examined upon an allegation, to prove the Will. Upon his answer to the interrogatories, he admitted that he was the solicitor to the executor (the promovent), and that he had employed the Proctor in the suit, and that if the executor failed in paying the costs, he would himself be legally liable to the Proctor. Publication passed, and the cause was assigned for hearing. Upon motion, the Prerogative Court rescinded the conclusion of the cause, and granted the promovent leave to re-examine the witness after a release of his liability. Affirmed on Appeal by the Judicial Committee of the Privy Council.

This was a cause of proving in solemn form of law the Will of Mary Mabbs, promoted by the Respondent, the sole executor named in the Will, against the Appellant and one Mary Rolph, the next of kin of the deceased. The Will was propounded in an allegation [208] given in on behalf of the Respondent, and upon this allegation, the two subscribing witnesses to the Will, George Shaw and John Delaroche Bragge, were examined in chief, and also upon interrogatories. The answer of Mr. Shaw to the interrogatory was in these terms: "I am the solicitor employed by him (the Appellant) relative to this suit. I did, in the first instance, employ and retain the Proctor who conducts this suit on his behalf; I do consider that I have thereby become responsible to the said Proctor for his bill of costs or expenses in this cause. I have not in any manner since been relieved from such responsibility. In case Mr. Carter should be unable to pay the amount of the Proctor's bill, I will not swear that the Proctor would not have any remedy at law or otherwise against me, for the recovery of the amount of his bill, for I consider that he would; but then I must add, that such is not likely to be the case, inasmuch as Mr. Carter is in circumstances to be well able to pay his legal costs."

Publication of the evidence passed, and the cause was assigned for hearing at the petition of the Proctor of the Appellant; but upon the discovery that the witness Shaw had admitted his legal responsibility to Carter's Proctor, for his costs in the

* Present: Lord Brougham, Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

suit, application was made to the Judge of the Prerogative Court on behalf of the Respondent, to rescind the order of the Court assigning the cause for sentence, and to permit the said George Shaw to be re-produced, re-sworn, re-examined, and again repeated to his deposition, after having been first released from his legal responsibility (if any); this application was opposed by the Appellant, who prayed the Judge to proceed to hear informations, and give a definite sentence, or final interlocutory decree in the premises.

[209] The learned Judge (Sir Herbert Jenner Fust), by his interlocutory decree, rescinded the former order of the Court assigning the cause for sentence, and gave leave to the Proctor of the Respondent to re-produce the said George Shaw for the purpose of his being re-sworn, re-examined, and again repeated.

The Appellant thereupon protested of a grievance, and brought this Appeal.

The Queen's Advocate (Sir John Dodson) for the Appellant.—In principle, this interlocutory order cannot be sustained. The rules of law presume an influence from interest, and evidence given under such influence cannot be altered by the witness executing a release of his claim for costs. He was the attorney in the cause, and ought to have known that his interest in the costs disqualified him. *Handley and Jones v. Edwards* (1 Curteis Ecc. Rep. 722). As the witness was clearly incompetent, rescinding the conclusion of the cause after publication passed was erroneous in law, and contrary to the practice of all courts. In *Vaughan v. Worrall* (2 Swan, 395). Lord Eldon refused leave to exhibit new interrogatories to prove the execution of releases of witnesses liable to costs of suit, and for a re-examination of such witnesses. That learned Judge there said (*ib.* 401). "It is a novelty to me to hear it said, that if it appears that a witness was interested at the time of the examination, this court knows any such practice as that a release being given the witness may then be re-examined. I believe that that never was done in any well-considered case." This case is conclusive: it was contrary to law to allow a [210] witness, who, at the time of his examination, was incompetent, by reason of interest, to be re-produced and re-examined upon a release being executed.

Dr. Addams, for the Respondent.—It is not an inflexible rule, that a witness cannot be re-examined after publication passed. In *Salmon v. Cromwell* (3 Phill. 220), this very question was raised by objecting to the competency of a witness who admitted that he was liable to the Proctor for costs; but Sir John Nicholl was of opinion that such interest did not disqualify him. And this has been the practice in the Ecclesiastical Courts, and so it is in Courts of Equity: the practice being in this respect similar; re-examination on the same interrogatories are allowed in instances in which the original examination is defective by reason of some accidental error. *Sandford v. Paul* (2 Dick. 750; S.C. 3 Bro. C.C. 370; 1 Ves. Jun. 398). A distinction exists between cases where a witness considers himself liable, and is actually liable. *Vaughan v. Worrall*, [2 Swan, 395] does not apply. That decision expressly went upon the ground, that, the witnesses having engaged to pay the costs of the proceedings, neither the Plaintiff nor the witnesses could have been otherwise than aware, at the time of their examination, that they were interested in the event of the suit. But the present case is distinguishable: it was not suspected by the promovent, or by the witness, that he was interested, until the examination had taken place; indeed, he had no actual interest in the suit, but only the liability for the costs, supposing that the promovent should not pay them, which is very improbable, as he is sworn to be a man in good circumstances.

[211] Lord Brougham.—Their Lordships do not think it necessary in the present case to give any opinion whatever as to the validity of the objection to the competency of the witness. All their Lordships have to deal with, is the question, whether it is advisable in any instance to allow the re-examination of a witness subsequent to his release from his liability, he having been previously examined. Their Lordships are of opinion, that no general rule can be laid down to govern all cases of this description, nor do they think that Lord Eldon, in the case of *Vaughan v. Worrall* [2 Swan, 395], laid down the proposition contended for by the Appellant, namely, that in no case was such re-examination to be allowed. The case before his Lordship was one in which he expressly said, that the party who examined the witnesses knew at the time they had an interest; and his Lordship said he decided that question without

prejudice to the question in a case where neither Plaintiff nor Defendant knew the fact of interest in the witness; so that it is clear that Lord Eldon was not laying down any general rule which might not bend to particular circumstances. Their Lordships will go so far as to admit this; that, as a general rule, it is manifestly objectionable to re-examine a witness after a release of that which would have been a valid objection to his competency; for a man who once has sworn with a really operative bias cannot be said to be free to speak the truth after the release; and though the bias which may have induced him to swear in the first instance has been removed, another bias has arisen, namely, the necessity which he may feel, of making his second testimony square with his first. For this reason their Lordships are of [212] opinion, that, in such a case, it would be extremely inconvenient to allow a re-examination; and so the Judge of the Court below said, he could not allow the practice to prevail as a general rule; meaning, unless some peculiar circumstances in the case shall justify the application. Their Lordships adopt that view of the law, and see no reason to doubt, that, in every case of this description, the circumstances and the nature of the objection as to the interest of a witness, must be considered. It is purely a technical objection, and no reason appears for not allowing this witness to be re-examined; there being therefore no suspicion beforehand as to the objection on the ground of interest, there is no reason to suspect what Lord Eldon, in the case before him, thought, namely, that the party examining the witness was cognizant of the objection at the time of such examination, and did not remove it, but laid by until the other side discovered the objection. We see no ground for altering the order of the Court below, and, therefore, dismiss the appeal with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principles on which Privy Council acts.* S.C. 7 Jur. 161. See 6 and 7 Vict. c. 85.]

[213] ON APPEAL FROM THE SUPREME COURT OF CIVIL JUSTICE OF BRITISH GUIANA.

MICHAEL MCTURK and PETER ROSE.—*Appellants*; JOHN BENT,—*Respondent* *
[Feb. 18, 1843].

In an action brought in the Supreme Court of British Guiana, the Plaintiff obtained an interdict restraining the Defendants, the managers of a plantation, from selling or consigning any portion of the proceeds of the plantation. This interdict remained in force until the cause came on for hearing (ten months afterwards,) when the Court discharged the interdict as having been obtained *per sub et obreptionem*, and condemned the Plaintiff "to make good to the Defendants all losses, costs and damages by them already had and suffered, or yet to be had and suffered in consequence." An Appeal was entered against this Decree, but not prosecuted. The Defendants to the previous action then brought an action in the same Court to assess the losses, costs, and damages incurred by reason of the interdict. Evidence was given of certain damages sustained in consequence of the interdict, which was not contradicted. The Court rejected the claim *in toto*. Held by the Judicial Committee on Appeal,—

- 1st. That the Decree of discharging the interdict must be presumed to have been conformable to the law of Holland prevailing in British Guiana.
- 2nd. That that Decree must be taken as a simultaneous Decree discharging the interdict, and pronouncing for damages. And,
- 3rd. That the Court below was wrong in rejecting the claim *in toto*, there being evidence of damages sustained by the interdict. And remitted the cause to the Court below to assess the damages incurred.

* Present: Lord Brougham, Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

The Appellants, previously to and on the 20th of August 1836, were in the possession and management of a plantation, called Vronn Anna, situate in the district of Essequibo, in the colony of British Guiana, as the attorneys of Lillias and Marion Craig, the owners. The plantation was subject to certain charges and incumbrances in favour of the firm of Campbell, Senior and Co., of Glasgow. According to the terms of their mortgage, it was agreed that the whole of the sugar [214] crop or produce of the plantation should be consigned to them, their order, or assigns, so long as the loan then due, together with any further advances made by them or any part thereof, with interest thereon, should remain unpaid.

The plantation was also subject to a mortgage of even date to the Respondent, John Brent, but of which he agreed that the mortgage to Campbell, Senior and Co., should have priority.

On the 20th of August 1836 the Respondent presented a petition to his Honour, Jeffrey Hart Bent, the Chief Justice of the Supreme Court of Civil Justice for the counties of Demerara and Essequibo, in British Guiana; and thereby, after setting forth divers claims, which he alleged he had on the said plantation and the produce thereof, to the effect, in substance, that the debt due to Campbell, Senior and Co., had or might have been fully discharged, by the produce of the estate, the Respondent prayed that His Honor would be pleased to grant his mandament, whereby the Appellants, as such attorneys, might be interdicted, under a heavy penalty to the Sovereign, from shipping or consigning to England, or to any other place beyond the jurisdiction of the Supreme Court, and also from selling and disposing in any manner whatsoever, either directly or indirectly, any of the produce then already made and gathered, or thenceforth to be made and gathered, on the said plantation, until the claim of the Respondent, under and by virtue of the mortgage to him as therein stated, upon the said plantation, should be fully paid and satisfied, with costs; and further that the Appellants might be ordered to pay the costs of the proceedings, and that in case of opposition (the interdict remaining meanwhile in full force and effect, [215] until the said Court, after hearing the parties, should decree otherwise), a day might be appointed to the opposer or opposers to appear before the said Supreme Court, to state the reasons thereof, to hear such claim and demand as the Respondent should then and there file in answer thereto, and further to proceed according to law.

The above petition was referred by the Chief Justice, on the 23rd of August 1836, to the Appellants, for a report within eight days after intimation. On the first of September in the same year, the Appellants presented to the Chief Justice their report on the Respondent's petition; and thereby, after showing that the debt due to Campbell, Senior, and Co., was not discharged, submitted to his Honor, that the Respondent's interdict ought to be rejected with costs.

The report of the Appellants was referred to the Respondent for his counter-report within eight days. The Respondent having presented his counter-report in support of his petition, the Chief Justice, on the 13th of September 1836, granted the following order upon the Respondent's prayer for the interdict:—"Upon reading the report, and counter-report, and documents annexed—Fiat as prayed, until it shall be shown to the Court that some and what debt is due to John Campbell, Senior and Co.; and further, until the Court shall be satisfied that the net proceeds of the plantation Vrouw Anna have been duly and legally administered; and in case of opposition, let the opposer or opposers appear before the Honourable Court of Civil Justice on the first and the following days of the Roll Court, to be held on the 10th day of October next, then and there to proceed according to law."

[216] The Appellants, having been served with this order for interdict, instructed Counsel to oppose the same. The usual pleadings took place, and various witnesses were examined, and the cause was argued on the 30th of June 1837 and the following day. On the 12th of July in the same year, the Supreme Court (the Chief Justice, *dissentiente*) pronounced the following decree:—"The Court having heard the parties, and having read and examined the documents and vouchers filed and produced in this matter, admits the conclusion of answer filed by the Defendants, and declares the interdict obtained *per sub et obreptionem* from His Honor the Chief Justice, to be unjust, illegal, and unfounded, and consequently condemns the Plaintiff to cancel and withdraw the same, free of costs and damages, with interdict to do or attempt the like in future, with further condemnation on the Plaintiff, to make

good to the Defendants all losses, costs, and damages by them already had and suffered, or yet to be had and suffered, in consequence thereof, with condemnation against the Plaintiff in the costs."

The Respondent then applied for leave to appeal to His late Majesty in Council from the above sentence, but failed in finding the requisite securities. By an order bearing date the 19th of February 1838, the Supreme Court declared the appeal deserted for the want of such securities.

The interdict pronounced by the Chief Justice on the 13th of September 1836 was served on the Appellants on the 15th, and on the manager of the plantation Vrouw Anna on the 16th of the same month, and continued in force until the 12th of July 1837, being a period of ten months. Vrouw Anna was a sugar [217] estate, and, as was alleged, was, at the time of the service of the interdict, in full cultivation, and producing upon an average 505 hogsheads of sugar a-year, together with a properly-proportioned quantity of rum and molasses. There was said to be also on the estate at that time a considerable quantity of produce made and ready to be removed, and also large quantities of canes on the estate ready to be cut, and which it was estimated would have yielded large quantities of sugar. Part of these canes were cut by the manager, and a considerable quantity of sugar made from them, but the remainder could not be cut or taken off the ground, in consequence, as was stated, of the curing house, and every other store on the estate, being completely filled with the produce already manufactured at the date of the interdict, and with that subsequently made; and the Appellants and manager being restricted from removing any part of such manufactured produce from the estate by the terms of the interdict, the reputed result was, that not only the remainder of the canes on the estate at the date of the interdict, and then ripe for cutting, but also other large quantities of canes, which subsequently became ripe and fit for cutting during the continuance of the interdict, rotted and decayed on the ground, and some were totally lost to the estate. Besides which, it was alleged, that the sugar already made at the date of the interdict, and that which was subsequently made as long as there was room to receive it, suffered very materially from being kept on the estate, a great part of it being totally lost, and what remained being very much deteriorated in quality; and, finally, the estate itself was said to have suffered severely from the postponement of the next crop, and the injury necessarily occasioned thereto. [218] Under these circumstances, the Appellants, upon the discharge of the interdict by the sentence of the Supreme Court of the 11th of July 1837, in order to ascertain the amount of damages sustained by the estate Vrouw Anna by reason of the interdict, applied to three respectable and experienced planters residing in the neighbourhood of the Vrouw Anna estates, and requested them to go over and survey minutely the estate, and examine the state of its cultivation, and the produce then on hand. The Appellants gave notice to the Respondent that such intended survey and examination would take place, and named the day on which the same would be made. Accordingly on that day a survey and examination was had, and a report was drawn up and signed by the three persons referred to: stating minutely the condition of the estate, its produce and capability, and the value and condition of the crops, and produce then upon it, with full particulars of the probable loss occasioned during the operation of the interdict.

The Appellants made their calculations from this report, and, estimating their losses at a very large sum, commenced an action in the Supreme Court to assess the damages, and filed their declaration of the same against the now Respondent (the Plaintiff in the original matter of interdict), whereby, after setting forth to the effect hereinbefore stated, and referring to the sentence of the 11th of July 1837, they concluded, that by definitive sentence of the said Honourable Court, the costs, losses and damages sustained by the said Appellants, and in consequence of the interdict, should be taxed, and fixed at the sum of £20,000 sterling, exclusive of costs of suit, and that the Appellants should be declared entitled to receive the said sum under and by virtue of [219] the sentence of the 11th of July 1837, *una cum expensis*.

The Respondent filed his conclusion of answer to the said declaration of damages.

Various other proceedings and pleadings were had therein, and the cause being at issue, the Appellants examined witnesses on their behalf to prove the damage

sustained by the interdict, and also filed documentary proofs. The Respondent examined no witnesses.

The cause came on for hearing on the 15th of May 1839, when the Supreme Court pronounced the following sentence:—"The Court having heard the parties, and having read and examined the documents and vouchers filed and produced in this matter, declares to reject the claim of the Plaintiffs with costs."

From this sentence the present appeal was brought, and the Appellants prayed that such sentence might be reversed, or so varied as to meet the justice of the case, for the following reasons:—

I. Because the Appellants having proved by evidence not contradicted by the Respondent, that the plantation Vrouw Anna had suffered material loss and injury by the operation of the interdict of the 13th of September 1836, the sentence of the 15th of May 1839, rejecting the Appellants' claim for damages *in toto*, with costs, was manifestly unjust in itself, and directly repugnant to the sentence of the 11th of July 1837, which declared the said interdict to be illegal and unfounded; and which condemned the Respondent to make good to the Appellants all losses, costs, and damages by them already had or suffered, or which [220] might thereafter be had or suffered, in consequence of the same interdict.

II. Because, although the Appellants might not, in fact, have proved a loss of £20,000 sterling, arising to the said plantation in consequence of the operation of the interdict, they, nevertheless, proved by uncontradicted evidence, a loss, amounting to many thousand pounds sterling in the whole; and it was the duty of the Supreme Court in adjudicating on the Appellants' claim for damages, which they had, by the sentence of the 11th of July 1837, a legal right to prefer against the Respondent, to have assessed and awarded the damages according to the evidence produced in the cause.

III. Because, if the sentence of the 15th of May 1839, was founded upon any ground, other than a failure of evidence to establish the fact of any loss having been occasioned by the operation of the interdict, the sentence was irregular and unwarranted in law, inasmuch as it would, in effect, be an attempt to reverse *pro tanto* by a decision in a strictly consequential and subordinate proceeding, the sentence of the 11th of July 1837, which, at the same time, according to the practice of the said Supreme Court, remains in force against the Respondent.

On the part of the Respondent, it was submitted that the sentence appealed from was well founded, and ought to be affirmed, for the following reasons:—

I. Because the Court would not have been warranted by the law or usage of British Guiana, in sustaining an action against the Respondent for any damages, if there had been any proof, which the Respondent insisted there was not, that any damages had [221] been suffered by reason of the interdict granted by the order of the Chief Justice of the 13th of September 1836, and subsequently continued by the order of the Court of the 29th of November 1836.

II. Because the Respondent had not incurred, nor was he by law subject to, any such responsibility, as that to which the Appellants, by their claim and demand, sought to make him liable.

III. Because there was no proof that the Appellants had sustained any damages whatever in consequence of the said interdict.

Mr. Pemberton, Q.C., and Mr. Hull, for the Appellant.—This case must be determined according to the principles of the law of Holland in force in British Guiana. By the law of Holland, a party against whom a mandament or interdict is obtained from one of the Judges, and which is afterwards discharged, is entitled to recover from the party who obtained such mandament or interdict, the amount of the damage which he has sustained in consequence of the order so discharged. The sentence of the 11th July 1837, therefore, awarding to the Appellants, not only the costs of the proceedings, but damages, in respect to the loss sustained by reason of the interdict, is in entire conformity with the law and practice of British Guiana. Vander Linden (Institutes of the Law of Holland, B. 3, Pt. I. c. 7, p. 439), in treating of arrests and penal interdicts, states the practice to be thus: "To obtain an injunction against the commission or completion of a certain act or work, it is now the practice to present a Petition to the Court for a writ, termed a penal mandament or [222] interdict, that is, an order of the Court, whereby the party complained of,

and all others, if need be, on pain of forfeiting a certain great sum as a fine to the Sovereign (which is understood to be the sum of fifty Caroline guilders), are interdicted or restrained from proceeding any further." It is apparent from the above, that it is not what would be called in England an *ex parte* application. This is further shown to be the case, for the author goes on to say (Institutes of the Law of Holland, B. 3, Pt. I. c. 4, p. 441), "When, therefore, the party to be restrained can show that his act or work does not violate or affect the right of the complainant, etc., no injunction will be granted." And again (*ibid.* p. 442), "The penal mandaments sought by application to the commissaries of the Court are never granted in the first instance; but the parties are ordered to appear on the merits on a certain fixed day, generally with a clause of suspension in the meantime. On the day appointed, the party against whom the mandament is sought is generally heard in opposition, and a pleading takes place, and afterwards an appointment or order is made on the Petition, either to grant it by the word '*fiat*,' or to reject it by the word '*nihil*;' and if the opposition to the order prayed for by the Petition appears to the Court perfectly well grounded, then the Petition is dismissed with costs, by the word '*nihil cum expensis*.' Jud. Prac. d. 1, s. 5." The author then proceeds to point out the steps to be pursued to discharge the injunction, which are similar to the proceedings which have taken place in the present case. He says (*ibid.* p. 444), "The Defendant in answering, concludes in the same [223] manner as in arrest, that the claim and demand be rejected, and the penal interdict removed with compensation of costs, damages, and interest." Now the Respondent in his case has relied upon the fact, that the order for the interdict made by the Chief Justice did not contain the words "at the risk and peril of the Petitioner;" and says, that the party who obtains the interdict is not liable for costs, damages, and interest, unless those words be inserted in the order for the interdict. That is not so. No such qualification of liability is mentioned in Vander Linden, and the practice in the Courts in British Guiana, for the last twenty years, has been to omit these words, as superfluous and unnecessary. [Lord Campbell.—Does the right of costs and damages depend upon the terms of the sentence of interdict, or upon the general law?] Upon the general law, proceeding upon the principle that it was obtained by false suggestion. The sentence discharging the interdict explains this. It declares the interdict to have been obtained, "*per sub et obreptionem*." The Decree from which this Appeal is brought is manifestly wrong; for the same Court, by their Decree discharging the interdict, as having been obtained *per sub et obreptionem*, acknowledged our right to the costs and damages incurred by reason of the interdict. Evidence was given of some damage, and the Court should have assessed and awarded us damages; we submit, therefore, that the only way in which justice can now be measured out to the Appellants, is to remit the cause back to the Supreme Court to assess the damages.

[224] Mr. Burge, Q.C., and Mr. J. Parker, for the Respondent.—The sentence of the 15th of May 1839 was fully warranted by the law of Holland. The words "*per sub et obreptionem*," inserted in the sentence, are mere formal words, and by no means establish that it was on the ground of *mala fides* that the Decree discharging the interdict proceeds. The orders granting the interdict contain no words from which it can be imported that the interdict was granted at the risk of the Petitioner. No such construction, therefore, as that attempted to be put by the Appellants upon the words "*per sub et obreptionem*," contained in the sentence, can be admitted. The plain meaning of the sentence is, that the Respondent should be liable only, if the Appellants had suffered by reason of any abuse of, or excess, or wilful default in, the execution of the interdict. Any other construction would not be warranted in law. Voet, in treating of interdicts (Lib. 43, tit. 1, s. 9), says: "*Cum aliquin in casibus, in quibus mandatorum poenalium usus vulgo admissus est, mandata haec poenalia ab initio vel simpliciter concedantur, vel ad certum tempus. Et si quidem simpliciter concessa fuerint, die serviente, sue conducto, is, qui ea impetravit, petit, ut iudex mandata poenalia, tanquam recte impetrata, stabilia faciat atque confirmet decreto suo, donec lis finita fuerit; sin ad certum tempus, desideratur die dicto per impetrantem, ut concedatur continuatio mandatorum poenalium usque ad exitum litis: de cujus pravi nec non allegatione partis adversae, contententis, per sub et obreptionem mandata haec impetrata (vide Wassenaar Pract. Judic., cap. i. num. 46 et 95; and the book entitled *Manier van* [225] *Procederen, Voor den Hare van Holland*,*

tit. 1, cap. 1, 2, *et seq.*)." And the author last cited by Voet, says, in speaking of this species of interdict, (tit. 3, cap. 3, num. 6,) "*Quod si is, contraquem mandatum poenale fuit impetratum, justam alleget exceptionem, cur tale mandatum non debeat ratum esse, tunc judex sui sententia non debere admittere talem exceptionem, sed pronunciare, mandatum tale per sub et obreptionem impetratum esse.*" "*Quo etiam casu in mulctam incidit pecuniarium decem florenorum, ob id, quod temere per sub et obreptionem mandatum tale impetravit, etiamsi forte non in specie esset insertum pronuntiationi judicis, sub et obreptionem intervenisse.*" These passages show, that a party coming to dissolve the mandament does not come upon the ground that the interdict had been obtained by fraud, but that it was only contrary to law that it should have been granted. We contend, however, that it is no part of the law of Holland, making it a matter of course, that, upon the dissolution of the interdict, the party who obtained it is to pay the damages incurred thereby; for surely if such was the law, these commentators would have stated it; instead of which, Vander Linden and Voet say, the party is to be mulct in ten florins. According to the Appellants' argument, the Judges would have no discretion whatever, to award the amount of damages in any case, nor to discriminate between *mala fides* and *bona fides*. But Voet continues—" *Uti ex adverso rigida procuratori fisci injuncta fuit exactio poenarum, mandatis oppositarum, si contra mandata talia quid factum sit, modo poenae apponantur, quinquaginta florenorum quantitatem non excedentes, nisi curia nominatim majorum quantitatem exprimi jusseret.*" This interdict cannot be said to [226] have been granted *ex parte*: the Appellants resisted it, and were heard against it; neither was there any *mala fides* on the part of the Respondent in obtaining it. The Chief Justice continued of opinion that the interdict was right. Surely there ought to have been a certificate of the Judges, or some judgment to prove the law of Holland to be as stated by the Appellants. No instance can be shown of an action of this kind. No authorities maintaining such a position have been cited. [The Right Hon. Dr. Lushington.—The sentence of the Court discharging the interdict, being unappealed from, must be taken as good and valid. It remains, therefore, for you to show either that the words used therein with reference to the losses, costs, and damages, have no meaning, or that the law of Holland does not authorize the condemnation of the Respondent in the losses, costs, and damages.] The Judge in discharging the interdict has no jurisdiction to award consequential damages upon the interdict: the discharge of the interdict is, therefore, no decision binding upon us in reference to such liability. But even admitting the liability for damages, there is no evidence of any damage proved to have been incurred by reason of the interdict.

Their Lordships, without calling upon the Appellant's Counsel to reply, delivered judgment, by

Lord Campbell.—The action in this case was brought upon the Decree of the Court, discharging the interdict. That Decree declared the interdict as unjust, illegal and unfounded, and condemned the Plaintiff to make good to the Defendants all losses, costs, and damages, in consequence thereof. Against this sentence there was no appeal: and, therefore, we must suppose that such [227] sentence was warranted by the law in force in British Guiana. Then an action was brought by the Defendants to assess the damages: and even in answer to that action the Respondent did not make any defence, upon the ground that there was no damage incurred by reason of the interdict, but merely upon the law of the case, which, in fact, had been declared by the sentence discharging the interdict. Witnesses were examined on one side, but none on the other,—the witnesses proved damage to a considerable amount. Under these circumstances, the Court discharges the action, acquits the Defendant from all responsibility, and absolves him from the consequence of the declaration contained in its former sentence. Their lordships are of opinion that the sentence of the 12th July 1837 must be taken as a simultaneous sentence discharging the interdict, and pronouncing for damages, etc., and that some damage must have arisen from the interdict. How is it possible that, during ten months, the owner of a sugar estate, who was interdicted from selling or assigning any portion of the produce, should not have suffered some loss by reason of such interdict? It has been said, that there was no interdict against removing the produce,

and that any damage incurred by misconstruing the interdict is not to fall upon the Respondent; but we think some damage must have arisen by reason of the interdict. It is said also, that the produce of the estate might have been housed; but then rent must have been incurred, which would have been sufficient to have supported the case of the Appellants. Their Lordships are, therefore, of opinion, that this sentence of the 15th May 1839, by which the Plaintiff was disentitled to all remuneration in respect to losses, costs, and damages, must be reversed; for [228] so far as this Court is able to look at it, it appears that the action was maintainable, and that there was some proof of some damage incurred by reason of the interdict; and, therefore, the sentence by which the Plaintiff was prevented from all relief must be reversed, and the cause remitted to the Court below to assess the damages.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 3. *British Guiana*. S.C. 7 Jur. 221. See *Nieuwerkerk v. Reynolds*, 1829, 1 Knapp, 169.]

ON APPEAL FROM THE COURT OF CHANCERY OF JAMAICA.

THOMAS MASON,—*Appellant*; The ATTORNEY-GENERAL of JAMAICA,—*Respondent* [June 17,* and Nov. 29,† 1843].

In the year 1827, letters of preference of escheated property in the Island of Jamaica were granted under the Great Seal of the Island; by the terms of which it was provided, that the grantee should, within twelve months from the date thereof, or for such further time as the Governor of the Island should limit and appoint, take the necessary steps to prosecute the rights of the Crown to the escheated property, otherwise the preference thereby given was to be void. The grantee entered into possession and received the rents and profits, but took no further steps to prosecute the escheat to final judgment for the Crown. Upon an information filed in 1835, by the Attorney-General of Jamaica, praying that the grantee might be declared accountable to the Crown, in respect of the rents and profits received by him since he had been in possession,—Held by the Court of Chancery of Jamaica, and affirmed on Appeal by the Judicial Committee, that the grantee was bound to prosecute the escheat to final judgment for the Crown within a proper time; and that he was liable to account to the Crown for the rents and profits received by him, from the time of entering into possession.

The letters of preference not forming part of the transcript, the hearing of the Appeal was postponed, and an order made for a certified copy to be transmitted by the Clerk of the Patents in Jamaica, to the Privy Council office.

This was an Appeal against a decretal order, made by the Court of Chancery of Jamaica, upon an information filed by the Respondent, the Attorney-General [229] of Jamaica, against the Appellant. By this order, the Appellant was declared accountable to Her Majesty for all the mesne rents, issues and profits of a piece or parcel of escheated land called Southampton Penn, and four slaves (subsequently apprenticed labourers,) late the property of John Collins, deceased, who died intestate, and without heirs inheritable of his estate, from the time he entered into possession thereof, under and by virtue of letters of preference granted to the Appellant upon his application, in the month of December 1827, for the purpose of escheating the real estate and slaves of the said John Collins, until the same were sold and disposed of under a suit for the payment of certain legacies and charges affecting the escheated property.

* Present: Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

† Present: Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

The information was filed on the 18th of December 1835, and stated, that the Appellant had applied by Petition, of the 3rd of December 1827, to the then Lieutenant-Governor of Jamaica, for letters of preference for escheating the real estate and slaves of the said John Collins, stating that he was desirous of prosecuting a writ of escheat of the said premises, and praying that letters of preference for a patent of escheat for the same under the Great Seal of the Island, granting and conveying the same on the usual terms to the Appellant, his heirs and assigns, for ever, might be granted to him upon his prosecuting with effect a writ of escheat in the premises; that on the 9th of January 1828, letters of preference issued under the hands of the Lieutenant-Governor's Secretary. The information then stated, that a writ of escheat accordingly issued, returnable as of February Grand Court 1828, and that in October of the same year, office was found for the Crown, and the Appellant thereupon entered into [230] receipt of the rents and profits of the estate and slaves. The information stated, that the Appellant did not take any further steps towards prosecuting the rights of the Crown, according to the provisions of the letters of preference, and the Acts of the Legislative Assembly of Jamaica, but remained in the receipt of the rents and profits of the escheated premises until the year 1837, when the same were sold for the payment of charges due thereon. The information then set forth the proceedings in a suit of *Wright v. Wright*, not material to the question raised in this appeal, and prayed that the Appellant might be declared liable to account to His said Majesty for the mesne rents, issues and profits of the said escheated premises, from the date of his possession.

The Appellant filed his answer on the 3rd of April 1837, wherein he admitted the statements in the information, relative to the proceedings under the writ of escheat, but alleged that he had been advised not to prosecute the same, as the premises in question would be subject to a sale, under the final decree in the suit of *Wright v. Wright*; and he submitted certain reasons to show that the premises were not the property of the Crown, that the writ of escheat and inquisition were altogether void and of no effect, "inasmuch as it was not therein stated and found, that the said John Collins therein named, died seised in fee simple, without heirs inheritable to that estate, so that the King's title might arise and appear thereby: and he craved the benefit of his defence in this respect, as if he had demurred to the said information." He also set forth the proceedings in full in the cause of *Wright v. Wright*; against the estate of the said John Collins.

The cause being at issue, witnesses were examined on [231] both sides, and the Decree made, from which the present Appeal was brought.

The Appeal came on for hearing on the 17th of June,* but in consequence of the Letters of Preference not being set out in the pleadings and not forming part of the transcript, their Lordships stopped the Appellant's Counsel, observing, that as the Letters of Preference formed the ground of these titles, it was impossible to proceed without them: they ordered the case, therefore, to stand over, and directed an application to be made by the officer of the Court to the Clerk of the Patents in Jamaica, for an authenticated copy of the Letters of Preference.

A duly certified copy of the Letters of Preference having in consequence of this order been transmitted to the Privy Council Office, the Appeal now came on for hearing on the merits (27th Nov. 1843).

The Letters of Preference thus procured were in the following form:—

"Sir,—I am commanded by His Honor, the Lieutenant-Governor, to acquaint you that he has been informed that John Collins, late of the parish of Saint Elizabeth, in the county of Cornwall, Esquire, hath lately departed this life intestate, without heirs inheritable of his estate; that the said John Collins died seised and possessed of a certain penn, piece, or parcel of land, situate, etc., in the parish of Saint Elizabeth, containing by estimation 800 acres or thereabouts, and bound, etc.; also of the following negro and other slaves (here the names were set forth). You are, therefore, desired to give the necessary directions that the King may [232] come at his rights; and if the said piece or parcel of land, with the appurtenances thereunto belonging, and slaves, or any other the estate, late of the said John Collins,

* Present: Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

are found escheatable, His Honor has been pleased to grant the preference to Thomas Mason, of the parish of Saint Elizabeth, Esquire, provided that the said Thomas Mason shall and do, within twelve months from the date hereof, or for such further time as His Honor, or the Governor, Lieutenant-Governor, or the person executing, for the time being, the functions of Governor, shall limit and appoint, take the necessary steps to prosecute the rights of the Crown in the said piece or parcel of land, hereditaments, and premises, otherwise the preference hereby given shall be revoked."

Mr. Burge, Q.C., and Mr. Heathfield, for the Appellant.—The proceedings relative to grants and prosecutions of escheats are regulated by the Acts of the Legislature of the Island. Escheats in Jamaica do not form part of the revenues of the Crown. The Legislative Act, 1 Geo. II., c. 1, in consideration of a fixed sum, settled on His Majesty and his successors, gave up, to the use of the Island, all escheats arising within the Island, to be applied and appropriated to the use of the Government of the Island. The 33rd Car. II., c. 22, prescribes the manner in which the inquisition is to be taken and executed, and it provides that the party to whom the escheat is granted shall pay into the Treasury of the Island, within three years after the grant of such patent, the full value of the escheated property. By the subsequent Acts of 58 Geo. III., c. 14, and 3 Geo. IV., c. 10, the grantee's liability is reduced to [233] one-sixth of the full value. There is no Act of the Jamaica Legislature which treats the grantee of Letters of Preference as being accountable to the Crown for any rents and profits which he may receive during the period he remains in possession of the estate. On the contrary, the Acts of the Legislature leave him in possession of the rents and profits, for the purpose of appropriating one-third of the value to reimburse himself the expense of prosecuting the escheat to final judgment, and of paying one-sixth of the value to the Governor for the grant of the Letters of Preference. The grant of the Letters of Preference does not in itself, or by implication, make the party who obtains it, accountable for the rents and profits. In no respect can the effect of the Letters of Preference make him so liable; he would, in that case, be the bailiff of the Crown. In the present case, it is evident that it was not thought right, by the revenue authorities of Jamaica, to impose on the Appellant the condition of entering on the property as the bailiff of the Crown. The Attorney-General has mistaken his remedy. The course he ought to have pursued under the circumstances was, either to have applied to have the Letters of Preference revoked, or to have obtained the appointment of a bailiff; but we submit that we were not bound to obtain final judgment for the Crown, the estate being charged with more than its value: consequently the Crown's interest being absolutely swallowed up by the charges due upon the estate, the claims of the legatees became paramount. The only other remedy which the Attorney-General had on account of the Appellant not prosecuting the escheat, was to enforce the penalty imposed by the 56th Geo. III., c. 24, which provides that any party obtaining a grant of Letters of Prefer-[234]-ence shall, within three months after the grant, proceed to perform the conditions of such Letters of Preference under the penalty of £1000. That, however, he has omitted to do, and cannot now enforce: we submit, therefore, that as the officers of the Crown have not pursued any of these courses, the prosecution to final judgment for the Crown was wholly useless, and the Appellant cannot now be called upon to account, but is entitled to hold the estate as against the Crown for his own use.

Mr. Kindersley and Mr. W. Rennalls, for the Respondent, the Attorney-General of Jamaica, were not called upon to address their Lordships.

Lord Langdale, M.R.—We are of opinion, that the Decree of the Court below ought to be affirmed. The case stands thus:—In the year 1797, certain lands called the Southampton Penn, and certain slaves now represented by four apprenticed labourers, were the property of Robert Benstead Wright; he made his Will of that date, by which he charged the estate with payment of his debts and legacies, and made certain specific devises thereof. Some time after his death, a person named John Collins became entitled, by purchase from his devisees, to the Southampton Penn estate and the four slaves. John Collins at the time of his death was entitled to other slaves. After Collins had become entitled by purchase, and in the

year 1822, certain legatees, under the Will of Robert Benstead Wright, filed a Bill in the Court of Chancery of Jamaica, to have those legacies established as charges against the estate, and payment made to [235] them. The Defendants to that Bill were the residuary legatees of Wright, the personal representatives of the purchaser, and the Attorney-General of the Island, who was made a party because Collins had died intestate and without heirs. This suit was proceeded with, and a Decree made in February 1826: by that Decree the Plaintiff's claims were established against the estate, real and personal, whereof Robert Benstead Wright was seized or possessed at the time of his death. It has been stated, and we think very properly, that the Bill did not pray for an account of the estate of the Testator, and no receiver was appointed. This Decree having been made in February 1826—in December 1827, Mason (the Appellant) presented his Petition for Letters of Preference of escheat. These were granted to him on the 9th of January 1828. Proceedings took place and office was found for the Crown in October 1828. It has been said, that this escheat might have been perfected in October 1829; but office having been found in October 1828, Mason took possession of the property, and entered into the receipt of the rents and profits of the estate: he did so under colour of the Letters of Preference, and under circumstances by which he undertook a duty to the Crown: it was his bounden duty to perfect the escheat; if he had done so, the Crown would have been entitled to a certain share of the clear value after payment of the charges; the remaining part would have belonged to the Preferee: but, from the time of the Appellant entering into possession, nothing further was done towards perfecting the escheat. The cause of *Wright v. Wright* proceeded, and on the 22nd of October 1832, the Master made his report, by which he ascertained the sums due to the different parties: [236] that report was afterwards confirmed, and a decree upon further directions pronounced on the 30th of September 1833, by which the legacies were ordered to be paid by the Defendants, or, in default thereof, the lands should be sold, and the proceeds applied in payment of the Plaintiff's claims; and if the proceeds of the land should not be sufficient for that purpose, then the compensation money received for the slaves should be applied.

On the 18th of December 1835, the present information was filed, and evidence was taken in the cause: the answer of the Appellant was put in, by which he admitted that he had never perfected the escheat; but he alleged that the Crown had acquiesced in his not having so perfected the escheat, and he alleged that the officers of the Crown advised him not to perfect the escheat, which it was his duty to do. In the month of September 1840, the Decree was made upon the information; but in the meantime, namely, in the month of June 1837, the property in question had been sold. The Decree was, in substance, that an account should be taken of the rents and profits of the land, and the services of the slaves (or apprentices), from the time of Mason entering into possession of them, until the said land and apprentices were sold under the Decree of the Court. It is from this Decree that the present appeal is brought.

Now the defence which has been alleged to-day is, that there is no right whatever on the part of the Crown to claim an account of the mesne rents and profits of the estate, from the time of the Appellant's entering into possession down to the time of the sale. The argument of the Appellant is, that under the Letters of Preference he took possession, and received [237] the rents and profits for nine years, but without doing that by which he would have been entitled to receive Letters Patent of escheat; yet that, nevertheless, he is not liable to account to the Crown, because the Crown might have called on him to give a bond for the payment of the Crown's share of the net value, or might have enforced the penalty for not perfecting the escheat, or might have revoked the Letters of Preference; but that the Crown could not make him account for the profits, and therefore, he was entitled to hold and enjoy them for his own use. Their Lordships cannot concur in this argument, for, at the time that the Appellant took possession of the estate, he did so under the express condition of performing a duty to the Crown. If it was his desire to be exonerated from that duty, it was for him to take steps for that purpose; it was not incumbent upon the Crown to interfere; and as long as the duty existed, he could not, by not performing it, exempt himself from it. He entered into possession upon the understanding, that he was to take certain steps which were to result partly to

the advantage of the Crown, and partly to the advantage of himself. He never took those steps; consequently, the Crown gained nothing in the way intended by the Letters of Preference: but is the Preferee, who failed in his duty to the Crown, to be allowed to take a very large benefit in a way not intended by the Letters of Preference? Nothing could be more inequitable than to allow him to do so. Then it was argued that the Crown had waived its right, the Crown having been a party to the suit of *Wright v. Wright*. No doubt, the parties who have established their charges in that suit have a title paramount to the Crown; but that circumstance does not affect the [238] ultimate right. It has been said, that, under the Decree, from which this is an appeal, the Appellant may be called upon for more than what he could have received; but that is not so: when he has accounted for what he ought to have received, he will be allowed all proper charges and disbursements. If there was such an ambiguity upon the Decree, as to make it probable that he would be charged for more than he has received, that would be a reason for altering the Decree in that respect; but there is no reason to apprehend that any such construction can be put upon the Decree.

Under these circumstances, therefore, their Lordships think that this Decree is right, and that this Appeal must be dismissed, and with costs.

[Mews' Dig. tit. ACCOUNTS AND INQUIRIES, A. 3, b. vi.; tit. COLONY III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, e. *Transcript Record*; and tit. CROWN, D. CROWN GRANT, G. ESCHEAT, 3 c. d. S.C. 7 Jur. 1071. As to transmission of documents to the Privy Council from the Court below, followed in *Mussumat Khoob Conwur v. Baboo Moodnarain Singh*, 1861, 9 Moo. Ind. App. 10; and *Ranee Surmomojee v. Maharajah Sutteeschunder Roy Bahadoor*, 1864, 10 Moo. Ind. App. 123; and cf. *Jackson v. Wilson*, 1838, 3 Moo. P.C. 177; *McCarthy v. Judah*, 1858, 12 Moo. P.C. 47.]

[239] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

AGA KURBOOLIE MAHOMED and Others,—*Appellants*: The QUEEN, on the Prosecution of Mahomed Kuli Mirza,—*Respondent** [June 17, 1843].

Heard *ex parte*.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. Held that the officer was justified in so doing [4 Moo. P.C. 246].

Held also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door [4 Moo. P.C. 247].

Quære. If indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer [4 Moo. P.C. 247].

Indictment at the Criminal Sessions held at Calcutta in 1841. The indictment contained three counts. The first count charged the Appellants with having assaulted and beaten the prosecutor; the second, that they assaulted and imprisoned him; the third, with an assault and battery in the common form. Plea, not guilty.

At the trial it appeared in evidence, that one of the Defendants, Mirza Allu Aukbur (one of the Appellants), had brought an action, which was then pending in the Supreme Court, against the prosecutor, Mahomed Kuli Mirza, and had sued out and delivered to the sheriff of Calcutta a *copies ad respondendum*, for the purpose of arresting and holding the prosecutor to bail in that action. The sheriff's warrant

* Present: Members of the Judicial Committee—Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington. Privy Councillor,—Assessor,—Sir Edward Ryan.

was deli-[240]-vered to one Board, for the purpose of arresting the prosecutor under the writ, and notice was given on the same day to the prosecutor, by the Plaintiff in the action, that he would be arrested on that day at his suit. The sheriff's officer and assistant, in the afternoon of the same day, went to the prosecutor's house for the purpose of arresting him under the writ. Upon their arrival, they found the outer door open, and entered; but before the officer could make an actual arrest of the prosecutor, he and his assistants were expelled from the house, and the outer door immediately closed and fastened. Upon the officer being so expelled, he sent to a police station for some police officers, and the outer door was by his authority broken open. It appeared that during the time the door was being broken open, the prosecutor fired a pistol twice or thrice from his house, apparently at the persons engaged in entering, but which he swore at the trial was loaded with powder only.

Upon the trial there was conflicting evidence, whether the sheriff's officers had in the first instance, before they were expelled, given express notice to the prosecutor of the purpose for which they entered. Evidence was given to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. There was no evidence that the prosecutor demanded to see the warrant, or to know the authority of the sheriff's officer in entering, or that he offered to submit to the arrest. Neither was there any evidence of an express demand of admission before the outer door was broken. The evidence conflicted as to any violence or circumstances of aggravation.

[241] The Judge (Sir John Peter Grant), in his charge to the jury, told them, that the assault and imprisonment were admitted, but justified; that the battery and aggravations of the assault were denied; and that the first question, therefore, for their consideration, was, whether the prosecutor was beaten, and whether the assault committed was attended with the aggravations alleged, or any great aggravations. Having recapitulated the evidence upon these points, the learned Judge stated "that the second point to be considered was, under what circumstances the beating, and other aggravations of the assault, and the assault and imprisonment themselves, were committed. That what the jury had to try was not any assault or violence offered to the sheriff's officer before the door was broken open: that for such violence, if offered, the officer had his remedy by action of damages or indictment, but could not offer it as a defence of an unlawful arrest: that the only question to be tried upon this point was, whether this arrest upon civil process, at the instance of a private individual, was a lawful arrest: that the rule of law is, that a man's house is his castle, and that the officer cannot justify the breaking an outer door or window to execute civil process at the suit of a subject; and his house is that place which he occupies, having his domicile and ordinary residence there: that, if the door be open, the officer may enter and execute the process upon the person or the goods, as the case may be; but that, if before any execution of the process he be thrust out, and the door shut, this latter act is no more than the owner of the house may well do, *scilicet*, to shut the door of his own house; and this, although he is not ignorant of the purpose of the officer's coming—for there must be certain and [242] direct proof that those in the house had notice of the process of the law, to make the act of his thrusting them out, unlawful: that if a man be legally arrested, and escape, and take shelter in his own house, the officer, upon fresh suit, may break open doors in order to retake him; but that, in order to justify the proceeding to that extremity, two things are necessary—first, that the person have previously been lawfully arrested; second, that due notice have been given by the officer of his business, and admission demanded, and refused: that in order to constitute a lawful arrest, one of two things is necessary—either that the bailiff or his assistant have laid hold of or touched the person meant to be arrested; or that the person, upon being informed of the bailiff's business, has submitted and gone with the bailiff, without resistance or flight: for bare words will not make an arrest, nor will an assault upon the officer, or offer of violence to him, whereby, through intimidation or otherwise, he is prevented from completing his arrest, convert that into a lawful arrest which is not completed: that without a valid arrest there can be no rescous or escape, and without a rescous there can be no lawful breaking of doors to effect an arrest on civil process at the suit of a subject; but that, if

there had been a rescous, and the breaking of doors had been lawful, there must have been previous notice duly given, admittance duly demanded and refused. It is no light matter by the law of England to violate the sanctity of a man's house."

Upon this direction the Defendants were found guilty. A rule *nisi* was granted in the ensuing term for setting aside the verdict, and having a new trial, upon three grounds—first, that the verdict was against [243] evidence as to certain of the Defendants mentioned in the rule; second, as to the Appellant, Aga Kurboolie Mahomed, that there was no evidence at all to go to the jury; thirdly, that the learned Judge had misdirected the jury.

This rule was afterwards, on the 29th of November 1841, discharged without costs. (Sir Edward Ryan dissenting.) The Court at the same time gave leave to the Defendants to appeal to Her Majesty in Council, from its judgment, refusing a new trial upon one ground only, namely, on the ground of the alleged misdirection.*

The Solicitor-General (Sir William Follett), and Mr. Greenwood, for the Appellant.—The charge of the learned Judge to the jury was a misdirection in law; and the rule *nisi* for a new trial, upon the ground of such misdirection, ought to have been made absolute, and not discharged. The sheriff's officer was justified, although he had not actually arrested the prosecutor, in breaking open the door and arresting him after he had obtained peaceable entry. The maxim "that every man's house is his castle," must be qualified. In all cases where the outer door is open, the sheriff may enter the house, and do execution. *Semayne's case* (5 Coke, 91, 4th Res.). In *White v. Wiltshire* (Palm. 52; 2 Rolle Rep. 137; Cro. Jac. 555), the Court said, though the sheriff cannot break into a house to make an execution by a *fi. fa.*, yet when the door is open, and he enters, and is disturbed in his execution by the parties who are within [244] the house, he may break into the house and rescue his bailiffs. Here the breaking open of the house was justified, the Plaintiff having occasioned the necessity of it. Having obtained peaceable entrance, the sheriff may afterwards break open the inner door, to execute process. *Lee v. Gansel* (1 Cowp. 1; Lofft. 374), *Lloyd v. Sandilands* (8 Taunt. 250), Sir M. Foster's Discourse on Homicide, p. 319. He may even, if once lawfully admitted, break open the outer door, if fastened against him, to get out. *Pugh v. Griffith* (7 Adol. and El. 827). Again, if the Defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. Anon. (6 Mod. 105; Lofft. 390).

The prosecutor had notice of the intended writ, and evidence was given, and not contradicted, to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. No proof, it is true, was given of an express demand of re-admission; the circumstances and conduct of the prosecutor prevented that, before the outer door was broken open: but there was evidence from which the jury might have inferred that the prosecutor knew the purpose for which the door was broken, and the authority under which the sheriff and his assistants acted. No express demand and refusal of re-entry was necessary. *Hutchinson v. Birch* (4 Taunt. 619). *Pew's case* (Hale, P.C. 458). The circumstances of each case must determine the propriety of demand of re-entry and refusal. *Pugh v. Griffith* (7 Adol. and El. 827).

[245] If the breaking open of the outer door was an unlawful act, the arrest under the writ could not be made the subject of an indictment for assault and false imprisonment. Lord Mansfield, in *Lee v. Gansel* (1 Cowp. 6), cited *Semayne's case* (5 Coke, 91), as deciding "that breaking open the outer door was a trespass, but that taking away goods under a *fi. fa.* was lawful." Indictment cannot lie: in this case it can only at most render the sheriff's officer liable to an action of trespass. *Hutchison v. Birch*. Bacon's Abr. Execution N. Pasch. 4 Ed. 4, pl. 19, cited 4 Taunt. 624.

* As to the power of the Supreme Court to allow or deny Appeals in criminal cases, and to impose terms upon which such Appeals shall be allowed, see Bengal Charter of Justice, 26th March 1774, sec. 32 [see now Art. 41 of Letters Patent of 28th Dec. 1865 (Stat. R. and O. Rev. iv. 94; and note to *In re Ames*, 1841, 3 Moo. P.C. 413].

Lord Campbell (June 24, 1843)—After stating the nature and facts of the case,—proceeded.

It was argued before us on the part of the Appellants, that the learned Judge at the trial ought to have directed the jury that if they believed the evidence for the Defendants, they should find a verdict of acquittal; and three points were made by way of exception to his charge. First, that although the prosecutor had not been arrested before the officer and those acting in his aid were expelled from the house, they were entitled to break open the outer door for the purpose of re-entering and arresting him; secondly, that under the circumstances they were entitled to do so without making any express demand for leave to re-enter; and, thirdly, that even if the breaking of the outer door was unlawful, the arrest under the writ and warrant could not be treated as a trespass, and could not be made the subject of an action or indictment for assault and false imprisonment.

[246] Having examined the authorities from *Semayne's case* [5 Co. 91] downwards, their Lordships are clearly of opinion, that the two first points ought to be decided in favour of the Appellants, so that, independently of the third, the judgment of the Court below must be reversed.

There is no doubt that, a man's house being his castle, the ordinary rule is, that the outer door cannot be broken open to execute civil process; but it is admitted here, that if the prosecutor had been arrested, and had then expelled the Defendants from his house, they might have broken open the outer door to enter and re-take him; and their lordships think that as they had once been lawfully in the house, and he knew that they were lawfully about to arrest him, and he unlawfully caused them to be expelled for the purpose of preventing them from so doing, he cannot be permitted to take advantage of his own wrong, by thus defeating the process of the law; and that they had a right to place themselves in the position which they occupied when his unlawful act began. Without an actual arrest, there was no rescous or escape; but the proposition, that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process; and then being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act.

Again, there is no doubt that, generally speaking, [247] before an outer door can be broken open, even to execute criminal process, there must be a demand of entry, and a refusal. But to what extent? To inform the owners of the house of the purpose for which the entry is to be made, and to afford him the opportunity of opening the door and personally admitting the parties who are to execute the process of the law. Here the prosecutor, who had just expelled the Defendants from his house, that they might not arrest him, full well knew the purpose for which they returned, and he showed a determined resolution to oppose their admission. While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary. *White v. Wiltshire* [Palm. 52; 2 Rolle, 137; Cro. Jac. 555]. *Pugh v. Griffith* [7 Ad. and E. 827]. This being so, there was no infraction of the law by the Defendants, and no objection can be made to the regularity of the arrest. Whether supposing the breaking open the outer door and the second entrance into the house to have been illegal, this indictment would have been maintainable, it is not now necessary to determine. From *Cameron v. Lightfoot* (W. Bla. Rep. 1190), *Tarleton v. Fisher* (Doug. 671), *Stokes v. White* (1 Cr. Mee. and Ros. 223), and *Newton v. Constable* (2 Queen's Bench Reps. 157), it appears that an action of trespass and false imprisonment will not lie at the suit of a person who is arrested under a writ and warrant for debt, when privileged from arrest, by attending as a witness under a subpoena; from which it may be argued, that here the prosecutor would be confined to his remedy, either civil or criminal, for [248] forcibly breaking and entering his dwelling house, and that the simple arrest cannot be made the subject of an indictment, nor of an action of trespass. On the other hand, it has been determined in *Hodson v. Towner* (B. R. H. T. 1837, 1 W. W. and D. 53), that the arrest of a party in his house, after breaking open the outer door,

is so far unlawful, that he is entitled to be discharged; and the arrest of the person under civil process, like seizing goods as a distress for rent, after breaking open the outer door, may be considered a continuation of the trespass. However, it is enough for the present, to say, that from the misdirection of the learned Judge at the trial, with respect to the right to break open the outer door of the Prosecutor's house, and the necessity of a previous demand and refusal to be admitted, the conviction cannot stand.

Their lordships can only report to Her Majesty that the rule for a new trial should be made absolute; but after this intimation of their opinion, they trust that the indictment will not be further prosecuted.

[Mews' Dig. tit. SHERIFF; D. DUTY AND LIABILITY OF, 2. a.; H. ARREST BY SHERIFF, 4. b. S.C. 3 Moo. Ind. App. 164. On point (i.) as to appeal to Privy Council in criminal cases, distinguished in *Reg. v. Eduljee Byramjee*, 1846, 5 Moo. P.C. 279; and see note to latter case, 5 Moo. P.C. at p. 295; (ii.) as to breaking open door to retake, see *Eagleton v. Gutteridge*, 1843, 11 M. and W. 465; *Bannister v. Hyde*, 1860, 2 E. and E. 627; (iii.) as to demand for re-entry, see *Sandon v. Jervis*, 1858, E.B.E. 935, 942, 948. For provisions of Indian law as to breaking open doors in execution of process, see *Code Civ. Proc.* (Act XIV. of 1882), ss. 271, 336, and cf. s. 263.]

[249] ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

DANIEL CAIN,—*Appellant*; JOHN TEARE, and JANE ELIZABETH his wife, and JOHN NELSON,—*Respondents* * [June 19, 1843].

R. S., by deed, conveyed to Trustees real estate in the Isle of Man, upon trust, in the first instance, to permit him, the settlor, to receive the rents and profits thereof during his life, and upon his death, in trust, to pay out of the rents accruing from such land, an annuity of £40 to H. A. during his life, and to pay the residue of such rents to J. A. her heirs or assigns; and upon H. A.'s death, in trust to convey the said lands to J. A. and her heirs, if then living, or, if she should be then dead, unto the heir-at-law of the said J. A., and the heirs and assigns of such heir-at-law. R. S. (the settlor) died intestate and unmarried. J. A. died, leaving H. A. her heir-at-law; then H. A. died, leaving J. E. T. his heir-at-law, and who then became heir-at-law of J. A. Upon a bill filed by J. E. T. against the surviving Trustee, under the deed, for the conveyance of the estate: Held by the Judicial Committee, affirming the Decree of the Court of Chancery of the Isle of Man, that J. E. T. took by purchase under the ultimate limitation, as the person answering the description of heir-at-law of J. A. at the death of H. A.; and a conveyance decreed.

By an Indenture bearing date the 9th of December 1803, made between Richard Symons, of Douglas, Esquire, of the one part, and John Cosahan and John Nelson of the other part, in consideration of the natural love and affection which Symons had for Henry Allen and Jane Allen, his half brother and sister, he gave, granted, bargained and sold unto Cosnahan and Nelson, their heirs and assigns, the estates and tenements of Bibaloe and Ballastole, in the parish of Concon, together with his intacks in that [250] parish, and the estates and tenements of Ballaquark and Shonest, in the parish of Lonan, with his intacks in that parish, within the said island; to hold unto the said Cosnahan and Nelson, their heirs and assigns, from the day of the date thereof, in trust that they should permit and suffer the said Symons to use, occupy, possess, and enjoy, and to receive the rents, issues, and profits, for and during his natural life, without impeachment of waste; and upon the decease of him, the said

* Present: The Lord President (Lord Wharnccliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Symons, in trust to receive the yearly rents, issues, and profits, and pay the clear yearly sum of £40 thereout, to such of the sisters of Henry Allen as the said Henry Allen should live with, for the purpose of maintaining and otherwise providing for him during his life; and in case the said Henry Allen should outlive his said sisters, pay and apply the said yearly sum of £40 to and for his use and behoof during his life, and pay the remainder of the said yearly rents, issues, and profits, after the payment of the said sum of £40, and all necessary outgoing and expenses, to and for the use and behoof of the said Jane Allen, her heirs or assigns; and upon the death and decease of the said Henry Allen, in trust to assure and convey all and singular the said lands and premises, with the appurtenances, unto the said Jane Allen and her heirs, if the said Jane Allen should be then living, or, if she should be then dead, unto the heir-at-law of the said Jane Allen, and the heirs and assigns of such heir-at-law: And by the said Indenture a power was reserved to the said Richard Symons, during his life, to alter, revoke, or make void the same, and also a power to him, during his life, and to the Trustees after his death, to grant leases.

[251] On 8th January 1816, Richard Symons died a bachelor and intestate, leaving a brother and three sisters, all of the half blood, surviving, viz.: the said Henry Allen, and Jane Allen, Catherine Allen, and Elizabeth Clarke formerly Allen, wife of James Clarke, who was the mother of the Respondent, Jane Elizabeth Teare.

In pursuance of a power of attorney from the above-named Trustees, Jane Allen entered into possession of the said lands.

By an Indenture dated 6th October 1817, made between Jane Allen of the first part, Catherine Allen of the second part, and Henry Allen of the third part, after reciting the deed of 9th December 1803, and reciting that Jane Allen was desirous of settling and assuring the said estates upon her sister, Catherine Allen, and that Henry Allen had consented to assign unto her all right and title which he had or might thereafter have in and to the same (except the said annuity of £40), Jane Allen and Henry Allen, in consideration of natural love and affection for Catherine Allen, and to carry into effect the true intent and meaning of the said deed of 9th December 1803, did give, grant, and sell unto Catherine Allen all and singular the said several estates, lands, and premises bargained and sold by Richard Symons, in and by the said deed of 9th December 1803, together with all rights, members, and appurtenances to the said several premises belonging or in anywise appertaining, to hold unto Catherine Allen and her heirs, from and immediately after the decease of Jane Allen, for ever, subject, nevertheless, to the annuity of £40, secured to Henry Allen.

Jane Allen died in January 1818, having previously [252] made her will, bearing date the 6th of October 1817; and thereby, after bequeathing various legacies, she gave and bequeathed unto her sister, Catherine Allen, all her share, right, and title in and unto certain houses and premises, situate in the town of Douglas, subject to an annuity secured upon the said houses and premises, and payable to Henry Allen, together with all the residue and remainder of her estates, real and personal, to her and her heirs and assigns for ever; and she appointed her said sister, Catherine Allen, executrix of her Will.

Catherine Allen, who had lived with her sister, remained in possession of the estates, by permission of the Trustees, until the year 1823, when the annuity of £40 not having been paid to Henry Allen, the Respondent, John Nelson (who survived his co-trustee, John Cosnahan), proceeded to recover the rents of the estates.

By an instrument in writing, dated 7th August 1824, under the hand of Catherine Allen, reciting the Indentures of 9th December 1803, and 6th October 1817, and that Jane Allen had since departed this life without lawful issue, whereupon and in consequence whereof, as well as in virtue of the deeds before-mentioned, the said Catherine (stating that she being the assign of the said Henry Allen, who was the heir-at-law of the said Jane Allen), was then absolutely entitled to the said estates, subject to the annuities payable thereout to the said Henry Allen during his natural life, she, the said Catherine Allen, in consideration of 10s., gave, granted, bargained, and for ever absolutely sold to John Kelly, Esq., and Robert Cannell, the said estates, etc., comprised in the Indenture of 9th December 1803, to hold in trust to permit and [253] suffer her, the said Catherine Allen, to possess and enjoy, and to receive the rents for and during her natural life: and, upon her decease, in

trust to convey the said lands unto John Cain, jun., of Glendhoo, in the parish of Kirk Conchan, and his heirs and assigns.

Catherine Allen died in June 1829, and John Cain, who had for some years previously lived with her on the estate of Bibaloe, entered into possession of the estates.

Henry Allen died on the 23rd July 1841, intestate and unmarried, leaving his niece, the Respondent, Jane Elizabeth Teare, the only child of his deceased sister, Elizabeth Clarke, his heiress-at-law, surviving.

On the 27th November 1841, the Respondents, John Teare and Jane Elizabeth his wife, filed their Bill in the Court of Chancery, of Man, against the said John Nelson and Daniel Cain, thereby stating the Indenture of the 9th December 1803, the death of Symons, leaving Henry Allen, Jane Allen, Catherine Allen, and Elizabeth Clarke, his half brother and sisters, and only nearest of kin; that all these were dead, and that the Plaintiff, Jane Elizabeth Teare, the only child of the said Elizabeth Clarke, was the heiress-at-law of Symons, and of Henry Allen and Jane Allen, and as such was entitled to the possession of the estate; but that Nelson, the Trustee of the estate, was unable to deliver possession, because Daniel Cain held possession of the premises, and refused to deliver them up, under some pretence of title; whereas the Plaintiffs submitted that neither Henry nor Jane Allen had anything more than a certain limited life interest in the said property, extended, in the case of Jane, to her heirs or assigns, in the event of her dying [254] before Henry, and to terminate on the death of Henry, when the estates were to be conveyed to the right heir-at-law of Jane Allen; for which purpose the fee-simple of the estates remained vested in John Nelson, until the happening of the said event: The Plaintiffs, moreover, submitted that if Henry Allen had any right to convey, he did by deed, duly executed, convey the premises to John Corlett and James Clarke, in trust, among other things after his decease, and the decease of Catherine Allen, to convey the premises to Elizabeth Clarke, and her heirs for ever; and therefore the Plaintiff, Jane Elizabeth, would be entitled to such right as the heir of Elizabeth Clarke; that she was also the heiress of Jane Allen, and that Henry Allen having survived Jane, Nelson was bound to convey to her, the Plaintiff; and prayed that she might be declared entitled to the estates, and that Cain might deliver up possession, and that Nelson might convey the estates, and for an account of rents against Cain, and a receiver, and for general relief.

The Appellant put in his answer to this Bill on 13th December 1841, and at the same time filed a Cross Bill against the Respondents, setting forth, amongst other things, the Indentures of 9th December 1803, of the 6th October 1817, and the 7th of August 1824, and a certain other deed, bearing date the 13th day of June 1831, whereby it was alleged that the said John Kelly and Robert Cannell had sold and conveyed the said lands to the said John Cain, who had departed this life, leaving the Appellant, his brother and heir-at-law, who thereupon became entitled to the said estates; and praying that the Respondent, John Nelson, might be ordered to execute a proper conveyance to the Appellant, of the legal estate.

[255] The Respondent, John Nelson, on 30th December 1841, put in his answer to the Bill of the other Respondents, stating that upon the decease of Henry Allen he was willing and desirous (as he conceived himself bound to do) to convey and assure the said lands and premises to the Respondent, Jane Elizabeth Teare, the heiress-at-law of the said Jane Allen, but was unable to deliver up possession of the said lands and premises to the said Respondent, because the Appellant had intruded into the possession thereof, and continued to overhold the same, and refused to deliver them up; and submitting himself to the guidance of the Court.

The original and cross cause came on to be heard on 8th April 1842, when the Court stated:—that the Bill filed by the said Daniel Cain ought to be dismissed, and the same was ordered and decreed accordingly: And it was thereby ordered and decreed that the said John Nelson should, at the expense of the said John Teare, execute a conveyance of the said estates, lands, and premises, to the said John Teare and Jane Elizabeth his wife, such conveyance to be settled by the Clerk of the Rolls, if the parties differed about the same: And it was thereby ordered, that it be referred to the Clerk of the Rolls to take and state an account of the rents, issues, and profits of the said estates and premises, which had arisen and become due

since the death of the said Henry Allen; and for the better taking of the said account, the parties were to produce before the Clerk of the Rolls, all deeds, books, and writings, in their custody or power, relating thereto, and were to be examined on oath, as the Clerk of the Rolls should direct, reserving the consideration of all further directions until after the Clerk of the Rolls [256] should have made his report, with liberty to any of the parties to apply to the Court as occasion should require.

From this Decree, Daniel Cain brought the present Appeal.

Mr. Bethell, Q.C., and Mr. Campbell, for the Appellant; and Mr. G. Turner, Q.C., and Mr. Gordon, for the Respondents.

On the part of the Appellant, it was contended, *first*, that according to the true construction of the Indenture of the 9th of December 1803, Jane Allen took under that Deed, either an equitable estate, in fee simple absolute, or, which was equivalent, an estate for the life of Henry Allen, with a remainder to herself, which, uniting with her life estate, according to the rule in Shelley's case (1 Coke's Rep. 93), conferred upon her the fee simple; and *secondly*, that if such construction failed, the alternative would be, that on the death of Jane Allen in the lifetime of Henry Allen, he, Henry Allen, under the said Indenture, as heir-at-law of Jane Allen, became entitled as equitable tenant in fee simple by purchase; and his conveyance of all his right or title, while in contingency or expectancy, by the Indenture of the 6th of October 1817, operated as a valid conveyance in equity, to pass his then present or any future equitable interest, and in any case operated against him and his heirs by estoppel.

For the Respondents, it was argued that the limitation contained in the settlement of the 9th of December 1803, was an alternative executory trust, in favour of Jane Allen and her heirs, if she should be alive at the [257] time of the death of Henry Allen, and if not, in favour of the persons who (Henry being dead) should, at the time of his death, answer the description of heir-at-law of Jane Allen, and the heirs and assigns of such heir; and that the Respondent, Jane Elizabeth Teare, was, in the event which happened, the person pointed out by the Deed, and entitled to a conveyance of the estate.

The following cases and authorities were cited:—*Webb v. Hearing* (Cro. Jas. 415), *Arches Case* (1 Coke's Rep. 66), *Stert v. Platel* (5 Bing. N.C. 434), *Willis v. Hiscox* (4 Myl. and C. 197), *Cholmondeley v. Clinton* (2 J. and W. 1), *Dubber v. Trollope* (Amb. 453), *Locke v. Southwood* (1 Myl. and C. 411), *Holloway v. Holloway* (5 Ves. 399), *Jones v. Colbeck* (8 Ves. 38), *Elmsley v. Goring* (2 Myl. and Keen. 32), *Barlow v. Salter* (17 Ves. 479), *Blackburn v. Edgley* (1 P.W. 600), *Campbell v. Harding* (2 Russ. and Myl. 390), *Briden v. Howlett* (2 Myl. and Keen. 90), *Butler v. Bushnell* (3 Myl. and Keen. 232). Preston's Rule in Shelley's case, 75, 113, 1 Powell on Devises, 285. 2 Powell on Devises, 459. 10 Vin. Abr. 234. 1 Roll Abr. 832. Coke on Litt. 9 B. 22 a. 1 and 2 Preston on Estates, 347, 349 and 28. Fearn's Contingent Rem. 9 edit. 150, 177-8-9-181, 241.

Lord Brougham.—The question in this appeal arises upon the construction to be given to the Deed of Settlement of the 9th of December 1803, whether under that Settlement Jane Allen took an equitable estate in fee sim-[258]-ple absolute, or an estate for life, with an alternative executory trust, in fee, if Henry Allen predeceased her, an event which did not happen.

It is impossible to deny that the word heir in a Deed may be either a word of limitation, or of purchase; it is a flexible word, and even admitting that it is more properly a word of limitation than of purchase, yet being, as I have said, a flexible word, it is much more flexible when used in the singular than when used in the plural, to denote a class, as "heirs." Their Lordships think they are able to elicit from this Deed a sufficient clear intention to warrant their considering the word heir as a word of purchase, pointing to the person who should be living, and answer the description at a particular time. The question then is, at what time is the heir to take? The words of the trust are, "Upon the death of Henry Allen, to assure and convey unto the said Jane Allen and her heirs, if she should be then living, or, if she should be then dead, unto the heir-at-law of the said Jane Allen, and the heirs and assigns of such heir-at-law:" the word "then" is twice used by the settlor, and used

clearly as an adverb of time; then at what time? Why unquestionably the time mentioned immediately before, namely, the death of Henry Allen. Their lordships are of opinion, therefore, that the decree of the Court below was right, and must be affirmed, and the Appellant must pay the costs of this appeal.

[Mews' Dig. tit. SETTLEMENT; II. C. EXECUTED SETTLEMENTS, 5. S.C. 7 Jur. 567; cf. *Olney v. Bates*, 1855, 3 Drew. 319; *Widdicombe v. Muller*, 1853, 1 Drew. 443; *Cormack v. Copous*, 1853, 17 Beav. 397; *Gill v. Barrett*, 1860, 29 Beav. 372; *Heasman v. Pearse*, 1871, L.R. 7 Ch. 275; *In re Deighton's Settled Estates*, 1876, 2 Ch.D. 783; *Palmer v. Orpen* (1894), 1 I.R. 32; *Valentine v. Fitzsimons* (1894), *ib.* 93.]

[259] ON PETITION FROM THE SUPREME COURT AT NEW-
FOUNDLAND.

BETHEL HENDERSON,—*Appellant*; ELIZABETH HENDERSON and others, -
Respondents * [June 16, 1843].

Upon a petition stating that a party against whom a decree had been pronounced by the Supreme Court of Newfoundland, was at the time resident in England and had no representative within the Island, or notice of proceedings against him; the Judicial Committee gave leave to appeal upon terms; notwithstanding that he had not asserted an appeal within fourteen days from the final Decree as required by the Charter of Justice of Newfoundland.

This was an application for leave to appeal from a final Decree of the Supreme Court of Newfoundland, made on the 6th of June 1841, in a suit in which the Respondents, Elizabeth Henderson, Charles Simms, and Joanna his wife, were Plaintiffs, and the Appellant was Defendant. The Bill was filed by the Respondents for an account of certain partnership transactions and dealings between the Defendant's father, William Henderson, and Jordan Henderson, both deceased; and by an order of the Supreme Court the Bill was ordered to be taken *pro confesso*, as against the Defendant, for want of an answer. Upon a reference the Master reported certain sums to be due from the Defendant to the Plaintiffs, and the Supreme Court decreed that the sums so found by the Master were due and owing by the Defendant to the Plaintiffs. The Defendant being resident in England, and out of [260] the jurisdiction, and having no one to represent him in the island, had no notice of these proceedings, and could take no steps therefore to avert them, or to appeal from the decree thus made, which was *ex parte*.

By the Charter of Justice [Sept. 19, 1825 (Stat. R. and O. Rev. iv., 351, 360)] and the Rules of the Supreme Court of Newfoundland, leave to appeal from any judgment, decree, order, or sentence, must be applied for within fourteen days after the same has been pronounced; this under the circumstances was impossible: the decree having been enrolled, the Plaintiffs had taken steps to enforce it against the Defendant here, by commencing actions in the Court of Queen's Bench in England, to recover two several sums of £8883 6s. 8d., being the sums mentioned in the Decree, as due from him to them. He accordingly presented a petition to Her Majesty in Council, setting forth these facts and circumstances, and the proceedings of the Court below, and prayed that he might be at liberty to prosecute an appeal from the original Decree, and the several orders and proceedings upon which the same was based, and in particular that the order for taking the Bill *pro confesso* against him, might be reversed and set aside for irregularity, and that in the meanwhile all proceedings in the actions in the Queen's Bench might be stayed by order of Her Majesty in Council.

* Present: The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

The petition was supported by an affidavit of the facts filed by the petitioner.

Mr. Purvis, Q.C., for the petitioner, the Appellant. Mr. Rolt, for the Respondents.

Their lordships granted leave to appeal from the [261] order for taking the Bill *pro confesso*, upon the terms of the petitioner giving security to the amount of the sums declared due from him, and prosecuting the appeal with due diligence, and ordered him to pay the costs of this application.

By an Order in Council confirming the report of the Judicial Committee, leave was given to the petitioner to prosecute his appeal from the final order of 6th of June 1841, upon terms of lodging his case within three months, and lodging within thirty days from the date of the Order in Council the certificates of recognizance to Her Majesty, in a penalty of £18,100, entered into jointly and severally before one of the Barons of Her Majesty's Court of Exchequer, by two or more securities to be approved by the Clerk in Council, conditionally to stand and abide such determination and order as might be made on the said appeal (a).

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL, 6; *Practice*, a. See *Retemeyer v. Obermuller*, 1837, 1838, 2 Moo. P.C. 93; and note thereto at p. 125. The conditions of appeal from Newfoundland are still regulated by the Charter of Justice of Sept. 19, 1825 (Stat. R. and O. Rev. iv., pp. 351, 360), made in pursuance of 5 Geo. IV., c. 67, s. 1.]

[262] ON PETITION FROM THE SUPREME COURT AT THE MAURITIUS.

WILLIAM BIRD HULM,—*Appellant*; FRANÇOISE HULM,—*Respondent* *
[June 16, 1843].

Heard *Ex parte*.

The Supreme Court at the Mauritius refused to allow an appeal to the Queen in Council, from a definitive sentence in a suit for a divorce *a vinculo*, except upon terms of giving security in the aggregate sum of £1200 sterling, for performance of the Order in Council, to be made on appeal, and the costs incurred thereby. On petition, the Judicial Committee allowed the appeal, fixing the security at £300.

The petitioner, William Bird Hulm, intermarried with the Respondent, Françoise Hulm, formerly Laboulaye, in the island of Mauritius, in the year 1839. Some time afterwards, and during the absence of the petitioner from the island, the Respondent instituted a suit in the Court of First Instance, and obtained, in default, a sentence of divorce *a vinculo*, on certain allegations of personal violence charged to have been exercised by the petitioner on the person of his wife. The petitioner interposed an appeal to the Supreme Court of the island. This Court by its definitive sentence, in default, confirmed the sentence of divorce appealed from. The

(a) On the 31st May 1844, a demurrer to the action at law referred to in the petition, on the ground that it was not maintainable, being upon a Decree of a foreign Court of Equity, was overruled by the Court of Queen's Bench (*Henderson v. Henderson*, 6 Queen's Bench Reps. 288), and on the 20th of July 1844, a demurrer for want of Equity, to a Bill praying for an injunction against proceeding in such action was allowed (*Henderson v. Henderson*, 3 Hare's Rep. 100). The appeal allowed by the Privy Council was not prosecuted.

* Present: The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Court of appeal in confirming the previous judgment by default, of the Court of First Instance, nevertheless authorized the petitioner to appeal to Her Majesty in Council against the said several sentence of divorce, but only on condition of the petitioner giving security in the aggregate sum of £1200 sterling, that is to say, £200 sterling for the costs of appeal, and the [263] sum of £1000 sterling as security for performance of the Order in Council to be made on appeal. The petitioner refused to comply with these terms, and presented a petition to Her Majesty in Council, praying to be allowed to appeal against such sentences, upon giving the usual security for costs of appeal.

Mr. Burge, Q.C., in support of the Petition.—The Court below did not deny our right to appeal, but imposed such conditions for securities as we could not give. The Charter of Justice of the Mauritius (April 13, 1831; Clark's Col. Law, 569) gives the subject a right of appeal from the Cour d'Appel, in the island, to the Queen in Council, against any final judgment, sentence or decree of the said Court, or against any rule or order made in any civil suit or action, having the effect of a final or definite sentence when the subject-matter at issue amounts to £1000. By the same Charter, power is reserved to the Crown upon special petition to admit an appeal upon such terms as Her Majesty may think fit to prescribe. No provision is made in the Charter or Order in Council for an appeal from a sentence *a vinculo*. Such a sentence was never contemplated. Unless we are admitted under the reservation contained in the Charter empowering the Crown to admit appeals not otherwise provided for, it will operate as a denial of justice. The Courts below may impose such terms as may amount (as in this case) to a refusal. [The Right Hon. Dr. Lushington.—In *Camberton v. Egroignard* (1 Knapp, 251), their lordships held that the Court in the Mauritius was the sole judge of the sufficiency of the security, and that this Court had no jurisdiction in the matter.] That case was a question of succession, and came within the [264] terms of the Charter: and the question there was not as to the amount, but as to the sufficiency of the security; that is, the bail was deemed insufficient. We are willing to give such reasonable security as your lordships may think fit to order.

Lord Brougham.—Their Lordships are of opinion that the Charter is sufficiently comprehensive to admit this appeal. The consequence of not allowing this appeal would be, to give the Court below the power to prevent any appeal by fixing an exorbitant amount as security for costs. The petitioner will be let in on terms of giving security for costs below and here.

By an Order in Council made on the petition, it was ordered “that the appeal from the said sentence should be allowed, on lodging in the Council Office the certificate of recognizance to Her Majesty, on a penalty of £300 sterling, to be entered into by some proper person (and approved by the Clerk in Council) before one of the Barons of the Exchequer, conditional to stand and abide such determination as might be made and awarded in the said appeal, as well as the costs thereof.”

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL, 6; *Practice*, m. On point (i.) as to security, cf. *A.-G. of Isle of Man v. Cowley*, 1858-59, 12 Moo. P.C. 27; *In re A.-G. of Victoria*, 1866, 3 Moo. P.C. (N.S.) 527; and *Muhammad Ikram-ud-din v. Mussamat Najiban*, 1896, L.R. 23 Ind. App. 167 (where the Judicial Committee granted special leave to appeal from the High Court at Allahabad without security); (ii.) as to competency of appeal under the Charter, see *D'Orliac v. D'Orliac*, 1844, 4 Moo. P.C. 374; as to conditions of appeal to Privy Council from Mauritius, see Orders in Council of April 13, 1831, and Dec. 12, 1894 (*Mauritius Laws Rev.* L. 97; Stat. R. and O. 1899, Part II., pp. 1693, 1701).]

[265] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

JAMES ILOTT,—*Appellant*; MARY GENGE,—*Respondent* * [February 21, 1844].

The mere circumstance of the deceased having called in two witnesses "to sign a paper for him," (which they did in his presence,) but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it: Held by the Judicial Committee of the Privy Council, affirming the judgment of the Prerogative Court not to amount to an acknowledgment of the signature by the deceased, so as to satisfy the provisions of 1 Vic., c. 26, sec. 9, and Probate refused to such paper.

This was originally a cause of proving, in solemn form, a holograph instrument made by the Rev. Henry Masterman, deceased, purporting and intended to be his last Will and Testament. The paper was signed by him, and attested by three witnesses: the attestation clause being in these words, "Signed, sealed and delivered in the presence of us, Samuel Hopkins, Henry Eaton, and John Chaffy, the 8th of September 1811." It contained various bequests, and appointed the Appellant, James Ilott, and Thomas Balston, executors.

Upon inspection of the paper, it presented the appearance of the signature of the deceased, and the date on which the execution took place having been written with different ink from the body of the Will, and in-[266]-serted after the Will was written: and as the attestation clause did not show upon the face of it that the provisions of 1 Vic., c. 26, s. 9, had been sufficiently complied with, the subscribing witnesses were applied to, to make an affidavit in the form required by the practice of the Prerogative Court, to supply this defect: they declined, however, to make such affidavit, whereupon a caveat having been entered, the paper was propounded in solemn form by the Appellant, as an executor named therein, and opposed by the Respondent, Mrs. Genge, whose interest, as the lawful second cousin, and next of kin of the deceased, in case he had died intestate, was admitted.

The first article of the allegation pleaded that on the 8th day of September the deceased, at about four o'clock in the afternoon, called on Samuel Hopkins, the parish clerk of Milton Abbas, who was at work in his shop, with Henry Eaton, his son-in-law, and said, "I want to hinder you two for a short time, to come to my house to sign a paper for me," or to that very effect; upon which the said Samuel Hopkins said, "We will come immediately." That the deceased then left, and went to his own house. That Hopkins and Eaton shortly afterwards went to the deceased's house, and found him standing at his writing desk, which was so placed on a small table near the wall that his back was turned towards them as they entered the room. That on their entering the room, the deceased turned round and said, "Well, Mr. Hopkins, you are come: I want you to sign this paper for me." The deceased then turned round again to his writing desk, and still standing up, did something with the paper, and it appeared to them, from his attitude and manner, that he was writing upon it. That after [267] a short interval, during which the deceased was so employed, he moved the paper from the desk, and put it on the table on which the desk was standing, and said, pointing with his finger to the bottom thereof, "Sign your names here." That Hopkins then took the pen, which was in the ink bottle, and which apparently the deceased had been just using, and signed his name in the deceased's presence, and in the presence of the said Eaton, and Eaton also signed his name in the presence of Hopkins and of the deceased: but that the upper part of the said paper was so folded or turned down as to conceal the writing on the concluding part thereof, so that Hopkins and Eaton could not see whether or no there was any signature or seal to it. That the deceased, on the same

* Present: The Lord Chancellor (Lord Lyndhurst), Lord Brougham, the Lord Chief Justice of the Queen's Bench (Lord Denman), the Lord Chief Baron of the Exchequer (Lord Abinger), Lord Campbell, Mr. Baron Parke, the Vice-Chancellor Knight Burce, and the Right Hon. Dr. Lushington.

afternoon, called on John Chaffey at the School House, and requested him to put his name to the paper, under those of Hopkins and Eaton, which he accordingly did; that the said paper was again so folded or turned down, as to conceal the writing on the concluding part thereof, but neither Hopkins nor Eaton were present when this third person signed.

The second article pleaded the handwriting.

The depositions of the subscribing witnesses were taken, and they were also examined upon Interrogatories. Hopkins, in his deposition respecting the signing of the paper by the deceased, stated that when he and the other witness, Eaton, went into the room, "The deceased was standing at a table on which was a little desk, his back to us, directly opposite the door at which we entered. He was doing something to a paper which was before him, for I could see a portion of it. I think he was folding it. It was at that table and desk that he did all his writings, as far as I [268] knew; there he used to be sitting, for it was high enough for that, and no more. But at the time of which I am speaking, he stood leaning forward. I am sure he was doing something to the paper before him; folding it I think. I could not swear that he was not writing; but I think if he was writing (when we went in) I should have seen and remembered his putting the pen into the little glass inkstand, in which it was when I saw it." He then deposed to the circumstances attending the signing of the paper by himself and Eaton, as pleaded in the allegation. To the interrogatory put to him, whether the deceased made use of a pen between the time he (the witness) went to him in his study, and that of his subscribing his name, he said, "I cannot swear that the deceased did write anything at all in my presence on the occasion deposed of, between the time when I so went to him in his study and of my subscribing my name as I have deposed. If he did write anything, I do not know why it might not have been as well filling up the date as signing his name."

The witness Eaton in his deposition stated, "We went into Mr. Masterman's house the back way, put down our hats on the kitchen table, and went on to his study door at once, because he had wished us to come as soon as possible. The door of that room was open: Mr. Masterman was standing at his writing-desk right facing the doorway, so he had his back to us as we entered. The writing-desk itself was, I should say, a foot and a half long, and about fourteen inches wide, the length being from right to left or left to right, and the desk itself stood on a table up against the wall: I had often seen him writing at that desk in that place. He commonly sat to write; he kept [269] but one chair in the room, and in it he used to sit at his desk when I have seen him writing. He was a tall man, and had to stoop if he stood to do anything at that desk. When I went into the room I saw nothing but his back; I could not tell what was before him on the desk, if anything. Apparently to me, he was leaning over the desk doing something to, or else looking at, what was on it; and that it was a paper that was on it was shown immediately from what followed. We had but just entered the room, when Mr. Masterman, turning half-round, said, 'Well, Mr. Hopkins, you are come.' My father-in-law said, 'Yes.' 'Well,' he said, 'I want you and Henry to sign this paper for me.' 'Certainly, sir,' we said. Mr. Masterman then stood a little aside to allow us one at a time to come to the table, and holding a folded paper so covered that there was no telling whether there was anything on it or not; or what was on it, I should say, for doubtless there was something on it, or he would not be hiding it as he did. He pointed to my father-in-law, where he should write his name, which he did; and then the same with me. It was close under where the upper part of the paper folded down upon it that we had to sign our names as we did. Mr. Masterman never said what it was we were signing."

To the interrogatory respecting the execution of the paper by the deceased, the witness said, "I could not say whether he (the deceased) was writing or not, from his manner. The time was very short, and I do not know how I can give a truer account of what was done than as I have deposed. The paper in question was not sealed in my presence or delivered, unless what I have deposed to was delivery. It does seem [270] to me as likely that the paper in question should not be signed, as that it was not sealed in my presence."

The learned Judge of the Prerogative Court (Sir Herbert Jenner Fust,) (reported 3 Curteis, 160) by his decree, pronounced against the validity of the testamentary

paper, being of opinion, under the circumstances of the case, that the signature was not acknowledged, either expressly or virtually, within the meaning of the Act of Parliament, in the presence of two witnesses present at the same time.

Against this decision the present appeal was brought. The Appellant relying upon the following reasons as the grounds of appeal:—

First. That, under all the circumstances of the case, it was to be presumed that the Will was signed by the testator in the presence of two witnesses. And,

Secondly. That the testator virtually acknowledged his signature in the presence of two witnesses.

For the Respondent it was contended that the paper was not executed pursuant to the requirements of the 1st Vic., chap. 26, sec. 9, and was therefore invalid.

(June 24, 1843.)* The appeal was argued in the first instance by

Mr. Wigram, Q.C., and Dr. R. Phillimore, for the Appellant, and Dr. Addams and Mr. Cleasby for the Respondent.

Their lordships afterwards directed the case to be re-argued by one Counsel on each side. Accordingly,

[271] Mr. Wigram, Q.C., argued the case on the part of the Appellant, and Dr. Addams was heard for the Respondent.

The following authorities were referred to in the course of the argument: upon the question of acknowledgment under the Statute of Frauds:—*White v. The British Museum* (6 Bing. 310), *Peate v. Ogley* (Comyns, Rep. 196); and upon the question raised, namely, the presumption that the Will was signed by the deceased in the presence of witnesses, *M^cQueen v. Farquhar* (11 Ves. 467), *Wright v. Wakeford* (17 Ves. 454), *Talbot v. Hodson* (7 Taunt. 251), *Bond v. Seauell* (Burr. 1773), *Hands v. James* (Comyns, 531), *Croft v. Paulet* (2 Stra. 1109), *Shires v. Glascock* (Salk. 688), *Newton v. Clarke* (2 Curt. 320), *Blake v. Knight* (3 Curt. 547).

The Lord Chancellor [Lord Lyndhurst].—In this case we do not think it necessary to decide the question as to whether or not the instrument was signed before the witnesses were called in; but, assuming that it was signed by deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator. We are all of opinion that the instrument was not signed in the presence of the witnesses. The cases which have been referred to under the old law, we think do not apply. We affirm the sentence of the Court below, and give costs, both here and below, out of the estate.

[Mews' Dig. tit. WILL; IV. EXECUTION, a. 2. S.C. below, 3 Curt. 160. Adopted in *Pearson v. Pearson*, 1871, 2 P. and D. 454; *Fischer v. Popham*, 1875, 3 P. and D. 249; and *Daintree and Butcher v. Fasulo*, 1888, 13 P.D. 70, 103; and see *Pascoe v. Smart*, 1901, 17 T. L. R. 595. See also *Cooper v. Bockett*, 1844-46, 4 Moo. P.C. 432.]

[272] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

WILLIAM BATCHELOR BROWNLOW and Others, *Appellants*; GEORGE GARSON, and Others,—*Respondents* † [July 3, 1843].

Appeal from the High Court of Admiralty not prosecuted; cause remitted with costs.

This was originally a cause of damage promoted by the Respondents, owners of

* Present: The Lord President (Lord Wharnccliffe), Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington.

† Present: The Lord President (Lord Wharnccliffe), Lord Brougham, Mr. Baron Parke, and Mr. Justice Erskine.

the ship and cargo, and the master, officers, and crew, against the Appellants, the owners of the steam vessel *Gazelle*.

The cause was heard on the 11th of December 1842, before the Judge of the Admiralty Court, who pronounced for the damage, and condemned the owners of the *Gazelle* and the Bail in costs.

An appeal having been asserted, and the usual proceedings taken in this Court, the cause was assigned for hearing on the 1st of June 1843.

The Proctor for the Appellants having, however, exhibited a proxy, and declared his parties, proceeded no further in the appeal.

Dr. Phillimore—Moved their lordships to remit the cause, and condemn the Appellants in costs,

Which was ordered accordingly.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*, n. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict. c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

[273] ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

In the matter of the Petition of MILES BARTON, and Others, against BARRON FIELD.

The Ship WINWICK [Feb. 14, 1842,* and Nov. 27 and 28, 1843 †].

This Court will not visit a Judge of an inferior Court with the penal consequences of an attachment for contumacy and contempt, for disregarding an Inhibition unless such disobedience is wilful, and proceeded from improper motives [4 Moo. P.C. 283].

An Inhibition to the Judge of the Vice-Admiralty Court at Gibraltar, inhibiting him from doing anything prejudicial to the parties Appellant pending an appeal, is not to be disregarded at his discretion, although he may consider that he is acting for the benefit of all parties.

Decree for a sale of a vessel condemned, after appeal asserted and Inhibition served personally on the Judge, held not such a contempt, under the circumstances of the case, as to entitle the owners to an attachment against the Judge for costs and damages incurred thereby.

This was an application for an attachment against Barron Field, Esquire, the late Judge of the Vice-Admiralty Court at Gibraltar, for contumacy and contempt, in decreeing the sale of the ship *Winwick*, her tackle, etc., after an Inhibition had issued under the Seal of the Judicial Committee of the Privy Council, inhibiting him, pending the appeal, from doing or attempting anything to the prejudice of the parties Appellants.‡

[274] By an Order in Council bearing date the 13th of July 1840 (*ante* [Moo. P.C.], vol. ii. p. 34), reversing the sentence of the Court below, it was, among other things, ordered that the Appellants (the owners of the ship *Winwick*) “be at liberty

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

† Present: Lord Cottingham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

‡ The proceedings which gave rise to this application are reported *ante*, vol. ii. [Moo. P.C.] p. 19, on the appeal from the sentence of the Vice-Admiralty Court of Gibraltar.

to proceed as they may be advised, against any person or persons whom it may concern, for further compensation for any loss they may have sustained, or expenses they may have incurred, by reason of the sale of the said ship, under the authority of the Court below, after service of the Inhibition under seal of this Court."

On the 14th of May 1841,* Miles Barton presented a petition on behalf of himself and the other owners of the ship *Winwick*, praying their lordships to decree a monition against the Judge of the Vice-Admiralty Court at Gibraltar, to appear and show cause why he should not pay the costs and damages incurred by the illegal sale of the ship. No affidavits were filed in support of this application to show that any damage had been incurred by the sale of the ship.

Dr. Nicholl for the motion—Relied on the Rules and Regulations regarding Appeals from the Vice-Admiralty Courts abroad, made in pursuance of 2 Will. IV., c. 51,† and cited the following [275] authorities: The case of the *Marshalsea* (10 Coke Rep. 76 a.); Dict. per Lord Stowell (1 Add. 21); The Ship *William* (6 Rob. Adm. Rep. 310); *The Dove* (18th June 1796); *The Nordiska Wanskapen* (27th March 1809. Note.—In the cases of the *Dove* and the *Nordiska Wanskapen*, which were produced by the Registrar of the Court, a monition was issued against the Judge, Registrar, and Marshal of the Vice-Admiralty Court, to bring in the sums they had respectively received as costs, and which had been disallowed by subsequent decree and taxation).

The Queen's Advocate (Sir John Dodson) *contra*.

Mr. Baron Parke.—There ought to have been an affidavit as to damages. The application ought to have been for a rule to show [276] cause why an attachment should not issue, and the present petition must be dismissed. Their lordships, however, think that leave should be given to amend the petition, and to make a fresh application.

On the 14th of February 1842,‡ a further petition was presented by Miles Barton, and the other owners of the ship, praying for a monition against the Worshipful Barron Field, the Judge of the Admiralty Court of Gibraltar, to appear and show

* Present: Mr. Baron Parke, Sir Herbert Jenner, the Right Hon. Dr. Lushington, and Mr. Justice Littledale.

† These Rules being printed only for the purpose of distribution to the Vice-Admiralty Courts, and not generally accessible, are here inserted.

"All appeals from decrees of the Vice-Admiralty Courts are to be asserted by a party in the suit, within fifteen days after the date of the decree, which is to be done by the Proctor declaring the same in Court, and a minute thereof is to be entered in the Assignment Book; and the party must also give bail within fifteen days from the assertion of the appeal, in the sum of £100 sterling, to answer the costs of such appeal.

"In all cases however in which an appeal is asserted, except respecting slaves, the Judge may proceed to carry his sentence into execution, provided the party in whose favour the decree has been made give bail to abide the event of the appeal, by two sureties, in the amount of the value of the property or subject in dispute, together with the further sum of £100 sterling, to answer costs in the event of the same being awarded by the Superior Court.

"The party appealing having complied with these Regulations, is then to cause the Judge and Registrar to be served with an inhibition from the High Court of Admiralty, restraining them from further proceeding in the cause, and also with a monition to transmit the process.

"This process will consist of a fair copy of the proceedings under seal of the Vice-Admiralty Court, to be made and signed by the Registrar, at the expense of the party ordering the same, which is to be transmitted to the Superior Court, pursuant to the monition.

"The proceeds, if in Court or in the hands of any individual, must, on a special monition for that purpose being served, be remitted to the Registrar of the High Court of Admiralty, or Court of Appeal."

‡ Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

cause why he should not be attached for contumacy and contempt for decreeing the sale of the ship *Winwick*, after having been personally served with the Inhibition of the Judicial Committee of the Privy Council, inhibiting him from doing any act in the said cause. This motion was supported by the affidavits of Robert Cotesworth, and others, from which it appeared that the alleged damages, occasioned by the sale of the ship, amounted to about £1000.

Mr. S. Martin in support of the Petition.

The Queen's Advocate for Mr. Barron Field, the Judge of the Vice-Admiralty Court of Gibraltar.

Lord Campbell.—The question is, whether an attachment is to issue against the Judge,—whether the Judge of the Vice-Admiralty Court sold the vessel to the prejudice of the party; the sale being in violation of the order of this Court. Their Lordships think there is good ground for granting a rule to show cause why he [277] should not be attached for decreeing sale after the Inhibition. The Judge must deliver his Act on Petition, the first session of next term.

The Act on Petition was afterwards brought in on behalf of Mr. Barron Field, the assenter of an appeal; and the proceedings therein, after setting forth the circumstances of the condemnation of the vessel, proceeded to state that on the 8th of February 1839, an affidavit of Thomas Smith of Gibraltar, a ship-builder, was filed, as to the perishable state and condition of the said vessel, and wherein he deposed that he had examined the said vessel, and was of opinion, that since he had appraised the said vessel in the month of January 1838, she had deteriorated in value 2000 dollars, the natural effect of the lapse of time, and exposure to the weather; and that he was of opinion that a further exposure to the weather, during the then ensuing summer, would very considerably decrease her value, the more so as she was not then in so good a condition to resist the effects of the weather as when he last examined her. That a motion was thereupon made in the said Vice-Admiralty Court, on the part of the Crown and seisor, to decree the vessel to be sold; whereupon the said Barron Field, the Judge aforesaid, and acting as such, having first heard Advocates and Proctors on both sides, did (for the reasons contained in the said affidavit, and in consideration of the constant expense of two ship-keepers to preserve the said vessel, in addition to the incidental expense of occasional salvage assistance which had been incurred, and which were likely to recur with the then approaching equinoctial gales, which renders the port of Gibraltar very dangerous in certain winds,) decree a com-[278]-mission to issue for the sale of the said vessel. That, in pronouncing such decree, the said Barron Field never contemplated or intended any act in contravention of the Inhibition so as aforesaid served upon him, and considered (as the fact was) that he was not doing or attempting anything to the prejudice of the parties Appellant, or their said cause of appeal, but that in directing the vessel to be sold, he was conferring a benefit on whomsoever might thereafter be entitled to the proceeds arising from the sale thereof. The Act then set forth the particulars of the sale, and the circumstance of one of the owners' brothers, a partner in a house at Liverpool, being the purchaser, as showing collusion between the parties, and the subsequent proceedings taken in this Court, and insisted that the said Barron Field, the Judge of the said Court, in decreeing the sale of the vessel, acted with perfect good faith both towards the owners and seizors of the vessel, having been called upon to exercise his judicial functions in a case of necessity and emergency, requiring an immediate remedy to protect all parties in the cause from further loss; and he humbly submitted that, by the tenor of the Inhibition served upon him, he was not precluded from exercising in such a case as this, a fair and equitable discretion when judicially applied to by either of the parties in the cause.

The owners replied to this Act on Petition, traversing and denying the facts and inferences therein drawn, and denying collusion in the purchase of the vessel, and praying and insisting that the Judge might be condemned in all costs and damages consequent on such sale, the amount thereof to be referred to the Registrar and Merchants, to ascertain and report. Both parties [279] filed affidavits in support of the various allegations and statements contained in the Act and Reply.

The Queen's Advocate, (Sir John Dodson,) Sir Thomas Wilde, and Mr. Edmund F. Moore, for Mr. Barron Field.

The sale of the vessel was warranted and requisite under the circumstances of

the case, and the decree for the same was not an act in contempt of the Inhibition of this Court. It was never intended by this Court that the Judge of the Court below should be proceeded against by penal process for the exercise of his discretion. Even if he were, under the circumstances, liable to such a proceeding, he is not solely liable, and ought not to be proceeded against alone; the party promoting the office of the Judge is the responsible party in the suit, and if any one is liable for the supposed damage occasioned by the sale of the vessel, he is, and ought at least to have been joined with the Judge. *Clarke's Praxis in Curis Ecclesiasticis*, tit. 265. If, under such circumstances, a Judge was personally liable, he could never safely try a cause of forfeiture without taking a bond of indemnity from the party promoting his office: that is the practice in the United States. *Ross v. Rittenhouse* (2 Dallas's Rep. 160). No such practice prevails here. In the cases of the *Dora* [1 Add. 21] and the *Nordiska Wanskapen* [4 Moo. P.C. 275], the object was to obtain the proceeds, and the monition was to bring them in. There was no breach of the Inhibition. No contempt of this Court has been committed by the Judge below. The language of the Inhibition is, that the parties inhibited are not to do or attempt anything [280] to the prejudice of the Appellants: here a positive benefit has been done. It was shown that the ship had deteriorated in value, had incurred salvage expenses, was becoming every day less valuable, and was likely at the approaching equinoctial gales to be entirely destroyed. Was the Judge of the Vice-Admiralty Court at Gibraltar, in whose custody the vessel was, to direct the parties to apply to this Court for an order for sale, and to wait the return of such order? The mischief anticipated might have happened before a meeting of this Court took place; and who could so properly examine the evidence of the ship's deterioration as the Judge of the Court below?—it was his peculiar duty. The circumstances presented a case of necessity and emergency, and left him no alternative but the exercise of a discretionary authority; for that he is not liable to an attachment. If the sale had been ordered before service of the Inhibition, no question of its propriety could be raised, but the proceeds, the *res*, are secured, and that satisfies the intent of the Inhibition. The offence committed by the Judge, if any, is an *Attentat*, but there are no articles exhibited against Mr. Barron Field for an *Attentat*, and they could not be supported, since they must charge, and the proof must be, that the Judge's act was wrongfully innovated or attempted pending the appeal. Lancelott, 2 pars, c. 12, lim. 6, n. 27, 28; and see 1 Add. Rep. 22, 23. The proceeding by attachment is wholly irregular, and, in such a case as this, unheard of. The affidavits of loss occasioned to the owners by reason of the sale at Gibraltar are not satisfactory; the evidence amounts to opinion only, is contradicted, and there is strong ground to presume collusion between the owners and purchasers of the vessel. The Prize Acts, 45 Geo. III., [281] c. 72, s. 52, expressly provide for a sale being made, notwithstanding an appeal is pending: and accordingly it has been held, that if a suit be commenced between a captor of a prize and a claimant, and a decree obtained either for or against the claimant, on giving security such sentence or decree shall be put in execution notwithstanding any appeal. *Thompson v. Smith* (1 Sid. 320: and see 2 Keble, 155).

Mr. Martin, Q.C., and Dr. Bayford, for the Owners.—The proceeding is in strict conformity with the direction of this Court. By the original judgment, which was a reversal of the decision of the Court below, the owners were to be at liberty to proceed as they might be advised against any person or persons whom it might concern, for further compensation for any loss sustained, or expenses they may have incurred, by reason of the sale of the ship under the authority of the Court below, after service of the Inhibition under seal of this Court. It is clear that this Court thought the Judge of the Vice Admiralty Court personally liable for such loss and damage, and accordingly a monition was applied for against the Judge, to appear and show cause why he should not pay the costs and damage incurred. On that application this Court required an affidavit of damages: this we supplied, and we then asked for a rule that Mr. Barron Field might show cause why he should not be attached for contumacy and contempt for decreeing the sale: this Court granted that application, and we come here now to answer the Act on Petition delivered in by the Judge, and to pray that the rule may be made absolute. The effect of the service of an Inhibition on the Judge is the same [282] as the service of a notice of the allowance of a Writ of Error. The Judge's hands are from that instant tied; he is, as far as the cause in question is

concerned, *functus officio*. *Chichester v. Donegal* (1 Add. Rep. 5, 21). Inhibitions are borrowed from the Canon Law, they were not known to the Civil Law, and arose out of the distinction introduced into the Canon Law, of allowing an appeal from a grievance,—no such appeal was known to the Civil Law. The Inhibition is part of the appeal, and the breach of it is a grievance of which we complain: Corp. Jur. Civ. Dig. 29, tit. 7; Cod. B. VIII. t. 62, l. 3; Ayliff's Paragon, p. 71, 73. If this is an *Attentat*, the wrongfulness of the act is sufficiently pleaded in our reply to the articles exhibited. *Lancellotti de Attentatis*, 359. In the Prize Acts, special provision is made for allowing a sale pending an appeal; such exception proves the general rule.

The Right Hon. Dr. Lushington.—Several questions of considerable difficulty and importance have been discussed in the course of the argument in this case, but their Lordships are of opinion, for the reason which I am about to state, that it is wholly unnecessary for them to enter into the consideration of those questions, or to give any opinion upon them.

The point upon which they intend to decide the case is as follows:—

This is an application, charging the Judge of the Vice-Admiralty Court at Gibraltar with having committed a contempt, in directing a decree of sale to pass, of the vessel *Winwick*, after he had been served with an Inhibition issuing under the authority of this Court.

[283] Now we do not offer any opinion upon the validity of the Inhibition: but, assuming for the present, that the Inhibition was fully justified in law, in pursuance of the Act of Parliament, and the practice of this Court, the question which arises is this—whether the Judge of the Vice-Admiralty Court, in decreeing a sale, was wilfully guilty of any disobedience of the appellate authority.

We are of opinion that it is not sufficient, for the purpose of visiting him with the penal consequences which it has been endeavoured to attach upon him, that he may have committed an error of judgment. We think it must be proved to our satisfaction, not only that there was error, but that, in addition to there being error, it was wilful error, and proceeded from corrupt or improper motives.

Now having considered the whole of these proceedings, we have come to the conclusion that no such culpability attaches to this Judge, because we think he may have acted according to the best of his judgment under all the circumstances of the case; he had to form an opinion as to the true effect and operation of the Inhibition: that was evidently to him a difficult question to deal with; and it appearing to their lordships that there was no wilful culpability, we cannot visit him with the consequences which the owners seek to attach upon him by this application.

The determination of their lordships, therefore, is to refuse the application, but without costs.

[Mews' Dig. tit. CONTEMPT OF COURT, 2. PARTICULAR CONTEMNORS. S.C. 8 Jur.

113. See note to *Barton v. Reg*, 1840, 2 Moo. P.C. at p. 34. As to appeals to Judicial Committee from Colonial Courts of Admiralty, see Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict. c. 27) and O. in C. of Dec. 11, 1865 (Stat. R. and O., Rev. IV. 403). From the rules of practice in Colonial Courts of Admiralty, see O. in C. of 23 Aug. 1883 (Stat. R. and O., Rev. I. 631). These rules have however been superseded in a number of Courts (for list up to Dec. 31, 1899, see Pulling's *Index to Stat. R. and O.*, 3rd ed., 1899, p. 106) by rules made by the rule-making authorities of such Courts and confirmed by O. in C. under s. 7 of the Colonial Courts of Admiralty Act, 1890.]

[284] ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE.

JAMES LOGAN AND JOHN MOORE,—*Appellants*; LIEUT. GODOLPHIN JAMES BURSLEM, the Officers and Crew of H. M. Ship *VIPER*, and the *QUEEN*,—*Respondents* * [Nov. 28 and 29, 1842].

The Ship *GUIANA*.

The 5th Geo. IV., c. 113, sec. 29, enacts that no Appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty (with the exception of the Cape of Good Hope and eastward thereof) unless an Inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. By the 3rd and 4th Wm. IV., c. 41, the appellate jurisdiction given by the previous Statute to the High Court of Admiralty was vested in the Judicial Committee of the Privy Council; but which Court, from its constitution, had no jurisdiction over the Appeal until the Petition of Appeal was referred to them by the Crown.

The Appellant presented, on the 16th of July 1841, a petition of Appeal from a decree of condemnation pronounced on the 12th of August 1840, by the Vice-Admiralty Court of Sierra Leone, against a vessel engaged in the Slave Trade, contrary to the provisions of the 5th Geo. IV., c. 113. The Appeal was not referred by Her Majesty to the Judicial Committee until the 11th of August 1841, one day before the year expired, and notice of such reference was not given by the Clerk in Council until the 13th of the same month, one day after the twelve months had expired, when the Appellant applied for and obtained an Inhibition. On protest against the Appeal; Held,—

1st. That the 5th Geo. IV., c. 113, was incorporated in the 3rd and 4th Wm. IV., c. 41 [4 Moo. P.C. 294].

2nd. That the Appellant having failed to procure, in compliance with the 29th section of the 5th Geo. IV., c. 113, an Inhibition to issue within twelve months from the sentence, was barred his Appeal; the provisions of that section being imperative, and leaving no discretion in the Court to relax the operation of the Act [4 Moo. P.C. 295].

This was originally a cause instituted in the Vice-Admiralty Court at Sierra Leone, on behalf of Lieutenant G. J. Burslem, the Commander, and the Officers and Crew of Her Majesty's schooner of war *Viper*, and our Sovereign Lady the Queen, against the said brig [285] or vessel *Guiana*, seized by Her Majesty's ship of war on the 26th of March 1840, together with her tackle, apparel, furniture, and the goods, wares, and merchandize laden on board her, for forfeiture and condemnation and penalties; by reason of her being at the time of such seizure engaged in the Slave Trade, contrary to the provisions of Stat. 5 Geo. IV., c. 113.

Proceedings having been taken against the said vessel on the 12th of August 1840, the Acting Judge and Commissary, by his introductory decree, pronounced the said brig *Guiana* to have been at the time of the seizure thereof engaged in the Slave Trade, contrary to the provisions of the above Statute, and as such, subject and liable to forfeiture and condemnation; and condemned the said brig, her tackle, etc., as forfeited: and pronounced that the shippers of the goods, wares and merchandize laden on board the said brig, were liable to the penalty due by law, that is to say, double the value of the said goods, wares, and merchandize, and that the said goods, wares, and merchandize, should be held in deposit until the said penalty was paid: and on the 19th day of the same month, the said Acting Judge decreed; that the cargo should be sold, evidence having been given that the same was deteriorating in value.

In the month of October 1840, information reached the owners of the vessel that she had been condemned; but in consequence of delays in the transmission of the process, copies of the proceedings did not reach this country until the 20th of July 1841.

* Present: Lord Campbell, Sir Herbert Jenner Fust, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

In the meantime, and on the 30th of June 1841, an [286] Appeal from the decree or sentence was interposed before a notary and witness by the Appellants' Proctor, on behalf of James Logan and John Moore, the owners of the said brig *Guiana*: as also on behalf of Manuel Francisco Topez (a Brazilian subject), the owner of the cargo.

On the 16th of July 1841, the Appeal, together with the usual petition to Her Majesty in Council, praying that the same might be referred to the Judicial Committee, was lodged in the registry of the High Court of Admiralty. This petition was laid before the Queen in Council on the 11th of August, one day before the expiration of the year from the date of the sentence or decree of condemnation, and referred by Her Majesty on the same day to the Judicial Committee.

Notice of such reference was not, however, given to the Appellants' Proctor before the 13th, the day on which the Registrar of the Court of Admiralty received intimation thereof.

In the meantime, and on several occasions subsequent to the 16th of July, when the Appeal and Petition had been lodged, the Appellants' Proctor attended in the registry of the Court of Admiralty and Appeals, and requested the Registrar to attend before some Surrogate to the Judicial Committee of the Privy Council, in order that the usual Inhibition might be decreed; but the Registrar declined to do so, on the ground that, until the Appeal and Petition had been answered, it was incompetent for any Surrogate to decree an Inhibition, or to do any act in furtherance of the Appeal.

In consequence of this refusal on the part of the Registrar, and no notice having been given of the reference by Her Majesty in Council until the 13th of August, the Inhibition could not be decreed until more than twelve months had elapsed from the date of the Decree.

See now 7 and 8 Vict. c. 69 s. 9. An order in council is annually issued referring to the Judicial Committee all appeals on which petitions may be presented to H. M. in Council during the twelve months next after the date of such order.]

[287] By the 29th section of the 5th Geo. IV., c. 113, it is provided, "that no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced: except when such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal."

By 3 and 4 Wm. IV., c. 41, s. 2, "all appeals or applications in Prize Suits, and in all other suits or proceedings in the Court of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America, and other His Majesty's dominions, or elsewhere abroad, which may now, by virtue of any Law, Statute, Commission, or Usage, be made to the High Court of Admiralty in England, or to the Lords Commissioner in Prize Cases, shall be made to His Majesty in Council, and not to the said High Court of Admiralty in England, or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time, wherein such appeal might, if this Act had not been passed, have been made to the said High Court of Admiralty or to the Lords Commissioners in Prize Cases respectively; and all Laws or Statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to His Majesty in Council."

By sec. 20, it is enacted, "That all appeals to His Majesty in Council shall be made within such times, [288] respectively, within which the same may now be made, where such time shall be fixed by any law or usage: and where no such law or usage shall exist, then within such time as shall be ordered by His Majesty in Council: and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for His Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to His Majesty in Council.

By the Orders in Council of the 9th of December 1833, made under the general

power of this Act by His Majesty in Council, for the more convenient conducting of appeals and applications in Prize Suits, and in all other suits or proceedings in the Court of Admiralty or Vice-Admiralty, it was ordered and directed, "That all such appeals, applications, suits, or complaints in the nature of appeals as aforesaid, shall be conducted in the same manner and form, and by the same persons and officers, as the same might have been conducted if such appeals, applications, suits, or complaints in the nature of appeals, had been made as heretofore to the said High Court of Admiralty, the said High Court of Delegates, or to the said Lords Commissioners in Prize Cases respectively."

And it was further ordered and directed, "That it shall and may be lawful for any four or more of the members of the said Judicial Committee of His Majesty's Privy Council to appoint such of the Advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty (as now are, or hereafter shall be, duly and lawfully admitted Surrogates of such Court respectively), to be Surrogates of the said Judicial Committee of His Majesty's [289] Privy Council, and that it shall and may be lawful for such Surrogates or any one or more of them who shall be so appointed as aforesaid, in all such appeals, applications, suits, or complaints in the nature of appeals as aforesaid, to administer such oaths or affirmations, and to do and perform all such other acts, matters, and things, and to make all such orders for the forwarding the said appeals, applications, and acts, or complaints in the nature of appeals, in their usual stages, preparatory to the final hearing thereof by the said Judicial Committee, as shall be found necessary, or have heretofore been done and performed or made by the Surrogate of the said Arches Court of Canterbury, and of the said High Court of Admiralty, in cases of appeal, applications, suits, or complaints in the nature of appeal, made and presented to such Court respectively, or by the Surrogates of the said Lords Commissioners in Prize Cases in appeals, applications, suits, or complaints in the nature of appeal, made and presented before the said Lords Commissioners."

And it was further ordered, "That upon any appeal, application, suit, or complaint in the nature of appeal, as aforesaid, being entered in the registry of the High Court of Admiralty and Appeals, a petition by or on behalf of the Appellants shall forthwith be presented to His Majesty in Council, praying that the said petition and appeal may be referred to the Judicial Committee of the Privy Council, to hear the same, and to report their opinion thereupon to His Majesty in Council, and upon such reference having been made, notice thereof shall be forthwith transferred to the registry aforesaid" (see these Orders, 2 Knapp P.C. Cases, xx.).

[290] On the 3rd of September 1841, the usual Inhibition, Citation, and Monition, were decreed, to which the Respondents appeared under protest on the 21st of April 1842, and a Proctor was assigned to bring in his Act thereon.

Accordingly, on the 27th of April, the Act on Protest was brought in by the Respondents' Proctor, setting forth the circumstances of the seizure and condemnation of the vessel for breach of the Act, 5 Geo. IV., c. 113, and the clause therein limiting the time of appeal, and submitting that, inasmuch as the sentence of condemnation was a sentence of a Court of Vice-Admiralty, neither at nor eastward of the Cape of Good Hope, and the Inhibition served was not decreed within twelve months of the sentence; by the express words of the Act, no appeal could be prosecuted therefrom.

To this the Proctor on behalf of the Appellants replied, admitting the seizure as set forth in the Act on Protest of the Respondents, and the circumstances and date of the sentence of condemnation, but submitted that the Inhibition was applied for twenty-six days within the period prescribed by the 29th section of the 5th Geo. IV., c. 113, and alleged that he was prevented from obtaining a decree for the issue of the said Inhibition within the time limited by the Statute, by invincible necessity, and by the impossibility of being able to compel Her Majesty to convene a meeting of Her Most Honourable Privy Council, inasmuch as from the altered state of the law subsequent to the passing of the 5th Geo. IV., c. 113, it is now only after a reference emanating from Her Majesty in Council, to the Judicial Committee of the said Privy Council, that any Inhibition could be decreed in any cause of appeal from any sentence of a Vice-Admiralty Court; and he [291] alleged that at the time of the passing of the said Statute, 5 Geo. IV., c. 113, the High Court of Admiralty was the appellate jurisdiction from all Vice-Admiralty Courts; and

it was competent for any Proctor exercent in the High Court of Admiralty, to attend on any day prior to the expiration of the twelve months from the date of the decree intended to be appealed from, before one of the Advocates of the Civil Law, who are Surrogates of the Judge of the High Court of Admiralty, to pray the usual Inhibition, which would then have been decreed and issued as of course; but that when the appellate jurisdiction of the High Court of Admiralty became transferred by 2 and 3 Wm. IV., c. 91, and 3 and 4 Wm. IV., c. 41, to Her Majesty in Council, it became essential, in the first instance, to petition Her Majesty in Council to refer the appeal to the Judicial Committee of the said Privy Council; and it has been and is still maintained by the Registrar of the High Court of Admiralty and of the Appeals, that until such petition and appeal are referred to the Judicial Committee as aforesaid, no advocate has power, as Surrogate of the Judicial Committee, or otherwise, to decree an Inhibition, or to do any act in any cause of appeal so referred as aforesaid; and that it is recited in all such Inhibitions, that the appeal and Inhibition have been so referred; and after setting forth the particulars of his requesting the Registrar to attend with him before a Surrogate, in order to obtain the prohibition, and his refusal, he alleged "that he had complied with the provisions of the said Statute of 5 Geo. IV., c. 113, to the utmost of his power, and had advanced *ex-pes* to an exact compliance with them, and that he was only prevented by imperious necessity, and a delay originating in the highest quarter, which he could not control, from [292] fulfilling them to their technical and literal extent; and he humbly submitted that even in the administration of the most unbending laws, no one is held to the fulfilment of an impossibility."

Dr. Addams and Mr. Butt, for the Respondents,* relied, in support of the Protest against the right of appeal, on the 29th section of the 5th Geo. IV., c. 113, and insisted that the Inhibition not having been applied for and decreed within twelve months from the time when the decree or sentence of condemnation was pronounced, the appeal interposed could not be prosecuted, and must be dismissed with costs.

Mr. Burge, Q.C., and Dr. Phillimore, for the Appellants, contended that the application for the Inhibition within the time limited by the Statute, though the same was not decreed, was, under the circumstances, and in consequence of the provisions of the Statutes 2 and 3 Wm. IV., c. 92, and 3 and 4 Wm. IV., c. 41, a sufficient requisition with the terms of the 29th sec. of 5 Geo. IV., c. 113. They insisted also that neither the seizor or the Crown could be heard upon the Protest. They cited *Day v. Savage* (Hob. 87), the *City of London v. Wood* (12 Mod. 669; Plow. Com. 176), *Dr. Bonham's Case* (8 Coke Rep. 107), *Muter v. Chipchase* (1 Moore P.C. Cases, 1).

[293] Lord Campbell (29th Nov. 1842).—This cause originated in the Vice-Admiralty Court of Sierra Leone. It was a proceeding for the condemnation of the ship *Guiana*, by reason of an alleged infraction of the Slave Trade Act. On the 12th of August 1840, a decree was made by that Court, pronouncing that there had been such infraction, and decreeing that the ship, her tackle, apparel and furniture were forfeited; and that certain penalties were incurred by the owners of the cargo. Against that decree there has been an appeal, which is now before us, by the owners of the ship. Information of this decree or sentence was received by the owners of the ship in the month of October 1840, and they took no judicial step until the 16th of July 1841, when they lodged an appeal in the Admiralty Court, and a Petition under the Privy Council Act, praying that it might be referred to the Judicial Committee. There was no answer received to that petition until the 13th of August, one day after the year expired, the answer being dated the 11th of August, the day before it expired. On the 3rd of September 1841, an Inhibition was decreed and issued; but between the 16th of July and the 11th of August there had been several applications made for the purpose of obtaining

* The Respondents' Counsel, being for the Protest, claimed and were allowed to begin, according to the practice of the Court of Admiralty. Their Lordships, however, remarked that such allowance was not to be drawn into a precedent, as it was against the practice uniformly observed in this Court.

the Inhibition. The question is, whether, under these circumstances, this Appeal can be prosecuted.

It is contended on the part of the seizors of the ship, that the Appeal cannot be prosecuted. We may at once dispose of one objection that is made on the part of the Appellants, namely, that the seizors or the Crown cannot be heard. Their Lordships are clearly of opinion, that, according to the principle of decided [294] cases, the seizors have a right to be heard, and to make any objection which the law affords them, to the Appeal being prosecuted. The question then is, whether the claimants of the ship have a right to prosecute this Appeal; and that depends upon the construction of two Acts of Parliament, and of certain Orders in Council. The first Act of Parliament is the 5th of Geo. IV., c. 113, s. 29, which enacts, "that no Appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except, etc." And so the law stood until the Act was passed constituting this tribunal, the Judicial Committee of the Privy Council.

By the 2nd section of the 3rd and 4th Wm. IV., c. 41, it is enacted [the learned Judge here read the section (*Ante*, [4 Moo. P.C.] p. 287)]. So that the 5th of Geo. IV., c. 113, is to be considered as incorporated in the 3rd and 4th Wm. IV., c. 41. Then, according to the power vested in the Privy Council, there are certain Orders made to regulate the mode in which Appeals shall be prosecuted, whereby, in such Appeals as this, it is ordered that there shall be a petition lodged in the place where the Court of Admiralty is held, and a petition to the Sovereign, praying that the case may be referred to the Judicial Committee. Now upon these Acts of Parliament, and Orders, the question arises whether, there having been no Inhibition decreed until the 3rd of September 1841, the Appeal can be prosecuted.

It is first said that this is a case in which we have a discretion—that on account of the great hardship [295] arising to the parties, if that construction is to be put upon the Acts of Parliament, there is a discretion vested in the Judicial Committee, to relax the operation of this Act of Parliament, the 5th Geo. IV., c. 113. In this particular instance, their lordships are clearly of opinion that they have no such discretion; that they are imperatively bound, by the express words of the Act; that they can only construe them; and that when they have arrived at what they consider a just construction of them, whatever the effect may be, that must take place. Indeed, it was probably with a view to take away that discretion from the Court, and to obviate the numerous applications which formerly were made, that this enactment was introduced into the Act, that in no case shall the appeal be prosecuted, "unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." That took away all discretion: and unless the conditions in every case to which that Act applies have been performed, the Court has no jurisdiction to hear the appeal.

What, then, is the true construction to be put upon this Act of Parliament, coupled with that which follows, the 3rd and 4th of Will. IV., c. 41? Their lordships are of opinion, that unless the Inhibition be both applied for and decreed within twelve months from the time when the decree and sentence was pronounced, the appeal cannot be prosecuted; and their lordships are of opinion, that this is a case to which that enactment does apply, and that the Inhibition must be considered as not obtained until after the expiration of twelve months. Indeed, that is broadly admitted on the part of the Appellants, because that [296] which is stated by their Proctor, in their Act on Protest, is, "that he was prevented from obtaining the said Inhibition within the time limited by the said Statute, by invincible necessity." He admits that he was prevented from obtaining it, and he says it was by invincible necessity; but he admits that the Inhibition was not decreed in this cause till the 3rd of September. Then, if it is necessary that the Inhibition should be decreed on or before the 12th of August 1841, the appeal cannot be prosecuted.

Was it therefore necessary that the Inhibition should be procured on the 12th of August 1841? Such is clearly the literal and grammatical construction of the words, "unless the Inhibition shall be applied for and decreed within twelve months

from the time when such decree or sentence was pronounced." Their Lordships would have been most happy if any construction could have been put upon this Act of Parliament, so as to allow this appeal to be prosecuted, but they have no power to dispense with the enactment of the Legislature.

As to what has been said of an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose, that what the Legislature has enacted is reasonable; and all, therefore, that we can do, is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice and absurdity, another construction possibly might be put upon them, but still it is a question of construction, and there is no power of dispensation from the words used.

There have been several suggestions thrown out, all [297] deserving great consideration, as to how we could construe this section of the Act of Parliament, and still admit the appeal. First, it has been suggested, that instead of "the Inhibition shall be applied for and decreed within twelve months," it might be, "or decreed within twelve months;" but it seems to us, that that construction would be using an unwarrantable liberty with the language which the Legislature has employed; and that, in fact, it would be putting out of the Act of Parliament, entirely, these words, "and decreed within twelve months," because then the same construction would be put upon that enactment as if the words only were "if the Inhibition shall be applied for within twelve months;" because they are not two separate, independent acts, one of which may take place without the other—applying for and obtaining the Inhibition, the Inhibition cannot be obtained unless it is applied for; therefore, if you were to say "or decreed within twelve months," it would be really striking out, which we have no authority to do, the words "and decreed," from the Act of Parliament.

Then, it has been suggested whether you might not use the words, "unless the Inhibition shall be applied for and decreed," where it is possible. But the Legislature has always supposed that it would be a possibility that this should be done; and we think that in putting such a construction on the enactment, we should be interpolating words without any authority whatsoever.

It has been said, that you might refer the application of such a clause to the case where there has been a Court called into existence, which might grant the Inhibition; and that the year should date, not from the decree, but from the time that the Court has been [298] called into existence, which could grant the Inhibition; but then the Act of Parliament is, "unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." Now there is scarcely any case in which there could be a Court capable of granting an Inhibition immediately after the sentence had been pronounced, certainly there are many cases in which no such Court could exist. With regard to what took place before the Judicial Committee Act passed, where there was an appeal from the High Court of Admiralty to the Court of Delegates, it must have been at least some days, or weeks, or months, before there could have been a petition presented to the Crown for a Commission of Delegates, and the Commission executed and accepted by those to whom it was addressed. Then, with reference to an appeal from the Vice-Admiralty Court abroad to the High Court of Admiralty in England, it must have been weeks and months, very often, before there could be an appeal brought from the Vice-Admiralty Court to this part of the world, lodged in the High Court of Admiralty in England, and then, an opportunity occurring, of applying for an Inhibition, and an Inhibition being decreed. It seems to us, therefore, that there are no means, either of omitting words, or of adding words, that will authorise us in putting the construction upon the Statute which is contended for.

Their Lordships regret that the Appellants should be shut out from the opportunity of having their appeal heard; but, however great that hardship may be, that cannot alter the law. It has been said, that hard cases make bad law; and their Lordships must guard against the inclinations that Judges may feel, on the [299] ground that there may be a pressure of the law in any particular case. The Courts must look at general rules, and be governed by them. It gives us less regret, however, in this case, because there was, as it seems, very considerable laches on the part of the Appellants. They heard of the condemnation in the month of October,

and they took no judicial step until the month of July following; and between the 16th of July and the 12th of August, if they had made the usual applications to the officers who superintend these matters, we have no doubt at all that there would have been a reference by the Queen in Council to the Judicial Committee before the year expired. It seems to us, therefore, that they themselves are to blame if there is any hardship. However that may be, their Lordships are of opinion that the Act of Parliament has imposed a condition which has not been complied with, and that, therefore, the appeal cannot be prosecuted. It is not, however, a case for costs. (See next case.)

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, a. On point (i.) as to right to begin (4 Moo. P.C. 292), cf. *Henfrey v. Henfrey*, 1842, 4 Moo. P.C. 29; (ii.) as to appeals to H.M. in Council, see note to *Muter v. Chipchase*, 1836, 1 Moo. P.C. 3, s. 29 of 5 Geo. IV. c. 113, is repealed by the Slave Trade Consolidation Act 1873 (36 and 37 Vict. c. 88).]

[300] ON PROTEST AGAINST AN APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRE LEONE.

MANOEL FRANCISCO LOPEZ, and Others.—*Appellants*; LIEUT. GODOLPHIN JAMES BURSLEM, the Officers and Crew of Her Majesty's Ship VIPER, and the QUEEN,—*Respondents* * [Nov. 28 and 29, 1843].

The Ship GUIANA.

The 5th Geo. IV., c. 113 (the Slave Abolition Act), sec. 29, enacts that no appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty (except in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof), unless an Inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. Held to apply to foreigners as well as British subjects [4 Moo. P.C. 305].

Protest against an appeal sustained; the Appellants (Brazilian subjects), the owners of the cargo on board a vessel seized and condemned under the 5th Geo. IV., c. 113, having failed to procure an Inhibition to issue within twelve months from the date of the condemnation.

The British Parliament have no power to legislate for foreigners out of the dominions and beyond the jurisdiction of the Crown; yet it can by Statute fix the time within which application must be made for redress, to the tribunals of the Empire. This being matter of procedure, becomes the law of the *forum*, by which all mankind are bound [4 Moo. P.C. 305].

The facts of this case, so far as the owners of the vessel *Guiana* were concerned, are fully detailed in the preceding case. The present appeal differed in no respect from the former, except that it was the appeal of the owners of the cargo laden on board the vessel, [301] and seized and condemned therewith, who were Brazilian subjects.†

* Present: The Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

† In pursuance of the 6th and 7th Vic., chap. 38, s. 1, which enacted that appeals, etc., might be heard by not less than three Members of the Judicial Committee of the Privy Council, under a special order of Her Majesty, the following Order in Council was made in this case:—

“VICTORIA R.

“Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, etc. To our trusty and wellbeloved James,

The Respondents, as in the preceding case, appeared under Protest of the 29th section of 5 Geo. IV., c. 113, [302] the Appellants not having procured an Inhibition to issue within twelve months after the condemnation pronounced by the Admiralty Court at Sierra Leone.

The question raised by the Protest against the right to appeal, and argued, was whether the Appellants, the owners of the cargo on board the *Guiana*, being Brazilian subjects, and the vessel captured at sea, were amenable to the provisions of the Statute 5 Geo. IV., chap. 113. The Appellants contended that they were amenable only to the treaties entered into between this country and the Brazils for the suppression of the Slave Trade, and that, consequently, the Vice-Admiralty Court at Sierra Leone had no jurisdiction under the Statute to have made any decree whatever in that cause, so far as concerned the cargo; but that if any breach of treaty had been committed, it should have been referred to the British and Brazilian mixed Commission Court at Sierra Leone, as the tribunal specially [303] appointed and provided for that purpose. The Respondents submitted that the suggested distinction between the present appeal, being that of the cargo, and the case of the brig *Guiana*, decided against in the previous appeal, was not such a distinction as to warrant any difference of Judgment in the two appeals.

Mr. Thesiger, Q.C., and Dr. Addams, in support of the Protest, and

Mr. Burge, Q.C., and Dr. Phillimore, for the Appeal, relied upon the following authorities: The *Le Louis* (2 Dobson, 210); The *Hercules* (2 Dobson, 353); The

Lord Wharncliffe, the Lord President of our Privy Council, and to our trusty and wellbeloved Privy Councillors, being Members of the Judicial Committee of our Privy Council. Whereas by an Act passed in the present year of our Reign, intituled, 'An Act to make further Regulations for facilitating the hearing of appeals and other matters by the Judicial Committee of the Privy Council,' it was amongst other things enacted, 'That in any appeal, application for prolongation or confirmation of Letters Patent, or other matter referred, or hereafter to be referred, by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty, by Order in Council, or special direction under Her Royal Sign Manual, having regard to the nature of the said appeal or other matter, and in respect of the same, not requiring the presence of more than three Members of the said Committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the Members of the said Judicial Committee, subject to such other rules as are applicable, or, under this Act, may be applicable, to the hearing and making Report of appeals and other matters by four or more of the Members of the said Judicial Committee.' Now know ye, that we, reposing great trust and confidence in your knowledge and integrity, have ordered, and do by these presents order, pursuant to the powers vested in us by the said recited Act, that the matter of a certain appeal from a decree of the Vice-Admiralty Court at Sierra Leone, touching the seizure and condemnation of the ship *Guiana* and cargo, be accordingly heard by not less than three of you, being Members of the Judicial Committee of our Privy Council, subject to such rules as are applicable to the hearing and making report on appeals and other matters by four or more of the Members of the Judicial Committee of our Privy Council.

"Given at our Court at Windsor, the 4th day of August, in the seventh year of our Reign.

"By Her Majesty's Command,

"J. GRAHAM."

Upon the above Order in Council being read,

Lord Brougham (5th August 1843 *) observed, that it was to be distinctly understood, that the late Act, 6th and 7th Vic., c. 38, which was now for the first time brought into operation, is only applicable to matters of inferior importance. There must be an Order in each case.

The Order was however not acted on, the cause as above stated being subsequently heard by four Members of the Judicial Committee. [S. 1 of 6 and 7 Vict., c. 38, was repealed by the Statute Law Revision Act, 1891 (54 and 55 Vict., c. 67).]

* Present: Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington.

Fabius (2 Rob. Adm. 245); *The Carrell and Magdalena* (3 Rob. Adm. 58); *The Cazador* (2 Moore's P.C. Cases, 15).

Lord Campbell.—This is an appeal by certain persons, alleged to be Brazilian subjects, and owners of the cargo laden on board the British ship *Guanau*, against a sentence of the Vice-Admiralty Court at Sierra Leone, by which that ship was condemned as forfeited, for being engaged in the Slave Trade, contrary to the provisions of the Statute 5 Geo. IV., c. 113, and the shippers of the goods on board were found liable to the penalty of double the value thereof.

An objection has been made that the appeal cannot be received, on the ground that the condition imposed by the 29th section of that Act, respecting the prosecution of appeals, has not been complied with; and [304] the only question now to be decided is, whether the appeal can be received.

I need not say that their Lordships must lean strongly against any such objection, and that it would be particularly satisfactory to them that the Appellants should be heard against the sentence in this case, as they are said to be foreigners. But we can only, to the best of our ability, put a construction on the Statute by which our jurisdiction is regulated; and if it appears to us that this Statute forbids us to receive the appeal, we are bound, however reluctantly, to dismiss it.

The Statute 5 Geo. IV., c. 113, was passed to consolidate the Acts relating to the abolition of the Slave Trade; and the 29th section enacts that "no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except where such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal."

In this case the sentence was pronounced by the Vice-Admiralty Court at Sierra Leone, on the 17th of August 1840, and the Inhibition was not decreed till the 3rd of September 1841.

Their Lordships have already decided that for this reason the owners of the ships were not entitled to prosecute their appeal. The Counsel for the owners of the cargo have attempted to distinguish their case from [305] that of the owners of the ship, on several grounds; but I regret to say, that their Lordships, after great deliberation, think that the cases are not distinguishable, and that the former decision (to which they adhere) must govern the present.

In the first place, it is contended that the owners of the cargo are not bound by the enactment, because they are foreigners. The British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, but it cannot be doubted for a moment that a British Statute may fix a time within which application must be made for redress to the tribunals of the empire. This is matter of procedure, and becomes the law of the *forum*. On matter of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the *forum*. If a law were made upon this subject, working oppression and injustice to the subjects of a foreign State, that State might make representations and remonstrances against this law to our Government; but while it remains in force, Judges have no choice but to give it effect. Had it been shown to us ever so clearly, that in this case the condition required could not have been complied with, if it has clearly, absolutely, and universally been imposed, we should have no power to dispense with it. At the same time, it is a great consolation to us to consider, that the enactment in question leaves ample time for the effectual prosecution of such an appeal, and that it may well be defended on the principles on which there are laws of prescription in all civilized countries, fixing the time within which suits shall be commenced, or appeals prosecuted. In the present case, nothing [306] has been said of the circumstances which led to the delay in decreeing the Inhibition; but in the former case, it appeared that the delay mainly arose from the laches of the agents of the Appellants in not sooner taking the proper steps for obtaining it.

The Appellants, as owners of the goods, must rely upon a part of the sentence, by which it is declared that the goods shall be held in deposit till the penalty is paid.

This, they contend, is contrary to the Act of Parliament, therefore not provided for in the Act; and, therefore, they say it entirely takes the case out of the operation of the 29th section. But the question at present is, not whether the sentence is justified by the Act, but whether it touches any of the matters provided for in the Act. Now, the 4th section of the Act provides, that a ship employed in the Slave Trade shall be forfeited; and the 7th section provides, that the shippers of goods to be employed in the Slave Trade shall forfeit double the value. The sentence below finds that the *Guiana*, at the time of her seizure, was employed in the Slave Trade, contrary to the provisions of the 5th Geo. IV., c. 113, and condemns her as forfeited, and pronounces that the shippers of the goods on board are liable to the penalty of double the value of the said goods, as the penalty due by law; and that the goods shall be held in deposit till the penalty is paid. Whether this sentence be or be not according to the Act, are the Appellants justified in saying that it is not a sentence touching any of the matters provided for in the Act? The Judge of the Vice-Admiralty Court may be mistaken in supposing that a lien could be claimed on the goods for the penalty; but can it be successfully contended, that the remedy for the penalty on the goods, in respect of [307] which the penalty was incurred, was not a matter touching the penalty and the goods? Are we to have a previous argument, as to whether this part of the sentence ought to be reversed before we decide whether the appeal can be heard? The construction of the clause of limitation contended for by the Appellant, would render it perfectly nugatory; for in every case it might be contended that the clause does not apply, if the sentence be erroneous; and the sufficiency of the sentence would be argued and determined on the Protest against receiving the appeal. If, indeed, the sentence contained a separate and distinct matter, not touching any of the provisions of the Act, although it did contain other matter touching those provisions; we think the clause would not apply to the sentence so far as the former matter is concerned, and that, *pro tanto*, the appeal might be received, although the condition about the decreeing of the Inhibition had not been complied with; but we cannot consider that the holding of the goods in deposit for the penalty is any such separate and distinct matter, and we make no doubt that it touches the penalty which the Act imposes. If this part of the sentence is utterly void, as contended for, the goods cannot be lawfully detained for the penalty, and the question may perhaps be tried in an action of trover, or for money had and received. Their Lordships think that it cannot be tried on this appeal, either alleged as a substantive ground for reversing the sentence, or as a ground for receiving the appeal. We know, by experience in this place, that the sentences of the Vice-Admiralty Courts are often very informal, and it would be most perilous to captors and seizers, if such informalities might be taken ad-[308]-vantage of, by appeal, at any distance of time. It was probably to guard against this, that the Legislature has anxiously made the limitation as to the time of appealing to apply in language so comprehensive to all sentences touching any of the matters provided for by the Act; and we are of opinion, that we should by no means be justified in putting a construction upon it, which would entirely defeat its object.

It was further argued, that the Vice-Admiralty Court at Sierra Leone had no jurisdiction in this case, and that we ought, therefore, to reverse the appeal; and, indeed, it was said we ought at once to reverse the sentence, or to declare it null. I did not exactly understand how we were to come to the conclusion that the Vice-Admiralty Court had no jurisdiction over this British ship for an infraction of the British Statute, or how the case could have been brought before the mixed British and Brazilian Commission. But the Appellants do not deny that there are supposable facts which would give the Vice-Admiralty Court at Sierra Leone jurisdiction over the whole case, and till the appeal is received and heard, how can we know that these facts did not actually exist, and were not the foundation of the sentence? But suppose that a total want of jurisdiction were established, the clause of limitation is not applied to sentences of Courts *acting within their jurisdiction*; and this sentence, if it were pronounced by a Court not having jurisdiction, would not the less be the sentence of a Vice-Admiralty Court, touching matters provided for by the Slave Trade Abolition Act.

A number of cases were cited to us, showing what that great Judge, Lord Stowell, had said and done [309] when he had to review sentences of Vice-Admiralty Courts, had for want of jurisdiction; but all these cases were regularly before him,

upon an appeal duly brought and prosecuted, and in none of them did the question arise which we have to decide, whether the appeal ought to be admitted upon the construction of an Act of Parliament for limiting the time for appealing. I apprehend, therefore, that in this stage of the proceedings, the argument arising from a supposed want of jurisdiction in the superior Court must be quite unavailing.

In the pardonable excess of a very laudable zeal, a power was imputed to this Court, which the learned Counsel for the Appellants on reflection must be aware does not belong to us. It was said that as a supreme tribunal, acting on the law of nations, we were to remedy all the grievances of foreigners, arising from the acts of Colonial Courts, which may in any shape be brought before us. But in reality, we are now sitting merely as a Court of Appeal from a Vice-Admiralty Court—strictly bound by Acts of Parliament, as much as the lowest Court of Justice in the kingdom. We cannot reverse or alter a sentence till it is regularly before us on appeal, and we cannot receive an appeal if, as in the present case, a previous condition prescribed by the Legislature has not been complied with.

I, for one, should have been well pleased if an attempt which was made in the last session of Parliament, to allow this appeal to be heard by altering the law for these particular Appellants, had succeeded. A clause in a Bill for this purpose passed one House of the Legislature without opposition, but [310] was not approved of by the other,* on the ground, as I was informed, that on inquiry it was found that if the agents employed had done their duty, the Inhibition might easily have been obtained in due time. But however that may be, the general law stands unaltered, and upon the just construction of that law their Lordships are of opinion that the appeal cannot be received. They will therefore humbly recommend to Her Majesty in Council that the appeal should be dismissed, as prayed by the Respondents.

[Mews' Dig. tit. PARLIAMENT, A. INTERNAL MANAGEMENT, 2. *Powers of*. S.C. 4 St. Tr. (N.S.) 1331. On point (i) as to appeals to H.M. in Council, see note to *Muter v. Chipchase*, 1836, 1 Moo. P.C. 3; and see *Logan v. Burslem*, 4 Moo. P.C. 284; (ii) as to exterritorial legislation and application of English law, see *Jefferys v. Boasey*, 1854, 4 H.L.C. 815; *MacLeod v. A-G. of New South Wales* (1891), A.C. 455; Forsyth's *Cas. Const. Law*, 238; Ilbert, *Government of India*, 410; Archbold's *Crim. Pl.* 22nd Ed. pp. 34 *et seq.*; (iii.) as to *lex fori*, see note to *Ruckmaboyl v. Mottichund*, 1852-4, 8 Moo. P.C. 41; and Forsyth's *Cas. Const. Law*, 249.]

* After the decision in the appeal of *Logan v. Burslem*, (*ante* [4 Moo. P.C.], p. 284), a Bill intituled, "An Act to make further regulations for facilitating and hearing appeals and other matters by the Judicial Committee of the Privy Council," was brought in the House of Lords. By sec. 11 of this Bill it was enacted, "That in all cases wherein a petition shall have been heretofore lodged as aforesaid, but the usual Inhibition and Citation shall not have been decreed within the aforesaid respective periods, the Judicial Committee and their Surrogates shall have full power to proceed, and the said Judicial Committee shall report, and Her Majesty shall adjudge on such report, in like manner and as if the said Inhibition and Citation had been decreed within the aforesaid respective periods, notwithstanding any Protest entered into or determined upon by the said Judicial Committee."

When the Bill was sent down to the House of Commons, a Select Committee was appointed by that House "to inquire into the facts attending the delay in extracting the Inhibition in the case of the ship *Guiana*, and dismissal of the appeal, in the said case, by the Judicial Committee of the Privy Council." The Select Committee, after examining witnesses, reported to the House that there did not appear sufficient grounds to sustain the above section (which had been imported into the Bill to meet the exigency of the case of the *Guiana*). The section was accordingly struck out of the Bill (see 6th and 7th Vic., chap. 38).

[311] ON PETITION FROM THE SUPREME COURT OF
VAN DIEMAN'S LAND.

In re SHERWIN* [Feb. 2, 1844].

Heard *Ex parte*.

Application for leave to appeal from an Order of the Supreme Court at Van Dieman's Land, refusing a fourth new trial of an action of trover, the subject-matter of which amounted to £970, refused; the Charter of Justice limiting the right of appeal to £1000, and the Judicial Committee being of opinion upon the merits, that it was a mere question for a Jury who had already found four times against the Petitioner.

The Petitioner, James Sherwin, was the Defendant in an action of Trover, to recover the amount of a Policy of Assurance, brought in the Supreme Court at Van Dieman's Land, by James Tetley. The action was tried at Hobart Town, before Mr. Justice Montagu, and a special jury. The jury, notwithstanding the charge of the Judge, that there was no evidence to connect the Defendant, as agent for the Plaintiff, found a verdict for the Plaintiff, for £970, being the amount of the Policy, deducting £30, the amount of premium: upon this the Defendant moved for, and obtained a new trial; and such new trial was heard before the Chief Justice, when the jury again found a verdict for the Plaintiff for the same amount, notwithstanding the charge of the Chief Justice. A further application was then made for, and another new trial granted. This new trial came on before the same Judge: when the jury again found for the Plaintiff. Upon this the Defendant moved again, and the Court granted a third new trial. This third trial was had [312] before the Chief Justice (who again charged the jury in the Defendant's favour), and the jury (though selected from another district) found again for the Plaintiff; the Judge reserving a point of law, whether the Plaintiff ought not to have been nonsuited, on the ground that his demand of the Policy from, and tender of premium to, the Defendant, and the Defendant's refusal to deliver the Policy, constituting the alleged conversion to support the action, did not, in fact, take place until after the Policy had ceased to be in the Defendant's possession or control.

In pursuance of the leave so granted, the Defendant moved the Supreme Court to set aside the verdict, and to enter a nonsuit, or, in the alternative, for a new trial; but the Court held that they had no power to enter a nonsuit, and refused the application for a new trial.

The Defendant (the Petitioner) then applied, by petition, to the Court, for leave to appeal to Her Majesty in Council, and that all further proceedings in the action might be stayed. The Court refused to grant leave to appeal, on the ground that the Petitioner's case did not fall within the provisions of the Charter of Justice (see the Charter of Justice of Van Dieman's Land, dated 4th of March, 1831; Clark's Col. Law, 653), inasmuch as the subject-matter of the suit at issue did not amount to the value of £1000, the sum restricted for appealing. From this refusal the Petitioner presented his petition to Her Majesty in Council, praying for leave to appeal against such Order or determination of the Supreme Court.

[313] Mr. Charles Buller for the Petition.—The appeal has been refused by the Supreme Court, simply on the ground of value, the sum at issue not amounting to £1000, as required for appeals by the Charter of Justice. In this case the damages were laid at £1000; but the jury only found for £970. The findings of the jury were in every instance against the opinion of the Judge. Upon the merits of the case, therefore, your Lordships may exercise the discretion vested in you by the saving clause in the Charter of Justice, to entertain any matter which the Crown in its wisdom may seem meet.

Lord Brougham.—You are calling upon us to apply, under the reservation con-

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, Lord Campbell, the Vice-Chancellor Wigram, and the Right Hon. Dr. Lushington.

tained in the Charter, the extraordinary interposition of our power to allow an appeal, and that only to determine a question of fact, namely, the ordinary question of agency. If you could show that some important question was to be determined, that might furnish a ground. This power which you now call upon us to exercise is eminently a matter of discretion. We never grant that which would lead to no result. If the Court below, having the strongest opinion in your favour, and having been four times frustrated by the jury, refused to grant a fourth new trial because they thought it perfectly useless, because the jury would persist in their verdict, what reason have you to suppose that upon our doing that which the Court below refused, the jury would find a different verdict? If there was a new trial granted, it would still be a question for the jury.

Motion refused.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to appeal*. As to special leave to appeal to H.M. in Council, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125; for the Charter of Justice of 4th March, 1831, see Stat. R. and O. Rev. iv., 382. But see now Commonwealth of Australia Constitution Act, ss. 3, 6, and 9 (*The Constitution*), chap. iii., ss. 73, 74, and notes on these sections in Quirk and Garran's *Annotated Constitution of the Australian Commonwealth*.]

[314] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

The GENERAL STEAM NAVIGATION COMPANY.—*Appellants*: WILLIAM MEDDLING TONKIN,—*Respondent** [Feb. 6, 1844].

The Ship *FRIENDS*.

In cases of collision, the rule of the Trinity House, that "where steam-vessels, on different courses, must unavoidably cross so near, that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other," is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, and when, by putting their helms to port, the collision may be avoided: but the rule is not applicable when either vessel, by unskilful management, is so near the shore, that by porting her helm there would be danger of collision: in such case, the vessel on her right course is justified, in spite of the rule, in putting her helm to starboard.

This was an appeal from the sentence pronounced by the Judge of the High Court of Admiralty, in a cause of damage brought by the Appellants, as the owners of the steam ship *Menai*, against the schooner *Friends*, and the Respondent, as the sole owner of that vessel.

The facts of the case, as pleaded in the Act on Petition, were in substance as follows:—That about 7 p.m., of the 27th of October, the steam-vessel was proceeding up Half-way Reach, and was just below the half-way house between Gravesend and London, being at the time on the Kentish side of river, and distant [315] therefrom about one-third of the width of the river, the night being dark, and the ebb-tide running, with the wind blowing strong from the west. That at such time the schooner *Friends* was observed, coming down the river, just open on the starboard bow of the steamer, and distant therefrom about a quarter of a mile, which was as far as a vessel having no light hoisted could have been seen in the darkness of the night. That the steamer had a good look-out, and had lights hoisted, one very large, with two burners, at the mast-head, which could be seen at the distance of a mile, at least, and the other, which was a smaller light, under the ship's head. That, upon perceiving the schooner, the helm of the steamer was immediately put to starboard,

* Present: Lord Brougham, Lord Campbell, Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

and the schooner still continuing to bear down upon the steamer, was still kept a-starboard, for the purpose of bringing the steamer as near the shore as possible, and thereby avoiding a collision. That, upon the schooner coming within hail, the pilot of the steamer hailed the crew of the schooner to put her helm up, but this direction was not complied with, and the engines of the steamer were thereupon stopped, and, in consequence of her helm being a-starboard, the steamer was so near the shore that she went a-ground. That the helm of the steamer was then ported, but that, in consequence of the steamer having taken the ground, it had no effect, and the schooner struck the steamer amidship, abaft the starboard paddle-box, causing the damage in question.

The owners of the schooner pleaded:—That the wind was west and by south, and the night starlight, and that the schooner was at the time proceeding down the river, in ballast, for Erith. That she was under her fore-sail, top-sail, top gallant-sail, fore-[316]-topmast stay-sail, and main-sail, and with all her hands on deck, keeping a good look-out; her course was southward of the mid-channel, the tide having recently turned, and running down. That, when the lights of the steamer were first perceived, from her position, they showed that the steamer's head was inclined to the northward. That, as the steamer rounded the point above half-way house, she opened upon the schooner's larboard bow, the vessels being then at the distance of about a quarter of a mile from each other. That the schooner's course was thereupon slightly altered, by steering her more towards the south shore; and upon rounding the point, the steamer's course, which had before been on the northward, was suddenly altered, by putting the helm a-starboard, upon which the helm of the schooner was put still more a-port, so that she approached within a very short distance of the south shore, her course having previously been between the south shore and the mid-channel. That the steamer was repeatedly hailed to port her helm, and some person on board the steamer called out to the schooner, in reply, to starboard her helm. That, in order to lighten the force of the collision, but when the respective vessels were too near to avoid a collision, the helm of the schooner was put a-starboard, and the peak halyards and the main sheet were let go, and immediately afterwards the steamer ran into the schooner, the funnel-chain of the former catching the bowsprit of the latter, carrying away the schooner's cutwater and apron, and doing her considerable damage. The schooner, in porting her helm and steering towards the south shore, acted in compliance with the instructions of the elder brethren of the Trinity House, that when there is risk of a collision, [317] vessels should pass each other on the larboard side, and that the accident was solely and entirely occasioned by the fault and misconduct of the persons on board the steamer.

Evidence was entered into on both sides: that on behalf of the General Steam Navigation Company consisted of the affidavit of the commander, the pilot, and engineer on board the *Menai* at the time of the collision, a surveyor, the Trinity pilot, and Harbour-master of the port of London;—and on the part of the Schooner, the affidavit of the mate, two watermen on board, the owner, and a passenger.

The case was heard before the learned Judge of the Admiralty Court, assisted by two Trinity-masters, when the court pronounced against the claim, and on behalf of the Steamer, and dismissed the owner of the Schooner with costs (reported, 1 Rob. 478).

From this decree the present appeal was brought.

Mr. Thesiger, Q.C., and Dr. Addams, for the Appellants.—The question depends upon the weight to be given to the rule of the Trinity House—whether that is to govern the case, or what is pleaded and proved by the evidence to be the practice, of vessels running against tide. The rule is not inflexible—it must bend to circumstances. Here the course pursued by the steamer was fully justified, and so a jury in an action at common law by their verdict found. The schooner might have avoided the collision. The rule of law respecting negligence is, that although there may have been negligence on the part of the Plaintiff, yet unless he might by the exercise of ordinary care have avoided the con-[318]-sequences of the Defendant's negligence, he is entitled to recover. *Davies v. Mann* (10 Mee. and Wel. 546). Neither can an action be maintained where the accident is the result of fault on both sides. *Butterfield v. Forrester* (11 East. 60); *Bridge v. The Grand Junction Railway Company* (3 Mee. and Wel. 244). Assuming, therefore, that the Appellants

were wrong, yet upon the principle laid down by the above authorities, the Court should not have decreed against them, as it is apparent that the collision might have been avoided by the schooner if those in charge of her had used due caution. In cases of collision, a difference exists between Common-law Courts and the Admiralty. In the former, if both parties are to blame there are no damages. In the latter, the loss is divided between the parties according to the negligence.

The Queen's Advocate (Sir John Dodson), and Mr. Platt, Q.C., for the Respondent.—If the custom, as pleaded by the Appellant, be not invariable, there is no usage at all. But this very rule of the Trinity House now sought to be avoided, has been sustained, and effect given to it. The Duke of Sussex (1 Rob. Adm. 274). There the Court held that the rule of navigation with regard to steam-vessels approaching each other at different courses, that each vessel should put her helm to port, so as always to pass on the larboard side of each other, was a rule of binding authority, and condemned a steamer for damages occasioned by neglecting this rule. This case is conclusive. There was an obligation on the steamer to have ported her helm, and have prevented the collision. No exception [319] can prevail to the rules laid down by the Trinity House. They are imperative. The cases cited as to the rule of the road do not therefore apply. Courts of Admiralty are governed by the same rules of evidence as at Common Law. The only difference is the mode of awarding damages, which in the present case is immaterial.

Lord Campbell (Feb. 8, 1844).—This is an appeal from the sentence pronounced by the Judge of the High Court of Admiralty, in a cause of damage brought by the Appellants, as owners of the steam-ship *Menai*, against the schooner *Friends*, and the Respondent, as the sole owners of that vessel.

After Act on Petition, Reply, and Rejoinder, and the examination of various witnesses on both sides, the case came on to be heard, the Judge of the Admiralty Court being assisted by two masters of the Trinity House.

The learned Judge having summed up the evidence, asked their opinion as to the conduct of the two vessels in point of seamanship when the collision happened; and they stated their opinion to be, "that the steamer was to blame, and that the other vessel conducted herself properly according to the rules of navigation," and thereupon he pronounced judgment against the claim on behalf of the steamer, and to dismiss the owner of the other vessel with his costs.

The case turned chiefly upon a rule of the Trinity House, bearing date 30th October 1840, that, "when steam-vessels on different courses must unavoidably or unnecessarily cross so near, that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. A [320] steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand."

In the evening of the 27th of October 1842, after it was dark, the *Menai* steamer, on a voyage from Ostend to London, was coming up the river Thames against wind and tide, and the schooner *Friends* was coming down the river with the wind and tide in her favour. They approached each other near the point which separates Barking Reach from Half-way Reach. The schooner put her helm to port, but the steamer put her helm to starboard. The consequence was, that a collision took place between them.

The Appellants insist that, circumstanced as the two vessels were when they came in sight of each other, the rule was not applicable, and that observing it would have increased the danger. They argue therefore that it was not binding on this occasion; and their lordships would be of this opinion, if they thought the fair result of the evidence to be that which is contended for by the Appellants. If the schooner was hugging the Kentish shore, leaving the steamer on the starboard bow, they might have passed each other without changing their course; and if the steamer was in that position, and the schooner by unskilful management was so near the Kentish shore, that if each vessel had put her helm to port, there would have been great danger of collision, in spite of the rule, the steamer would have been justified in putting her helm to starboard, and the schooner would be liable for the damage that ensued, although at last she observed the rule; for the rule can only be applicable where the vessels, by continuing their respective courses, are likely to come into

collision, and where, [321] by putting their helm to port, the collision may probably be avoided.

But there is strong evidence to show, that when the two vessels came in sight of each other, the steamer was nearer the north side of the river; that if she had not starboarded her helm, the two vessels would have passed each other on the larboard side, and at any rate that if they were to change their course from the risk of collision, there was nothing to have prevented the steamer from putting her helm to port, so as certainly to have kept them clear of each other. The learned Counsel for the Appellants admitted at the Bar, that if the evidence for the Respondent was to be believed, the negligence was to be imputed to the steamer, and not to the schooner. That evidence was submitted to the elder brethren of the Trinity House, and their lordships are not prepared to say that the conclusion which they draw from it is erroneous. Always entertaining great respect for such an opinion, we should by no means consider ourselves bound by it, though approved of by the Judge of the Admiralty Court, if we thought it erroneous; but in this case, looking to the situation of the witnesses, and the statements they make, we should have arrived at the same conclusion. It is not alleged that any erroneous principle of law has been laid down; and the case depends upon the credit to be given to the witnesses.

It was suggested at the Bar, and not denied, that an action had been brought in the Court of Exchequer by the owner of the schooner, against the owners of the steamer, in respect of this very collision, when there was a verdict for the Defendants. Without at all questioning the propriety of that verdict, according to the evidence laid before the jury, their lordships [322] can only consider whether this decision is not authorized by the evidence in the Court of Admiralty. It is not stated that, on the trial of that case, any direction in point of law was given, inconsistent with the Judgment now appealed against. I apprehend that the principles on which such cases are determined, in the Courts of Common Law and in the Court of Admiralty, are precisely the same, and I entirely concur in the cases that have been cited on the part of the Appellants, *Butterfield v. Forrester* [11 East, 60], *Bridge v. The Grand Junction Railway Company* [3 M. and W. 244], and *Davis v. Mann* [10 M. and W. 516]. The Court of Admiralty has the great advantage, where both parties have been to blame, of being able to apportion the loss, according to their respective degrees of culpability; but in a case like the present, upon the same facts, ought to pronounce exactly the same Judgment as a Court of Common Law.

Their lordships will, therefore, recommend to Her Majesty, that the Judgment appealed against should be affirmed, with costs.

[Mews' Dig. tit. SHIPPING A., XX. COLLISION 11 b.; 13, i. S.C. 1 Rob. W. 478. On point (i.) as to rule of the road at sea, see *The Unity*, 1856, Swa. 101; *The Duke of Sussex*, 1841, 1 Rob. W. 274; *The Hope*, 1840, ib. 154; *The Immaganda Sara Clasina*, 1850-52, 8 Moo. P.C. 75; Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), s. 418; and regulations under that section enumerated, with list of foreign countries (up to Dec. 31, 1899), to which they have been extended by O. in C. made under s. 424 of that statute, in Pulling's *Index to the Stat. E. and O.* 3rd ed. 1899, pp. 450, 451; (ii.) as to identity of rules of law and admiralty in regard to negligence (4 Moo. P.C. 322), cf. *Cayzer v. Carron Co.*, 1884, 9 A.C. 880, 882; (iii.) position of Elder Brethren, cf. *The Beryl*, 1884, 9 P.D. 137. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict., c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

[323] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

THOMAS LE BRETON, Esquire.—*Appellant* : JAMES ENNIS.—*Respondent* *
[Feb. 6, 1844].

Heard *Ex parte*.

By the Law of Jersey, it is necessary, in order to constitute a valid judgment, that a majority of the Jurats constituting the Court, concur in the Judgment. If they are equally divided, the Bailiff has the casting vote [4 Moo. P.C. 320.]

A judgment of the Royal Court, in an action of defamation, consisting of the Bailiff and six Jurats, of whom three were of opinion that the action ought to be dismissed; two for the Plaintiff; and one "that the Court could not pass judicial sentence upon the Defendant,"—and the Bailiff did not vote. Held by the Judicial Committee to be bad, and the Judgment of the Court below reversed [4 Moo. P.C. 338].

And, upon the merits, judgment ordered to be entered for the Plaintiff, with damages awarded by their lordships [4 Moo. P.C. 338].

In this case an appeal was brought from the Act or Judgment of the Royal Court of Jersey, constituted of the Bailiff and six of the Jurats of the Island, in an action for defamation, brought by the Appellant, Her Majesty's Attorney-General for the Isle of Jersey, against the Respondent. The action was commenced by a *remonstrance*, or declaration, containing the grounds of charges against the Respondent, which was filed on 9th of October 1837. The Defendant having appeared, allowed judgment to go by default, but was afterwards permitted to plead a justification and to examine witnesses. The cause was protract-[324]-ed from Court-day to Court-day for nearly two years, sixty witnesses having been examined, almost all of them being re-called and re-examined, one of the principal of them as many as twenty-one times, and another eighteen. The evidence was taken down in writing, according to the practice prevailing in the Royal Court, in the presence of two Jurats; the Act or Declaration, having been first read to the witnesses, who were respectively interrogated as to their knowledge of its contents. When completed, the whole evidence was read over and the case argued in the presence of six Jurats, by whom judgment was delivered, on the 8th of May 1840. The Act and Judgment, as set forth in accordance with the Order in Council of 1833, was in the following form:—

"In the action of *Thomas Le Breton*, Esq., Her Majesty's Attorney-General, against *Mr. James Ennis*, to answer the remonstrance presented in Court against him by the said *Thomas Le Breton*, Esq., the 9th of October 1837, setting forth that he was, some time back, retained as Counsel by the said *Mr. Ennis* in an action which he entered against *Mr. William Maingy*, one of the partners of the commercial house of *John Thomas and Co.*, of *St. Petersburg*: *John William Dupree*, Esq., His Majesty's Solicitor-General, being retained with the Plaintiff. That this case was argued by the said Plaintiff before the Inferior Court on the 17th October 1831, and both parties then appealed from the decision given, and the case was finally heard before the full Court on the 16th of January 1834. That the Plaintiff has been recently apprised that the said *James Ennis* spreads and circulates publicly, divers false and calumnious reports relating to the Plaintiff's conduct in the said case, accusing him of having been [325] bribed by the Attorney or legal agents of the said *Mr. Maingy*, to betray the interests of the aforesaid *James Ennis*, and of having received a sum of money to lose the said cause confided to him, or words of that purport or meaning. That, not satisfied with spreading this serious calumny, the said *Mr. Ennis* has also lately said, and circulated publicly, that the Plaintiff had allowed himself to be bribed by receiving and accepting a sum of money to prevent a criminal prosecution against the late *Mr. Clement Nicolle*, or words of

* Present: Lord Brougham, Lord Campbell, Sir Herbert Jenner Fust, and the Right Hon. Thomas Pemberton Leigh.

that purport or meaning. That the said Mr. Ennis has spread other reports injurious to the character of the Plaintiff. That the Plaintiff is assured that the object of the said Mr. Ennis in spreading these calumnious reports, as atrocious as they are false, is to sully his character, and to rob him of the good opinion of his fellow-citizens, and thus to wound his honour and injure his interests; and these various calumnies would, without doubt, produce the result, were they not repressed, and their author exposed to public obloquy. And praying that the said James Ennis be condemned to make a public apology to the Plaintiff, and to pay him two thousand pounds sterling damages," etc.

Mr. Bailiff having proceeded to collect the opinion of the Jurats who have to give judgment in the case—

"Philip Maret and George Bertram, Esquires.—On the plea put in by the Defendant, the 30th April last, that he is not liable to answer this action for any expressions he might have uttered against the Plaintiff's character previously to one year and a day before the entry of the Plaintiff's remonstrance. Whereas, on the 2nd of December 1837, the Defendant, without admitting that he had circulated the alleged calumnies specified in the Plaintiff's remonstrance, maintained [326] that he had said nothing with reference to the character of the Plaintiff, or to the matter alluded to in the Plaintiff's remonstrance, which he was not prepared to prove; and the cause was sent to proof, both on the facts alleged by the Plaintiff and on the plea of the Defendant. Whereas the parties having acquiesced in that decree, by hearing evidence as well on the Plaintiff's plea, as on the merits of the case, have been of opinion that the Defendant comes too late in his plea of annual prescription, and on the merits of the case itself. Whereas the facts alleged by the Plaintiff in his remonstrance against the said Mr. James Ennis, viz.:—That the Defendant has circulated and spread publicly, that the Plaintiff, who acted as his Counsel in a cause between him (the Defendant) and Messrs. J. Thomas and Co., of St. Petersburg, had suffered himself to be bribed, by accepting and receiving a sum of money from the Attorney or legal agents of the said Messrs. Thomas and Co., to betray his interest in the said cause. Further, that the Plaintiff had also suffered himself to be bribed, by accepting and receiving a sum of money for stifling a criminal prosecution against Mr. Clement Nicolle were fully substantiated. Whereas the Defendant, who had undertaken to prove the truth of all that he had alleged, has failed in so doing. Whereas the reports thus circulated and publicly disseminated by the Defendant are calumnious and defamatory, and highly injurious to the honour and character of the Plaintiff.—The said Philip Maret and George Bertram, Esquires, have been of opinion to condemn the said Mr. James Ennis to pay the Plaintiff fifty pounds damages, with costs.

"Edward Leonard Bisson, Esq., has been of opi-[327]-nion that, with reference to the affair of Maingy, partner of the house of John Thomas and Co., of St. Petersburg, in which the said Mr. Le Breton acted as Defendant's Counsel, considering that the Plaintiff has not proved that the expressions used by the Defendant respecting the Plaintiff's conduct have been so used within one year and a-day before the entry of the Plaintiff's remonstrance; and on the second point relating to the matter of Mr. Clement Nicolle, considering that the Plaintiff has not clearly proved that the Defendant has accused the Plaintiff of having suffered himself to be bribed,—the Court cannot pronounce a judicial sentence against the Defendant; and, therefore, that the parties ought to be sent out of Court, each bearing their own costs. And

"Philip Winter Nicolle, Peter Perrot and Charles Bertram, Esquires.—Whereas on the plea of the Defendant, stated in the Act of the 7th of November 1837, the Court decided that no proof should be received but upon the two facts specially mentioned in the said remonstrance. These two are, 1st. That the Plaintiff has recently been apprised that the said James Ennis spread and circulates publicly, various false and calumnious reports respecting the Plaintiff's conduct in a cause which he pleaded for the Defendant before the full Court, the 16th of January 1834, in an action entered by him against Mr. Maingy, representing the commercial house of John Thomas and Co., of St. Petersburg, accusing him of having suffered himself to be bribed by the Attorney or legal agents of the said Mr. Maingy, to betray the interest of the said Ennis, and of having [328] received a sum of money to lose the

said cause entrusted to him, or words of that purport or meaning. 2nd. Of having recently said, and publicly disseminated, that the Plaintiff had suffered himself to be bribed, by receiving and accepting a sum of money for stifling a criminal prosecution against Mr. Clement Nicolle, or words of that purport or meaning. On the first point:—Considering that the Defendant has put in the plea of prescription of suit; as by the law and custom of the Island, all actions for defamation must be instituted within one year and a-day from the time the injurious report has been uttered or disseminated; and that it is not proved that the injurious expressions attributed to the Defendant with reference to the affair of Maingy have been by him spoken within one year and a-day from the entry of the remonstrance; have been of opinion that there is prescription, and that the Defendant was no more liable to action; therefore, to disallow that part of the remonstrance. On the second point:—Considering that the Plaintiff has not proved that the Defendant has made use of the expressions attributed to him, and that, by several depositions, it appears that a sum of money has been paid to Mr. Peter John Simon, then the Plaintiff's clerk, respecting the affair of Mr. Clement Nicolle.—The said Messrs. Nicolle, Perrot, and Bertram, were of opinion to discharge the Defendant from the action, and to condemn the Plaintiff to pay costs.

“The Court has, therefore, discharged the Defendant from the action, and condemned the Plaintiff to pay costs.”

[329] The Plaintiff below appealed from the above Judgment, and prayed its reversal, variance, or alteration, for the following reasons:—

I. Because the said Judgment, in respect of so much of it as is in favour of the Respondent, proceeded upon evidence which the date of the record rendered irrelevant and inadmissible, and also upon the absence of evidence of what was already admitted on the record.

II. Because the Judgment, in respect of so much of it as is in favour of the Respondent, is not warranted by the evidence.

III. Because the Judgment gives the Defendant the benefit of the defence of prescription, although the Defendant had not pleaded such defence.

IV. Because the Judgment, in respect of so much of it as is in favour of the Respondent, is not warranted or supported by the reasons and grounds thereof set forth in the Judgment.

V. Because, while the speaking by the Respondent of the defamatory words was proved, he failed to establish any justification thereof, as appears by the Judgment, whereby the Appellant was and is entitled to damages and costs; and nevertheless the Appellant is deprived by the Judgment of both, and ordered to pay the costs of the Respondent.

VI. Because the evidence, adduced by the Respondent, to establish the truth of the charge contained in the 2nd Count of the Remonstrance, not only violates the rules of evidence, but altogether fails to establish the truth of the charge in question, and is unworthy of credit.

VII. Because the Judgment is not the Judgment of the majority of the Court.

[330] The Respondent did not appear on the appeal, which was, therefore, heard *ex parte*.

The Solicitor-General (Sir William Follett), and Mr. Warren, for the Appellant, in support of the appeal.

The arguments are not reported; being entirely confined to an examination of the voluminous evidence taken in the Court below. No authorities respecting the law of Jersey were produced; the practice of the Royal Court being stated in the Appellant's case, and at the Bar, as laid down in the Judgment.

The Right Hon. T. Pemberton Leigh (Feb. 20, 1844).—This is an appeal from a Judgment of the Royal Court of Jersey, discharging the Respondent from an action brought against him by the Appellant, and condemning the Appellant in costs.

It appears that by the Law of Jersey, a majority of the Jurats constituting the Court must concur in the Judgment; and that if they are equally divided, the Bailiff has the casting vote. In this case the Court consisted of the Bailiff and six Jurats; of whom three were of opinion that the action ought to be dismissed with

costs; two were of opinion that there ought to be judgment for the Appellant; and one was of opinion "that the Court could not pronounce a judicial sentence against the Defendant, and that, therefore, the parties ought to be sent out of Court, each bearing his own costs." There does not, therefore, appear to have been a majority of the Jurats in favour of the Judgment which was actually pronounced; and, as the Bailiff gave no vote, it is difficult to see how this objection to the Judgment can be overcome.

But, as the whole case is before us, and we have been called upon by the Appellant to decide on the merits, we consider it our duty now to pronounce the sentence which, in our opinion, ought to have been pronounced in the Court below, and with that view we have carefully examined the whole of the proceedings and the evidence.

The action was brought by Mr. Le Breton, the Attorney-General of the Island of Jersey, against Mr. Ennis, for defamation. Two specific grounds of complaint were alleged.

First.—It appears that in the year 1831, the Plaintiff had been Counsel for the Defendant in a suit of *Ennis v. Maingy*; and the Plaintiff alleged that the Defendant, Mr. Ennis, had circulated reports accusing him (the Plaintiff) "of having been bribed by the Attorney or legal agents of Mr. Maingy to betray the interests of him (Mr. Ennis), and of having received a sum of money to lose the said cause confided to him."

The second complaint was, "that the Defendant had lately said and circulated publicly that the Plaintiff had allowed himself to be bribed by receiving and accepting a sum of money to prevent a criminal prosecution against the late Mr. Clement Nicolle."

After some proceedings which, for the purpose of our Judgment, it is not necessary to state in detail, the Defendant pleaded in these terms on the 2nd December 1837.

"The Defendant, without admitting that he has circulated the alleged calumnious rumours stated in the Plaintiff's remonstrance, contends that he has alleged nothing with regard to Mr. Le Breton's [332] conduct, or to the circumstances mentioned in his remonstrance, which the Defendant is not prepared to substantiate."

In this state of things, it was ordered by the Court, "that all such persons as may have any knowledge both of the facts stated in Mr. Le Breton's remonstrance, and of the plea of the said Mr. Ennis, be summoned to give evidence."

The examination of witnesses commenced on the 4th January 1838, and it appears to have continued till the 14th December 1839. During this period a vast number of witnesses were examined, and in many instances repeated examinations were had of the same witness. Of the evidence thus taken, it appears to us that much the greater part is either entirely foreign to the issue between the parties, or is of so loose and unsatisfactory a nature that it could not be received in any Court as influencing the mind of the Judge.

With respect to the first complaint in the remonstrance, we think that the uttering by Mr. Ennis, of the words to the effect imputed to him, was sufficiently proved. No attempt to maintain their truth was made by the Defendant; but after the evidence had been finished, and, as it appears, on the 30th April 1840, he pleaded or argued (for the pleadings seem to be by parole,) that the words in question had not been uttered within a year and a day before the commencement of the action, and that therefore, by the law of Jersey, no action in respect of them could be maintained; and of this opinion were four of the Jurats: the other two Jurats were of opinion, that this ground of objection was not open to the Defendant, having regard to the state of the pleadings, and the period of the cause at which the objection was first raised. The [333] Appellant contends that the latter opinion ought to have prevailed.

This is a question which depends entirely upon the law of Jersey, and the practice of the Courts in that country, and no authority has been cited to us upon the subject.

We were informed at the Bar, that the Appellant was indifferent as to the amount of damages, and that he was induced to prosecute this appeal merely with a view to the vindication of his character, which he considers to be affected by the Judgment on the second point.

As we think that on the ground of error on the 2nd point the Judgment must be reversed, it does not appear to be necessary to express any opinion on the question, whether, under the circumstances of this case, the lapse of time could be used in bar of the action; no attempt was made in the Court below to maintain the truth of this allegation, and no imputation in respect of it can rest upon the Plaintiff.

Upon the second point, the allegation, that the Plaintiff had allowed himself to be bribed, by receiving a sum of money to prevent a criminal prosecution; the uttering by the Defendant of words to that effect appears to us to have been proved, and evidence was gone into by the Defendant at great length, with a view to establish their truth. The facts appear to be these:—about the end of 1827, a person of the name of Esnouf accused Mr. Clement Nicolle of having committed an indecent assault upon him. It appears to have been intended to support the charge by the evidence of two persons named Blampied and Gruchy. Such an offence by the law of Jersey may be the subject, both of an action for damages by the party assaulted, and of a criminal prosecution by the Attorney-General [334]. In the action however, which is styled a "*cause en ajonction*," the Attorney-General must be a Plaintiff, and the party injured sues as his *ajoint*; but it is proved in this case, by testimony which is not attempted to be contradicted, that in such a cause the Attorney-General is nothing more than a formal party, that he cannot prosecute the suit without the *ajoint*, and that the *ajoint* may put an end to it without communication with him.

On the 19th November 1837, an action was commenced by Esnouf against Nicolle, to recover damages for this alleged assault; and on the same day the *ajonction* of the Attorney-General was granted, and Mr. Nicolle being arrested gave bail to the action. It seems that he denied the truth of the charge, and alleged that it was a mere attempt at extortion; but having called a meeting of his friends, some of whom recommended him to resist, and others to compromise the action, he left the Island, and instructed his friends to settle the matter with Esnouf.

This was accordingly done, and on the 28th of December 1827 a settlement took place in the presence of Mr. Godfray, who acted as the law-agent of the prosecutor, by the payment of £150, and the costs of the action. Of this sum, £50 were paid to Mr. Blampied, one of the witnesses—and the remaining £100 are stated by Esnouf to have been divided between himself and Gruchy. This fact is denied by Gruchy, but there is not the slightest evidence to connect the Appellant in this case with the receipt of any part of the money, or with any knowledge of the compromise.

Evidence, however, seems to have been gone into by the Defendants, for the purpose of proving that besides the action the Attorney-General might have instituted [335] a criminal prosecution against Nicolle, and that he was induced by corrupt considerations to abstain from doing so.

This corrupt consideration is alleged to have been given in two ways—First, by the payment of a sum of money to Mr. Simon, the clerk of the Attorney-General; and Second, by the purchase from the Attorney-General, through the medium of Simon, of certain sums of annual rent, which it is said that the Attorney-General was desirous of selling, and that Mr. Nicolle or his family were induced to purchase, with a view to stop the criminal prosecution.

It seems from the evidence of Mr. Du Pré, the Queen's Advocate, that, by the Law of Jersey, such a prosecution can only be commenced by the Attorney-General, upon "the report of the constable or chief of police, who having arrested the accused person, presents him before the Court, with a report, upon which report the Attorney-General forms his accusation."

In this case the constable did attempt to arrest Nicolle, but was unable to find him—Nicolle soon afterwards left the Island, and though he subsequently returned, no arrest or report to the Attorney-General was made. If there had been, it would be doubtful whether the Attorney-General would have been justified in prosecuting. It is sworn by one of the witnesses, Mr. Le Feuvre, who acted for Mr. Nicolle on the settlement of the action, that both Esnouf and Blampied have declared to him, "that the pretended attack was nothing but a farce, and all they had in view was a treat (*fricot*) from Mr. Nicolle."

With respect to the payment of a sum of money to Simon, on behalf of the Attorney-General, and the [336] purchase of rent, Mr. Simon, who has been repeatedly examined, admits the receipt on behalf of the Attorney-General of two sums of £120, and £300 from Mr. Charles Nicolle, a son of Clement Nicolle. These

sums he states to have been received as the purchase-money for rent sold by the Attorney-General to Charles Nicolle; the first sum being received in the month of December 1827, and the second in the month of February 1828, but he most positively denies the receipt of any other sums, or that the payment of either of these sums, or the purchase of the rent, had any connection whatever with the criminal proceedings against the father.

It is proved that Mr. Simon was not only the clerk of the Attorney-General, but also his agent in the management of his landed property—that he sold for him about this period various portions of rent to different persons, and one portion to a Mr. Rive, on the same day on which the sale to Nicolle was made.—The books of Simon were produced, in which entries of the receipt of these sums on account of rent appear to have been regularly made; and there was no evidence to show that the sum paid by Charles Nicolle was at all higher than the price paid by other parties.

The only evidence to connect the payments of the money, or the purchase of the rent, with the criminal prosecution, is that of Charles Nicolle. This gentleman was examined nineteen different times upon this subject; the first examination being on the 5th April 1839, and the last on the 19th October 1839. In his earliest examinations he denied having been party to any arrangement, by which a criminal prosecution, by the Attorney-General, was to be prevented, or that any money was paid, or any rent was purchased with that [337] view. In his subsequent examinations he contradicts this statement, and alleges that a sum of money had been paid to Simon by the Defendant in his presence, with the intention, as he believed, of preventing the prosecution, and that he was induced to purchase the rent from the same motive. But upon an examination of this gentleman's testimony it is so confused, so full of inconsistencies and contradictions, is so opposed to the other evidence in the case, and appears to have been so much influenced by the representations, which from time to time were made to him, by different parties in the intervals of his examinations, that it is impossible for the Court to place the slightest reliance upon it. Even supposing him to have been influenced, in purchasing the rent, by the motives which he describes, there is nothing whatever to show that the Plaintiff was aware of them, or that the omission to institute a prosecution against the father was in any manner directly or indirectly affected by the purchase made by the son.

We have no hesitation, therefore, in coming to the conclusion, that the Defendant has entirely failed in making out a justification of this grave charge, nor does it appear that the Jurats, who were of opinion to discharge the Defendant from the action with costs, considered that such justification was made out. For they state as the reason for their Judgment, that the Plaintiff had not proved that the Defendant had made use of the expressions attributed to him, and "that by several depositions, it appears that a sum of money had been paid to Mr. P. J. Simon, then the Plaintiff's Clerk, respecting the affair of Mr. Nicolle," not stating that, in their Judgment, either the fact of payment was proved, or that the Plaintiff was privy to it.

[338] Upon the whole, we are of opinion that the Judgment below must be reversed, and that Judgment must be given for the Plaintiff. It has been stated to us, that the Appellant does not desire to press for heavy damages, and that the Respondent is not in a situation to pay them; some damages however must be awarded. The attack upon the character of the Plaintiff has been of the most serious kind. The Defendant after more than once, according to the evidence, acknowledging that it was groundless, has finally persisted in maintaining its truth. In this he has totally failed.

Under these circumstances, we think that substantial damages ought to be awarded, and that it must be left to the discretion of the Plaintiff to enforce or not the payment. The two Jurats, who were of opinion with the Plaintiff, proposed to award him £50; with reference only to the second complaint in the remonstrance, to which, for the reasons already assumed, we confine ourselves. We consider that sum to be far from excessive, and we shall therefore adopt it. Our recommendation to Her Majesty will be, to reverse the Judgment of the Court below, and to enter up Judgment for the Plaintiff, with £50 damages, and the costs of suit.

[As to position of bailiff and jurats, see *In re States of Jersey*, 1853, 9 Moo. P.C. 185; 8 St. Tr. (N.S.) 285; and Appx. C. at p. 1161. On point as to assessment of damages, followed in *Doss v. Doss*, 1866, 14 L.T. (N.S.) 648.]

[339] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

The Right Hon. JOHN WILSON CROKER,—*Appellant*: The MARQUIS OF HERTFORD and Others.—*Respondents* * [February 7, 14, and 21, 1844].

A domiciled Englishman (while resident at Milan) executed, in October 1838, a Codicil, disposing of personal property situate in the United States of America. This Codicil was holograph, signed, though not attested, but was well executed, according to the Austrian Law. Held by the Judicial Committee (affirming the Judgment of the Prerogative Court), 1st, That the validity of the Codicil was to be governed by the Law of the domicile; and 2dly, That the provisions of the 1st Vict., c. 26, applied to testamentary papers made in foreign countries by a domiciled Englishman [4 Moo. P.C. 361].

Testator by his Will, made in 1823, directed his Executors to pay any legacies he might afterwards give by any testamentary writing, witnessed or not; and after making various Codicils, he, in 1838, made a Codicil, which was signed but not attested, and by a further Codicil in 1839, duly signed and attested, he declared that he thereby "ratified and confirmed his said Will and Codicils." Held, that such general reference was not sufficient to identify and so incorporate the Codicil of 1838, in that of 1839, and Probate of such Codicil refused [4 Moo. P.C. 368].

The Statute 1 Vict., c. 26, extends generally to Wills made previously to the passing of the Act, where alterations have been made affecting such Wills, subsequent to the 1st of January 1838 [5 Moo. P.C. 340].

The question in this Appeal respected the validity of a Codicil to the Will of the late Marquis of Hertford. The Marquis died in London on the 1st of March 1842. On his death a large number of testa-[340]-mentary papers were found, consisting of a Will, bearing date the 25th of February 1823, and twenty-nine Codicils of various dates from that date to the 26th of April 1839, which were severally admitted to proof. The deceased left various other script and papers of a testamentary nature, one of which, dated the 28th of October 1838, was the paper in question, and with respect to the validity of which, this Appeal was prosecuted.

By the Will, the Testator appointed his son, Lord Yarmouth (the present Marquis of Hertford), Lord Lowther, Mr. J. W. Croker, (the Appellant,) Mr. Hopkinson, Mr. De Horsey, and Captain Meynell, Executors. In this Will, among other provisions, was the following:—"Whereas I have heretofore made several Codicils or testamentary papers, which it is my wish shall be considered as part of my Will, now I do hereby ratify and confirm all and every such Codicils and testamentary writings, and declare and direct that my Executors shall appropriate and apply any monies, stocks, funds, or other property, either specially or otherwise given, accordingly; and in the event of a deficiency of such monies, stocks, funds, or other property so specifically bequeathed, I direct my Executors to apply a sufficient part of my personal estate, hereinafter bequeathed, for and towards the legacies and annuities, in such Codicils and testamentary papers particularly mentioned." And then, [341] after giving all his pictures, plate, jewels, goods, chattels, ready money, and securities (not previously disposed of), to his Executors, with directions to realize and pay his debts, funeral and testamentary expenses; and subject thereto, he directed them to stand charged therewith, upon trust, to "pay, satisfy, and discharge the several

* Present: Lord Brougham, Lord Denman, Lord Abinger, Lord Campbell, The Chief Justice Tindal, Mr. Baron Parke, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

legacies and annuities given and bequeathed by this my Will, or such Codicils or testamentary papers as aforesaid, or which I shall or may give or bequeath, by any Codicil or Codicils hereto, or by any testamentary writing or writings under my hand or signed by me, and whether witnessed or not, and do and shall stand possessed of, and interested in, all the surplus or residue of the said monies," upon trust to pay the same to his son, the present Respondent, provided he, within one year from the date of the Testator's decease, give full effect to "every direction, appointment, devise or bequest in this my Will, or any Codicil or Codicils, or other testamentary writing, which I have already heretofore made, and may be subsisting, or may now or hereafter make." With a proviso, on his son's refusal or neglect, that the said surplus and trust monies, with other funds before bequeathed to his said son, should be paid "to the Commissioners for the time being, appointed for the reduction of the National Debt." And at the conclusion of the Will, the Testator ratified and confirmed the same, in the words following:—"And hereby, revoking all former Wills, but ratifying and confirming all Codicils and testamentary papers as aforesaid, which I wish to be considered as if incorporated in this my Will, I declare this to be my last Will and Testament. In Witness whereof, etc."

[342] The testamentary paper, of the 28th of October 1838, the subject of the present Appeal, was holograph, and as follows:—

"Codicil."—"I hereby give and bequeath to Charlotte, Countess of Zichy Ferraris, to be held by her, for her own sole and separate use, the stock or shares of which I may die possessed in the United States Bank, which now, I believe, exceed three thousand. Milan, October 28th, 1838."—"Hertford."

"And I also give and bequeath to my friend, the Right Hon. John Wilson Croker, all my stock and shares in the Virginia United States Stock, which I think are one thousand dollars. October 28th, 1838. Milan."—"Hertford."

By a further Codicil, executed by the Marquis, dated the 26th of April 1839, after making certain alterations in his former Codicils, not affecting the Appellant's interest, and giving certain legacies to parties therein named, he concluded thus: "And I hereby ratify and confirm my said Will and Codicils, except as before excepted in every respect." This Codicil was signed and sealed, and attested by two witnesses.

Mr. Croker, the Appellant, called upon his co-executors to join with him in taking probate of the testamentary paper of the 28th of October 1838, which they declined to do. Accordingly, he propounded the same; and after pleading the Will (which had been admitted to probate), and that the Testator in October 1838 was resident at Milan, a city in the Austrian dominions, and subject to the laws, customs, and usages of Austria, in which city the Testator had theretofore frequently resided, and where he then had [343] a house and establishment, money in the hands of his bankers, and certain stock in the national establishment, there known by the name of Monte di Milano: he alleged that the Codicil propounded, was then made and executed in conformity with the laws, usages, and customs of, and in the form required and observed in making Wills and testamentary dispositions in, the Austrian dominions. That the whole of the stocks, shares, and property, bequeathed by the Codicil, whether to Mr. Croker, or to the Countess de Zichy Ferraris, was, at the time of making the same, and still was, locally situate in the United States of America. That, by the laws, usages, and customs, which were, on the 28th of October 1838, and still are, in force at Milan, any Will, Codicil, or testamentary instrument, in the handwriting of a Testator, whether an alien or native, and signed by him by his name or title of honour, was, and is, good, valid, and effectual, to all intents and purposes, without any attestation or other formality whatsoever; and that the Codicil was duly executed by the said Testator according to such usages and customs, and that the same was, and is, by the said laws, usages, and customs, a good and valid testamentary disposition. That by the said law, usages, and customs, any transactions of an alien in the Austrian dominions, conferring rights upon another person without a reciprocal obligation on the part of the latter, is allowed to be governed by the law of Austria, or by the law of the country of which the alien is a subject, according as either law favours most the validity of such a transaction. That the Testator, on the day of the making of the Codicil, and immediately after the execution thereof, delivered the same to the Countess de Zichy Ferraris, and the same

was [344] never afterwards in his custody, possession, power or control. The allegation then further pleaded the Codicil of the 26th of April 1839, and that the Testator had thereby ratified his said Will and Codicils, and among them, the Codicil in dispute, in the words following: "I hereby ratify and confirm my said Will and Codicils, except as before excepted in every other respect."

The Judge of the Prerogative Court rejected this allegation (reported 3 Curteis, Rep. 468). From this decision the present Appeal was brought by Mr. Croker only.

The Solicitor-General (Sir Wm. Follett), Dr. Harding, Dr. R. Phillimore, and Mr. Montagu Smith, for the Appellant.—The points to be considered in this Appeal, are of first impression and of the highest importance; they involve the questions, whether a testamentary paper executed in a foreign country, according to the *lex loci*, is not entitled to probate here, though the domicile of the Testator is in England. Whether the new Will Act, and the regulations contained in it, can be applied to an instrument, not executed within the limits of its operation, and not made, therefore, under its provisions; there is another question, also, viz. whether this Codicil is not, by inference and relation, sufficiently incorporated with the original Will, so as to make it a subsisting part of that Will, and, therefore, entitled to probate.

The validity of the original Will is indisputable; it is executed and attested according to the Law existing at the period of its date, and appoints executors. It is clear, also, that at the period of making it, the Testator [345] contemplated and intended it to include other testamentary instruments, whether anterior in date, or to be made subsequently. He says: "Whereas I have heretofore made several Codicils or testamentary papers, which it is my wish shall be considered as part of this my Will. Now, I do hereby ratify and confirm all and every such Codicils and testamentary writings;" and then, after directing his Executors to realize and set apart certain parts of his personal estate for the payment of legacies, funeral and testamentary expenses, and debts, he directs them to apply the remainder in discharge of "the legacies and annuities given and bequeathed by this my Will, or such Codicils, or testamentary papers, as aforesaid, or which I shall, or may, give and bequeath, by any Codicils hereto, or any testamentary writing or writings, under my hand, or signed by me, and whether witnessed or not."

Now, in the third of the Codicils admitted to proof, which is dated the 23rd of February 1827, the Testator expressly says, "I confirm all Codicils to my Will, wheresoever and whatsoever." Here there is a manifest allusion to Codicils, either made or intended to be made, and not in his possession. Again, in the sixth Codicil, of the 13th of February 1828, he uses the same expression; then in the Codicil, number twenty-two, dated Milan, 9th of December 1834, he says, "I have many Codicils in the world, their dates will give their validity, as they vary, but where not revoked, I confirm them." The expressions in these instruments, show that the Testator contemplated giving effect to all the instruments executed as Codicils to his Will, as he expresses it, "wheresoever and whatsoever;" the number of testamentary papers executed is a clear indication that the Testator thought and intended them [346] to be valid instruments, and so being admitted to proof they are. But all these are dated previous to January 1838. It appears, that on the 28th of October 1838, Lord Hertford, being resident at Milan, made a further Codicil, the instrument in question; it is holograph; signed by him, but not attested, no attestation being required by the law of Austria, in the dominions and subject to the law of which, Milan is a principal city. It disposes of property not situate within the limits, or subject to the control, of either Austria or England; and was delivered into the custody of the Countess de Zichy Ferraris, in whose favour, as well as that of the Appellant, it is made, and remained in her custody, and under her control, from that period to the death of the Testator. It is not pretended, that this instrument was ever revoked. By a subsequent Codicil, executed according to the provision of the Will Act, and which is dated the 26th of April 1839, the Testator declares, that he ratifies and confirms his said Will and Codicils, except as before excepted, in every other respect. The questions, therefore, that arise out of these circumstances, are three: *First*, Whether the Codicil of the 28th of October 1838, being made in Austria, according to the law of the Austrian dominions, and valid, therefore, according to the *lex loci*, is not entitled to probate: *Secondly*, Whether the Codicil of the 26th of April 1839 does

not incorporate the previous Codicil of October 1838, so as to bring it within the intent and meaning of the provisions of the 1st Viet., c. 26; and *Thirdly*, Whether, upon the fair construction of that Act, its provisions are applicable to a Codicil to a Will, dated prior to the year 1838, when that Act first came into operation.

I. It is not disputed that the Codicil executed at [347] Milan, being in the hand writing of the Testator, though not domiciled in Milan, and signed by him, is a valid testamentary paper according to the laws, usages, and customs of Austria; this is pleaded and admitted. By the Law of Nations, the validity of a contract is to be decided by the law of the place where it is made; this is the universal rule (Story's Com. on Conf. of Laws, ch. viii. s. 241-2). No more forcible illustration of this rule can be produced than that of marriage. That is a contract exclusively a matter of municipal regulation, and yet in the single instance of the law, creating a personal incapacity, such contract is by the law of England, as well as all other nations, admitted to be governed by the *lex loci contractus* (Story's Com. on Conf. of Laws, ch. iv. s. 86-7); the incidents of the contract, that is, the rights, duties, and obligations of the status of marriage, are governed by the domicile of the parties (Story's Com. on Conf. of Laws, ch. vi. s. 109-114). The Statute of Wills, is but a municipal regulation, applying only to England and Ireland, having no operation in Scotland or the Colonies. Can it be said that a Will, made in Austria, by an Englishman resident there, must be according to the form prescribed by the English Act? Such a doctrine has never yet been held. Foreign jurists adopt, to its fullest extent, the maxim "*locus regit actum*," and hold that a testament made in the form prescribed by the law of the place in which it is made, is valid to pass immoveable property wherever it is situate (4 Burge's Com. on Col. Law, 582). Accordingly, such is the rule in Spain, Holland, and France (4 Burge's Com. on Col. Law, 583, 4 and 5; Voet. lib. 1, tit. 5, n. 13; Code Civil Art. 970-999); but it is said a different rule [348] prevails here, and the case of *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373) is relied upon by the learned Judge in the Court below, as conclusive on this point; he treats this case as if it were one of succession, and says, the cases are too numerous to entertain any doubt, that the succession is governed by the law of the domicile, and that *Stanley v. Bernes*, has settled any doubts that might have existed before: but we submit that that case is in our favour; there the Testator was resident in Portugal,—whether domiciled or not, was not conclusive: he made a Will, valid according to the law of Portugal, in the form required by that law; he afterwards made two Codicils in the form required by the English law, but which were not valid, according to the Portuguese law. The Court of Probate here pronounced in the first instance in favour of these Codicils; the learned Judge, Sir John Nicholl, being of opinion that the original domicile remained, to the extent of making valid testamentary dispositions: he thought, as appears from his Judgment, that the original domicile was never lost. The Court of Delegates reversed his decision, and refused probate of the papers; the grounds of their Judgment are not set forth.

[Mr. Baron Parke.—By the decision of the Court of Delegates, in *Stanley v. Bernes* [3 Hagg. E.R. 373], it was certainly intended that a party must be testate, according to the law of the domicile, and that he was intestate, unless he made a Will, valid according to the *lex domicilii*.]

Like marriage, we submit, the solemnities are to be governed by the *lex loci*, the incidents by the *lex domicilii*. *Warrender v. Warrender* (9 Bligh, New Rep. 89). Such a rule [349] is not inconsistent with the ordinary rules of our law, and is acknowledged and recognised by the principles of international law (Denisart, Art. Domicile. Vattel, lib. 2, c. 8, s. 111, 175).

II. But assuming, for the purpose of the argument, that the *lex domicilii* applies, then is not the Codicil of October 1838 incorporated and made part of the Testator's Will, by the Codicil of April 1839? In this Codicil, after varying some previous bequests and adding new ones, the Testator expressly says, "I hereby ratify and confirm my said Will and Codicils, except as before excepted, in every other respect." This is a confirmation of the original Will, and the Codicil of 1838 being incorporated with it: it is a republication of that Codicil, sufficient to bring it within the new Will Act. The Will itself, shows that it was the Testator's intention to make valid, after-executed papers,—the only mode of doing so, with respect to the Codicil of 1838, was by such a Codicil as that of 1839; the paper of 1838 is en-

dorsed "Codicil." By the law as it stood before the late Statute, an unattested Codicil might become properly attested, if referred to by one duly executed: all the authorities prove this. *Molineux v. Molineux* (Cro. Jas. 144); *Smith v. Mulford* (4 Mod. 131); *Habergham v. Vincent* (2 Ves. J. 228): in that case Wilson, J., says, The question is, whether the prior paper is so referred to, as that there is no doubt of its identity. In the same case Buller, J., cites the case of *Doe dem. Sibthorp v. Taylor* (2 Ves. J. 232), as showing the difference between a paper before, and a Codicil after the Will. That was a devise of land, except such as by a Codicil the Testator should give. Afterwards he made a Codicil, and gave part of the land; [350] but it was not executed before three witnesses. The heir insisted that the Testator was intestate as to the excepted land. The Court held that if the Codicil was in being, at the time of the Will, it would be part of the Will, and the same as if inserted: but being made afterwards, and no revocation for want of proper execution, it would not do, and was no Codicil. There was no republication of the Will so as to include the Codicil. Here there is an express republication, and the question therefore is, whether there is not sufficient proof that when the Testator confirmed his Codicils, he intended to refer to this particular paper. *De Bathe v. Lord Fingal* (16 Ves. 167); *Guest v. Willasey* (2 Bing. 429, et 3 Bing. 614). It is not necessary that the instrument confirming the previous Will or Codicil should be on the same paper as the original Will; it is sufficient if it distinctly refer to it. *Gordon v. Lord Reay* (5 Sim. 274); *Utterton v. Robins* (1 Adol. and Ell. 423); *Barnes v. Crowe* (1 Ves. J. 486); *Pigott v. Waller* (7 Ves. 98); *Goodtitle v. Meredith* (2 Maul. and Sel. 5); *Smart v. Prujean* (6 Ves. 560); *Dillon v. Harris* (4 Bligh. 321); *Doe dem. Williams v. Evans* (1 Crom. and Mee. 42); *Jackson v. Hurlock* (2 Eden. 271); *Wood v. Hitchings* (2 Moore, P.C. Cases, 355). All these are cases previous to the late Will Act, but the same principles have been recognised and acted on since. *Lady Durham's Case* (3 Curt. 57); *Willesford's Case* (3 Curt. 77). In *Andrews v. Turner* (3 Q.B. Rep. 177), it was held that a Will of lands made before January 1838, and revoked, might, under the Stat. 7 Will IV., and 1 Vict., c. 26, be republished after that [351] day, by a Codicil attested by only two witnesses. This decision was founded upon *Brooke v. Kent* (3 Moore, P.C. Cases, 334) in this Court.

III. The Will Act does not in fact apply: the paper sought to be propounded is testamentary—there is no doubt of that: it was valid before, and is expressly saved by sec. 34 of the Statute. How does the confirmation of the Will affect it? It is said that by designating it as a Codicil, it is stamped with a legal character, and cannot be admitted to proof, because not executed with the formalities required by the Act. The word Codicil, though a technical term, is not strictly confined to its legal signification (Swinburne on Wills, p. 1, 27): it is evidently used by the Testator to denote a testamentary paper, and ought to be so construed. In *Gill v. Shelley* (2 Jarman on Wills, 136), where the word children was used to designate a class, it was held to include an illegitimate child; that was a much stronger case, for it overruled all the previous decisions. In *Smith's Case* (2 Curteis, Rep. 796), probate was granted of a Will and two Codicils, the first Codicil not being attested: the latter, which was duly executed and designated as "a second Codicil to my last Will and Testament," was held to refer sufficiently to the former Codicil to entitle it to proof.

Sir Charles Wetherell, Q.C., Mr. Kindersley, Q.C., Dr. Jenner, and Mr. Schomberg, for the Respondent.—The question at issue, is not one, as has been argued, of Foreign Law, or of construction and intention. It is simply a question of English Law, to be determined purely by English rules, and the proper construction of the English Statute of Wills. The moral conviction of the intention of the Testator, however strong, is not to supersede the legal conviction. The Milan Codicil has been rightly rejected from proof. The confirmatory Codicil of April 1839, shows no intention to incorporate the Codicil, in question, of October 1838. It commences, "This is a further Codicil to the Will, Testament, and Codicils of me, Francis Charles Seymour Conway, Marquis of Hertford, K.C." It then speaks of "former Codicils," and after giving several large pecuniary legacies, among which is a sum of £15,000 to the Countess de Zichy Ferraris, concludes, "And I hereby ratify and confirm my said Will and Codicils, except as before excepted, in every other respect." There is no mention or allusion to the Codicil of 1838, and yet it is con-

tended that by these words, it is to be incorporated in the Will: that the Codicil of 1839 is to travel with a retrospective operation, and to let in all previous informal papers under this vagrant clause. But to come to the propositions contended for:—

I. The *lex domicilii*, not the *lex loci*, must be the rule. *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373-465) fixed the rule to which the previous cases were tending; *The Duchess of Kingston's Case* (4 Burge's Com. on Col. Law, 588; Story's Com. on Conf. of Laws, ch. xi., sec. 465-6; Coll. Jur. vol. i. p. 323); *Curling v. Thornton* (2 Add. Ecc. Rep. 6; S.C. 8 Sim. 310); *Munroe v. Douglas* (5 Mad. 379). The same doctrine prevails in America (Story's Com. on Conf. of Laws, ch. xi., sec. 468) and in Scotland (*ib.* 469). The rule, *locus regit actum*, is stated too broadly, when applied to testamentary dispositions: it applies to acts, [353] *inter vivos*, where, as in contracts, there are privies, and, in strictness, extends only to immoveable property. In *Price v. Dewhurst* (4 Myl. and Cr. 76-82), the Lord Chancellor Cottenham, in giving judgment, declares the law upon this subject; he says, "The law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession, as to personalty, but regulates the decision, as to what constitutes the last Will. That this is the law and practice of the Ecclesiastical Courts in this country, appears from many recent decisions, such as *Curling v. Thornton*. In the case of the goods of Maraon (1 Hagg. Ecc. Rep. 498), the domicile having been in Spain, the law of that country decided the Probate. In *Hare v. Nasmyth* (2 Add. 25), the property was in England, and the party died there, but the domicile was in Scotland, and the validity of the Will was held to depend on the law in Scotland." And he then cites the cases of *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373), and *Anstruther v. Chalmers* (2 Sim. 1), as decisions on the same point. The law is very clearly laid down, and all the decisions considered, in Robertson on Personal Succession, chap. 8.

II. In order to incorporate the Codicil of October 1838, there must not only be a plain identification, but a sufficient certainty: this is the principle decided in *Habergham v. Vincent* (2 Ves. J. 204); *Wilkinson v. Adam* (2 Ves. and Bea. 422); *Wood v. Wood* (1 Phil. Ecc. Rep. 357); *Winn v. Littleton* (1 Vern. 3); *Strode v. Russel* (2 Vern. 621); *Boydell v. Drummond* (11 East, 142); and the cases cited on the other side. The whole question [354] is, whether there is sufficient certainty: the principle of the law requires positive certainty—that is the position laid down by Mr. Wigram in his Treatise on extrinsic evidence in the interpretation of Wills (3 Maxim, p. 54), and is justified as well by the authorities he refers to, as those already cited. Now, what is there to identify this paper in the Testator's acts? In 1839, he re-publishes his Will and Codicils, "except as before excepted;" there is no mention, no allusion to, nothing like an identification, of the Codicil of 1838, in terms: can it then be inferred, at least, so plainly, as to come within the rule of the decisions?

III. The term Codicil, made use of, is a strictly technical term, and applies to such papers only as are legally Codicils. Sheppard's *Touchstone*, 399; Godolphin's *Orphans' Legacy*, p. 19. It cannot be held to apply to testamentary papers, for they are not within the Act; they might be Codicils or Wills previously: but the statute requiring certain formalities for its execution, gives the word Codicil a purely technical meaning, and it must be interpreted with reference to its legal operation, and not as contended for according to any vague notions or intentions the Testator may be supposed to have had. If a Testator use language capable of being applied to a variety of classes, if more especially applicable to one class, it is a rule of construction that such language must be held exclusively applicable to that class. Wigram on extrinsic evidence, in the interpretation of Wills, p. 56; *Dillon v. Harris* (4 Bligh, 321).

Dr. Addams appeared for the Executors, but offered no argument.

[355] The Right Hon. Dr. Lushington (June 13, 1844).—The late Marquis of Hertford died in London on the 1st of March 1842. On his death were found a large number of testamentary papers. Of these papers the Judge of the Prerogative Court decreed probate in common form of a Will, bearing date on the 25th of February 1823, and of twenty-nine Codicils, dated at different periods between the 25th of February 1823 and the 8th of November 1839, both inclusive. Such probate

issued to the Executors named in the Will and Codicils, on the 10th of June 1842, the Judge reserving the consideration of the validity of certain other scripts.

On the second session of Michaelmas Term 1842, a Proctor appeared for Mr. Croker, one of the Executors named in the Will, and alleged him to be a legatee, in a script marked 31 D, and subsequently propounded the same in an allegation. This allegation was opposed on behalf of the present Marquis of Hertford, the residuary legatee of his father, and, on the 17th day of March 1843, was rejected by the Court. From the Decree rejecting this allegation, Mr. Croker appealed to Her Majesty in Council, and the Marquis of Hertford appeared as Respondent, to support the decision of the Court below.

The formal question for the determination of their Lordships is, whether the Decree rejecting the allegation shall be affirmed, or whether it shall be reversed, and the allegation admitted; but in effect the question to be decided is, whether, assuming all the facts contained in the allegation to be true, the script dated Milan, 28th of October 1838, marked 31 D, shall be admitted to probate or not.

[356] The substance of the allegation is as follows:—First. That the script propounded is in the handwriting of the late Marquis. Second. That it was written by him whilst resident at Milan. Third. That by the law of Austria, by which Milan is governed, such script would be a valid Codicil. Fourth. That the script was delivered on the day it was written, to the Countess de Zichy Ferraris, a legatee therein named, and continued in her possession until the death of the Testator. Fifth. That the script propounded, whether originally valid or invalid, is rendered valid and operative by the Codicil bearing date the 26th of April 1839, already admitted to probate.

In the course of the discussion, two points of importance were admitted and assumed on both sides: 1st. That the late Marquis died legally domiciled in England, having never had another domicile; 2nd. That the Statute 7th Will. IV. and 1 Vict., c. 26, extends generally to testamentary papers made after the 1st of January 1838, as decided by this Court, in the case of *Brooke v. Kent* (3 Moore's P.C. Cases, 334), which Judgment is recognized by the Court of Queen's Bench, in the case of *Andrews v. Turner* (3 Q.B. Rep. 177). But it is contended on behalf of the Appellant, that the peculiar circumstances of this case take it out of the Statute.

The Statute as to Wills, requires that every testamentary paper written after the 1st of January 1838, shall be attested by two witnesses. The script propounded is dated the 28th of October 1838, and is not attested by any witness; therefore, *prima facie*, it is not entitled to probate.

But probate is asked on two grounds: First. That the script is valid by the law of Austria, which, it is [357] said, the law of England, the domicile of the Testator, ought to adopt for the purpose of deciding this question; Second. That the script is made valid and operative, by the words of reference to Codicils, in the Codicil of the 26th of April 1839, which is attested according to the Statute of Wills.

To consider those propositions in their order.—The Testator being domiciled in England, and the *forum* English, the law of England, in the sense in which that expression is here used, must govern the transaction. It is true that the law of England may, possibly, for the purpose of deciding upon the validity of this script, adopt the law of another country, viz. the law of the country where the script was actually written: but whoever alleges that an English *forum* must, for the purpose of determining any question, adopt the law of a foreign country, must, as it is an exception from ordinary rules, distinctly prove from acknowledged principles, that such foreign law ought to be applied.

To prevent mistakes, it may be convenient to state with more particularity what the proposition to be maintained is. First. The proposition necessarily assumes, that the recent Statute is confined in its operation and effect, to the testamentary papers of domiciled Englishmen, executed in England: for it could not be argued, that if the Statute in express terms has enacted that the testamentary papers of domiciled Englishmen, executed abroad, should be invalid unless attested by two witnesses, such enactment would not be binding upon all English Courts as to all domiciled Englishmen. Second. Proceeding on such assumption, the proposition maintains that the *lex loci regit actum* is the law to be applied,—the [358] Austrian,

French, or Dutch law; according to the place where the testamentary instrument was made.

Now, if the first part of the proposition be true, viz., that the Statute does not extend to the testamentary papers of Englishmen made in foreign countries, it is obvious that there would be no occasion to resort to foreign law at all; for, according to universal practice prior to the passing of the recent Statute, all testamentary papers valid by the then existing law of England, wherever executed by a domiciled Englishman, were valid and admitted to probate; and if this Statute does not extend to such papers made abroad, why should not the old law, not being abrogated as to them, prevail?

It seems, therefore, almost superfluous to discuss the question, whether the *lex loci regit actum* should be applied to this case; for, if the Statute is construed to apply to the testamentary acts of all domiciled Englishmen, wheresoever done, then no foreign law can overrule the Statute. If the Statute does not apply, then the old law and practice must: and this paper cannot be entitled to probate. The whole of this part of the case resolves itself into this, whether the Statute shall be held applicable to testamentary papers made out of England, or not.

It is hardly fitting to pursue this inquiry further; for the question could only properly arise on the assumption that the Statute did not apply to testamentary papers executed abroad, and that the paper in contest was invalid by the law of England, prior to the Statute, but valid by the law of the country where written. It is sufficient to add that there is no instance in which foreign law has been resorted to as a guide to the decision, whether a testamentary paper of a domiciled Englishman should be deemed valid or not: the laxity of the law of England, before the Statute, rendered the occurrence of a case in which foreign law could be called in aid, very improbable; but still, in universal practice, the law or domicile was alone regarded; indeed, had the *lex loci regit actum* prevailed against the law of domicile, many papers executed abroad must have been pronounced invalid. For instance, take the case of a Will of an English subject having an English domicile, executed abroad, in a country where stricter forms were requisite than the former testamentary law of England demanded, and where the alternative of a reference to the law of domicile, as pleaded in this case, did not exist; in such a case, to adopt the *lex loci regit actum* would be to hold the instrument void. No trace in the history of English testamentary law is to be found, of the introduction of this principle, and it is difficult to discover how the laws of other nations, on matters which are purely municipal, should form any sufficient ground for the introduction of a new Statute to govern the testamentary acts of domiciled Englishmen. There is a wide distinction between wills and contracts.

This brings us to the construction of the Statute: and, first, what are the words of the enactment? The ninth section enacts, that no testamentary act shall be valid, unless it be in writing, and executed according to the Statute. Now, those words are general, and do not of themselves import any exception: but it may be that exceptions may be engrafted upon them, if it can be shown, from a consideration of the whole Statute, and from acknowledged principles of law, that the Statute was not intended to apply to such excepted cases. Then what is the alleged exception? That the Statute does not extend to testamentary papers of domiciled Englishmen made out of England. Now it must be admitted that there are no words to be found, pointing to such exception; but would the exception be reconcilable with the principles hitherto acted upon? The principles hitherto acted upon are these: *First*, That *mobilia sequuntur personam*; *Second*, That the law of domicile regulates testacy and intestacy; *Third*, That the Courts, in the case of foreigners domiciled abroad, having property here, always apply to the law of the domicile, as in the cases of *De Bonnaval v. De Bonnaval* (1 Curt. 856), and *Hare v. Nasmyth* (2 Add. 25), and numerous other instances; *Fourth*, That the *lex loci rei sitae*, and the *lex loci regit actum*, have not been applied in any instance. If the *lex loci regit actum* be engrafted on the Statute by way of exception, the following consequences would arise: that the law of domicile would, in great measure, be broken in upon; that whenever an Englishman accidentally travelling abroad happened to make a testamentary paper at a place he was passing through, the Courts here would have to decide upon its validity by foreign law, and this might happen to several papers made by the same Testator, in different

countries, having different testamentary laws. If the validity of a Codicil be triable by the adoption of such foreign law, so must the revocation of a Will; and consequently a Will duly executed in England, according to the Statute, might be revoked by a holograph paper, unattested, made abroad in countries where the law holds such testamentary papers valid.

Again, other and very serious results would follow from this exception. A testamentary paper, executed according to the Statute abroad, might not be valid, for the law of the country might require the attestation of three witnesses, or a different form of attestation. The [361] exception would not only produce those consequences, but it would directly militate against the principle, that a man is presumed to know the law of his domicile, but not the testamentary law of a country he may casually visit. It is difficult to say where such an exception, if admitted, would stop; would not the same principle tend to abrogate the effects of the seventh and eighth sections, as to the age at which testamentary papers may be made, and as to married women? The great object of the Act would be defeated, the object being the introduction into the English testamentary law, of fixed and positive rules for the execution of testamentary instruments.

It is no answer to this reasoning to say, that the Statute would not extend to the testamentary papers of foreigners or Englishmen domiciled abroad. Such an exception would be founded on the acknowledged doctrine of the law of domicile, and be according to practice. It would only be the adoption of the same principle which governed the great case of *Wilson v. Marryatt*, (8 T. Rep. 31.), namely, that a British subject domiciled abroad might carry on a trade permitted to the citizens of the country in which he was domiciled, though in general terms British Statutes had prohibited such trade to British subjects.

For the reason now stated, we are of opinion that the testamentary papers of Englishmen, not domiciled abroad, are subject to the provision of this Statute, wherever such papers may have been made, and we find that in the case of *Maltass v. Maltass* (3 Curt. 231), Sir Herbert Jenner Fust has expressed his opinion to the same effect.

As to the question whether the script, dated Milan, 28th of October 1838, is rendered operative by the Codicil of the 26th of April 1839, the latter paper [362] being duly attested according to the recent Statute.—That Codicil is as follows:—“This is a further Codicil to the Will, Testament and Codicils of me, Francis Charles Seymour Conway, Marquis of Hertford, K.G. I had, in former Codicils, endeavoured to give as much as possible to Lady Strachan: now I wish to withdraw all, except a provision of seven hundred a-year, under my old family settlements, which I am entitled to bequeath to any one for life, and what I give underneath. I give to her, the said Louisa Dillon Strachan, ten thousand pounds—to Charlotte, Countess of Zichy Ferraris, fifteen thousand pounds—and to Matilda, Countess of Berchtoldt, five thousand pounds. And I direct that these sums be a first and primary charge upon all the manors, messuages, lands, tithes, and hereditaments in the county of Warwick, and preferably in the parish of Salford (the town of Birmingham to be excepted), to and over which I have any disposing power, and I hereby ratify and confirm my said Will and Codicils, except as before excepted, in every other respect.” The words relied on for validating the Milan script are these:—“I hereby ratify and confirm my said Will and Codicils, except as before excepted, in every respect.”

The legal meaning and effect of these words must be ascertained from the whole of this paper, and in accordance with the acknowledged rules of interpretation. There are two modes of affixing a meaning to words used in an instrument of this description: first, by taking the strict and primary acceptation; second, from the context of the whole, adopting a wider and more general meaning. If the first mode of interpretation is to prevail, then, on the 26th of April 1839, the word “Codicil” could only mean a testamentary paper, which required the death of the Testator alone [363] to give it testamentary effect; or, in other words, a testamentary paper duly executed and attested, according to the Statute. Certainly, there have been very many authorities to show that where a Testator uses a technical expression of this kind, its strict and primary sense ought to be applied; and it is exceedingly difficult to find, in this paper of the 26th of April 1839, any expressions

which could legally induce the Court to break in on this established principle: but, however, without saying more on this point at present, we will proceed to consider what will be the effect and consequence of the other mode of construction, and applying to the word "Codicil" a more general and extended meaning.

If the word "Codicil" be divested of its strict legal meaning, the next inquiry is, what might it mean? Why should it be restricted to a paper written and signed by the deceased? In common parlance, men were accustomed to call every paper subsidiary to a Will, a Codicil, though it were only a preparation in draft or unsigned. By the law which existed before the Statute, every paper, no matter in what state, proved to be intended to be final, whether written by the Testator or not, was entitled to probate. If the present legal meaning of the word "Codicil" be departed from, why take a less extensive meaning than that which the old law would give, and which Testators very commonly used? And if this be so, the Codicil of the 26th of April 1839 would validate all previous papers of this description, however loose they might be, signed or unsigned, with or without erasures, obliterations, and interlineations. Surely, this shows the danger of abandoning a general rule, for the purpose of carrying into effect what may be thought the Testator's intention.

There is, however, another and most important rule [364] of construction, which, if any but the strict and primary sense were attributed to the words used in this Codicil, would be violated. That rule appears to be correctly expressed in the work of the present Vice-Chancellor Wigram, as to the interpretation of Wills:—"When there is nothing in the context of a Will from which it is apparent that the Testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the Will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." Now, to apply this doctrine to the present case.—The strict and primary sense of the word "Codicil" is a testamentary instrument which would, *per se*, become valid immediately, on the death of the Testator; such words, so interpreted, are sensible with reference to extrinsic circumstances; for there are Codicils made prior to the 26th of April 1839, duly executed, so as to come within the strict and primary sense; therefore, according to the rule of construction stated, however capable the words may be of another and popular interpretation, or however strong the intention of the Testator, the strict and primary sense must be adhered to. If, then, the strict and primary meaning be attached to the word "Codicil," the Codicil of the 26th of April could not render operative the Milan script, for it is not entitled, legally speaking, to be called a Codicil.

It is not necessary, however, to rest our Judgment on this ground. We will now take into consideration the [365] question which was most argued at the Bar, assuming that the Milan paper might be included under the term "Codicil": the question now before us is, whether the Milan script is rendered valid by the executed Codicil of April 1839. What is the proper meaning of the words "rendered valid?" Before the passing of the recent Statute, it was common to republish a Will or a Codicil for the purpose of rendering them operative from the date of publication, because, otherwise, lands acquired subsequently to the first execution would not pass. Ordinarily, there had been a previous legal execution of the Codicil sought to be republished; as, indeed, the term itself imports; but there was another mode admitted to be legal, namely, in a regularly executed Codicil, to refer expressly to a paper not previously duly executed: this was not, properly speaking, a republication, but an incorporation, by reference, of an unexecuted paper.

We will next consider upon what principle it is, that incorporation by reference has stood, and may be justified.

By the Statute of Frauds, devises of lands were to be in writing, signed and attested; this was the security which that law provided for the authenticity of such instruments. Any attempt to devise lands with less security, would be, *pro tanto*, a defeazance of the Statute; therefore, it was held that a man could not by his Will

reserve to himself the power of devising land by an unattested Codicil—for such Codicil would carry with it less proof of authenticity; but it was permitted to a Testator to render operative as part of his Will duly attested, a written paper already in existence; and for this reason—because, the paper being clearly identified, and the Will duly attested, the security intended by the Statute would not be diminished. It is, however, evident that certainty and identification is the very essence of such incorporation. If any doubt can exist as to the instrument to be incorporated, then the principle of incorporation by relation would fail; consequently, so far as we can discover in all the cases of incorporation under the Statute of Frauds, there has been an express reference to a paper in writing described with certainty.

This is the doctrine of Mr. Justice Wilson, in *Habergham v. Vincent* (2 Ves. Jun. 231). His words are, "If a Testator in his Will refers expressly to any paper already written, and has so described it that there can be no doubt of its identity."

From this doctrine it does not appear that in subsequent cases there has been any departure. It is most distinctly affirmed by Lord Eldon, in *Smart v. Prujean* (6 Ves. 561). Lord Eldon says: "The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is to be incorporated, in such a way, that the Court can be under no mistake." It is useless to travel through all the other cases cited at the Bar; they may vary in circumstances, as the instrument may be on the same paper or not, but none depart from the principle.

Having then examined the doctrine applied to incorporation, in cases having reference to the Statute of Frauds, the next step is to determine whether it does not equally apply to the present Statute of Wills; there is not any ground for distinction, for the only difference as relates to this case, is attestation by two, instead of three witnesses; a bequest of personal estate being now governed by the same rules as apply to devises of real property.

This brings us at once to the question, whether the [367] Milan script, being a separate paper, distinct from the Codicil of the 26th of April 1839, and not executed according to the Statute, is incorporated as part of the Codicil of April 1839; for "republished," in the proper sense of the term, the Milan Codicil cannot be, for it never was legally published or duly executed.

Bearing in mind that certainty, and prevention of mistake, are requisite, let us examine the words of the Codicil of April 1839. There is no express reference to the Milan script by date, by contents, or by any specific description which could identify. The words to be relied on are, "I affirm my said Will and Codicils." If such words are sufficient for incorporation, then general description will incorporate, without express reference or identification. Is general description, certainty, without chance of mistake?

We will trace the consequences which may result from holding general description sufficient:—First. Instead of attaching to the word "Codicil" its strict and primary sense, a merely popular acceptance of the term must be substituted; Second. In the popular acceptance of the term, as has already been discussed, any paper of a testamentary kind, signed or unsigned, might be introduced; Third. This would of necessity introduce uncertainty, for it might be that the testator intended to refer to some, and not to other papers, and thus many of the mischiefs existing under the old law, and which this Statute was intended to prevent, might be revived. The want of specific identification would of necessity repeal to a certain extent the Statute; for if general reference would do, why should not a Testator write as many Codicils as he pleases, after the incorporating Codicil, and by omitting to date them, or by antedating them, defeat the provisions of the Statute?

[368] Is it possible to contend that this construction might not produce uncertainty? What the Statute requires is signature and attestation: without such protection the law says property shall not be bequeathed, unless the paper to be incorporated is as clearly identified as if it was actually a part of the executed Will or Codicil. To give it validity and effect, would be to say, that property might be bequeathed without the attestation of witnesses: in other words, *pro tanto*, repeal the Statute.

It may possibly be said, that the intentions of the Testator will be defeated by

this decision; and if so, we may lament it: but we sit here, not to try what the Testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made; and we must not be induced by any consideration of intention or hardship, to relax the provisions of a Statute (perhaps the most important of modern times) for the disposition of property.

Being of opinion that all the facts stated in the allegation would not, if proved as laid, entitle the Milan script to probate, we must affirm the Decree of the Judge of the Prerogative Court rejecting the allegation.

With respect to costs, considering the very peculiar circumstances of the case, we shall advise Her Majesty to direct that the costs of the Appeal in this Court be paid out of the estate. The costs in the Court below are already given in a similar manner; but to prevent an injurious precedent, we must add, that in other cases such recommendation will not be repeated, save under circumstances equally peculiar and stringent. The cause to be remitted.

[Mews' Dig. tit. INTERNATIONAL LAW, VI. PROPERTY, c. *Movable Property*; tit. WILL. II. TESTAMENTARY INSTRUMENTS, i. IX. CONSTRUCTION, a. k. 1. c. S.C. 8 Jur. 863; and, below, 3 Curt. 468 (*sub nom. De Zichy Ferraris v. Hertford*). On point (i.) as to domicile, see *In re Capdevielle*, 1864, 33 L.J. Ex. 306; and *Udny v. Udny*, 1869, L.R. 1 H.L. (Sc.) 441, Phillimore, *Int. Law*, ss. 51-60; see also The Wills Act 1861 (24 and 25 Vict. c. 114); the Domicile Act 1861 (24 and 25 Vict. c. 121, and Convention between United Kingdom and U.S. of America relative to disposal of real and personal property (Treaty Series, 1900, No. 17); (ii.) as to incorporation (4 Moo. P.C. 368), discussed in *Allen v. Maddock*, 1858, 11 Moo. P.C. 435; *Anderson v. Anderson*, 1872, L.R. 13 Eq. 386; *In the goods of Adamson*, 1875, 3 P. and D. 255; (iii.) as to operation of 1 Vict. c. 26, it may be noted that the language of the judgment (4 Moo. P.C. 356) is elliptical. The point decided is clearly and correctly stated, however, in the head-note (4 Moo. P.C. 340).]

[369] ON APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE.

THOMAS JENNINGS,—*Appellant*: HENRY WORSLEY HILL,—*Respondent* *
[Feb. 20, 1844].

THE AUGUSTA.

A party attached for non-payment of costs decreed against him in an Appeal under the Slave Trade Act [5 Geo. IV. c. 113], in which the Crown and the Captors were the Respondents; upon supersedeas by the Crown, ordered to be discharged out of custody: notwithstanding the Captors' objection to the Crown receiving costs out of the proceeds of the sale of the vessel condemned.

By the 44th sec. of the 5th Geo. IV., c. 113, the Captors of a vessel employed contrary to the provisions of the Act, are only entitled to a moiety of the proceeds of the sale thereof, after deducting the costs of prosecution [4 Moo. P.C. 372].

This was a motion to relax and supersede an attachment issued against Thomas Jennings, the Appellant, for not obeying a monition for payment of costs decreed on appeal under the following circumstances:

The Appeal was from a sentence of the Vice-Admiralty Court at Sierra Leone, condemning the vessel, (the *Augusta*.) her tackle, etc., upon a charge of aiding and abetting the slave-trade, contrary to the 5th Geo. IV., c. 113. The Appeal was heard before their Lordships † on the 5th of April 1843, when the sentence of the

* Present: Lord Campbell, Sir Herbert Jenner Fust, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

† Present: The Lord President (Lord Wharnccliffe), Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington.

Court below was affirmed, and the Appellant, Jennings, condemned in costs of the Appeal (the judgment rested entirely on the facts and evidence in the cause, and contained no new principle of law as applicable to such cases).

[370] On the 7th of July 1843, a monition issued against Jennings for payment of these costs. The monition was served personally, and, on the 7th of December, having been returned, and the Appellant certified in contempt for not having obeyed it, an attachment was issued against him. Under this attachment, Jennings was taken into custody and lodged in the Queen's Bench Prison. On the 18th of January 1844, the costs of the Crown were directed to be paid out of the proceeds remaining in the registry; and on the same day one moiety of the net proceeds, after deducting the costs of the Crown, was directed to be paid to the Respondent, the Captor, pursuant to the 44th sec. of the 5th Geo. IV., c. 113.

On the 8th of February, Nicholl, Her Majesty's Procurator-General, in pursuance of the directions of the Lords Commissioners of Her Majesty's Treasury, alleged before the Surrogate, that he would proceed no further under the attachment decreed against the said Jennings, and consented to the same being superseded. The Proctor for the Respondents, the Captors, refused to attend the Surrogate, whereupon the matter was referred to the Judicial Committee.

Dr. Addams now moved to discharge Captain Jennings from the attachment.

The Queen's Advocate (Sir John Dodson), for the Crown, offered no opposition; but

Dr. H. J. Nicholl, for the Respondent and others, the Captors—Opposed the motion, contending that by the 44th sec.[371]-tion (*a*) of the 5th Geo. IV., c. 113, one moiety of the proceeds of the condemned vessel vested in the Captors at the time of the seizure, and that if the Crown was entitled to deduct the costs out of the proceeds, it would defeat the object of the Act. The sum might perhaps be paid by the Crown, upon a petition of right.

Lord Campbell.—In this case their Lordships are of opinion that the warrant of arrest should be superseded, and that Cap-[372]tain Jennings is entitled to be discharged. Captain Jennings has been arrested for costs decreed to the Crown on an Appeal in this matter in which the Crown is prosecutor. Their Lordships are of opinion, that the Crown has a right to supersede the process which issued at its own instance. Their Lordships are of opinion, that the Crown must be supposed to have done what is necessary to satisfy itself that the process should be superseded. We find it thus stated in the proceedings in the cause: "Nicholl, Her Majesty's Procurator-General, in pursuance of the directions of the Lords Com-

(*a*) This section is in the following terms:—"And be it further enacted, That the proceeds of all ships and goods seized, prosecuted, and condemned, for any offence against this Act, except in such seizures as shall be made at sea by the Commanders or Officers of Her Majesty's ships or vessels of war, shall be divided, paid, and applied as follows: that is to say, after deducting the charges of prosecution from the gross amount thereof, One third of the net proceeds shall be paid into the hands of such persons as His Majesty, his heirs and successors, may please to appoint, for the use of His Majesty, his heirs and successors; One third part thereof to the Governor or Commander-in-Chief of the Island, Colony, Plantation, Settlement, or Territory, where the said seizure shall have been made or prosecuted; and the other third part thereof to the person or persons who shall lawfully seize, inform, and prosecute the same to condemnation. And in case of seizures made at sea by the Commanders or Officers of His Majesty's ships or vessels of war, one moiety of the said net proceeds, after deducting the charges of prosecution as aforesaid, shall be paid into the hands of such person as His Majesty, his heirs and successors, may please to appoint, for the use of His Majesty, his heirs and successors; and the other moiety to the Commanders or Officers of His Majesty's ships or vessels of war who shall have made the seizure and prosecuted the same to condemnation, subject, nevertheless, to such distribution in the seizures made by the Commanders or Officers of His Majesty's ships or vessels of war, whether at sea or otherwise, as His Majesty, his heirs and successors, shall think fit to order and direct by any Order or Orders in Council, or by any proclamation or proclamations to be made for that purpose."

missioners of Her Majesty's Treasury, alleged that he should proceed no further under the attachment decreed against the said Thomas Jennings, and consented to the same being superseded." Therefore, on this minute, it is clear that the Crown has consented to the warrant being superseded:—are we to interfere, and say there is no power in the Crown to grant a supersedeas? We apprehend that there is no discretion vested in us to advise the Crown either to supersede the warrant, or to allow it to remain in full force; that is a matter between Captain Jennings and the Crown. Even if the Crown had acted improperly towards the Captors, the parties before us are only Captain Jennings and the Crown, and we cannot interpose to prevent Captain Jennings having the benefit the Crown intends him to have. It has been said in argument, that Lieutenant Hill and the Captors have a vested interest in the proceeds; and so they have, but it is in the net proceeds, after deducting the charges of the prosecution: and it is not until those charges have been deducted, that the net proceeds are ascertained.

Their Lordships must not be understood to say, that [373] there is no remedy against the Crown. Dr. Nicholl referred to a proceeding by petition of right on behalf of the Captors; but their Lordships, looking to this section of the Act of Parliament, and finding the words are, "after deducting the charges of prosecution," that the net proceeds are to be the net proceeds after deducting the charges of prosecution—finding this enactment, their Lordships apprehend that Lieutenant Hill has no cause of complaint—that the Crown has a discretion to do what is proper. It is the Crown who issued the Monition, and had Captain Jennings arrested; and if the Crown thinks proper to consent to Captain Jennings being discharged, we conceive that it is not exceeding the just power belonging to the Crown.

Therefore, Captain Jennings ought to be discharged. We think the Captors have no reason to complain, if they have one half of the net proceeds after these charges are paid.

[5 Geo. IV. c. 113, s. 40, was repealed by the Slave Trade Consolidation Act, 1873 (36 and 37 Vict. c. 88). See ss. 11-16 of the Act of 1873, and note to *Muter v. Chipchase*, 1836, 1 Moo. P.C. 3.]

[374] ON APPEAL FROM THE SUPREME COURT OF THE MAURITIUS.

ALCESTE FLORENTIN ANTOINE D'ORLIAC.—*Appellant*: LA DAME D'ORLIAC,
—*Respondent* * [May 9, 1844].

The Charter of Justice of the Mauritius gives no right of Appeal to the Queen in Council, from a sentence of divorce.

But the Crown can, upon special petition, for that purpose, grant such leave.

Appeal granted by the *Cour D'Appel* in the Mauritius, from a sentence of divorce, *à vinculo matrimonii*, upon petition of Respondent, discharged as incompetent. But

On special petition, leave to appeal granted by the Judicial Committee upon terms of the Appellant's lodging his printed Case within a given time, or the Appeal to stand dismissed.

This was a petition by the Respondent, La Dame D'Orliac, for the discharge of an Appeal, granted by the *Cour D'Appel* of the Island of the Mauritius, to her husband, the Appellant, from a sentence of that Court, pronounced on the 16th of September 1841, affirming a Decree of the Court of First Instance, for divorce *à vinculo matrimonii*, by reason of cruelty and outrage.

By the Charter of Justice, granted by His late Majesty, King William the Fourth, to the Island of the Mauritius, dated the 13th of April 1831, it is, among other things,

* Present: Lord Brougham, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

provided " that it shall and may be lawful for any person or persons, being a party or parties to any civil suit or action depending in the said Cour D'Appel of the Island, to appeal to His Majesty in Council, his heirs and successors, or his or their Privy Council, against any final judgment, sentence [375] or decree of the said Court, or against any rule or order made in any such civil suit or action, having the effect of a final or definitive sentence, and which Appeal shall be made subject to the rules and regulations following, that is to say, in case any judgment, decree, order or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £1000 sterling, or in case any judgment, decree, order or sentence shall involve, directly or indirectly, any claim, demand, or question to, or respecting property, or any civil right, amounting to, or of, the value of £1000 sterling, or in case the same shall affect the right or alleged right of any person to freedom, the person or persons so aggrieved, by any such judgment, decree, order or sentence of the said Cour D'Appel, may within fourteen days next after the same shall have been made, pronounced or given, apply to the said Cour D'Appel, by Petition, for leave to appeal therefrom to His Majesty, his heirs and successors, and his or their Privy Council."

The Petitioner submitted, that a suit or divorce was not comprehended within the causes from which an Appeal was given by the Charter of Justice; and that, consequently, the Appellant ought not to have been permitted by the Supreme Court to Appeal to Her Majesty in Council. And after setting forth that it was a mere question of fact and evidence, of which the Courts below were best enabled to judge, she prayed that the Appeal might be discharged.

The Petition came on *ex parte*.

Mr. Wigram, Q.C., for the Petitioner.—The Charter only gives the right to Appeal when the subject-matter amounts to £1000. This is a suit [376] for divorce, which is clearly not comprehended within the Charter. It is impossible to estimate or assess the value. No instance was ever known of an Appeal from a sentence of divorce, and, as we are informed, there are express instructions to the Governor not to give leave to Appeal from sentences of divorce. There is in fact no jurisdiction.

Lord Brougham.—The words of the Charter are, "Where the sentence shall involve directly or indirectly any claim, demand or question to, or respecting, property, or any civil right amounting to, or of, the value of £1000 sterling." Surely the validity of marriage, title to dower, or a question of legitimacy, are all civil rights. And were there no other remedy it would be quite monstrous to say, that you might appeal for £1000, and not for a case where legitimacy is involved. But the Charter we think has omitted cases of divorce, and the Cour D'Appel was, therefore, wrong in granting the Appeal. There should have been a special application here, for leave to appeal, under the general powers reserved by the Charter to the Crown, which may, if it think fit, grant leave to appeal. Their Lordships will exercise their discretion in so advising Her Majesty, if a proper case is brought before them; but this Petition must be granted, and the Appeal allowed by the Cour D'Appel, dismissed.

In consequence of the dismissal, the Appellant presented (June 13, 1844*) a Special Petition praying for leave to appeal. This Petition disclosed no fresh merits.

[377] Mr. B. S. Follett, for the Petitioner.

M. Wigram, Q.C., in opposition to the Petitioner—Submitted, that in the absence of merits, the Court would not grant the extraordinary indulgence prayed for. The case was one of particular hardship to the wife; she had obtained the sentence of divorce nearly four years ago, and the delay and remissness in prosecuting the appeal operated cruelly upon her.

Lord Brougham.—We think the Petitioner ought to be let in; but it will be upon terms of his lodging his Case, on or before the 27th of June, and paying the

* Present: Lord Wharncliffe, Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

costs of the day. The Appeal to stand dismissed if the Case is not lodged within the time stipulated, without further application to this Court.

By an Order in Council it was ordered that leave ought to be granted to the said Petitioner to enter and prosecute his Appeal from the said Decree of the Court of Appeal of the Island of Mauritius of the 16th of September 1841. Provided nevertheless, that such appeal do stand dismissed, unless Appellant or his agents have lodged his Petition of Appeal and printed Case on or before the 27th June instant.

The Appeal and printed Case not having been lodged on the 27th of June, the time prescribed by the above Order, the Appeal became dismissed.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL. 3. *Leave to Appeal*. As to conditions on which special leave is granted in civil cases, see note to *Rettemeyer v. Obermüller*, 1837, 2 Moo. P.C. at p. 125. See, as to appeals from Mauritius, *Hulm v. Hulm*, 1842-43, 4 Moo. P.C. 264.]

[378] ON APPEAL FROM THE COURT OF APPEALS FOR THE PROVINCE OF LOWER CANADA.

JAMES HUTCHINSON,—*Appellant*: ROBERT GILLESPIE and Others,—
Respondents * [May 9, 1844].

The firm of S. and W. H. in Lower Canada, being indebted to J. W., transferred 75 promissory notes to a factor, on his account. At the time of the transfer S. and W. H. were *en déconfiture*. A *saisie arrêt* having subsequently issued by order of the creditors of S. and W. H., the 75 notes in the hands of the factor were attached. Held by the Judicial Committee, that the transfer having taken place before the execution of the *saisie arrêt*, was valid by the French law in force in Lower Canada.

A Commission for examination of witnesses in Canada, to prove such *déconfiture*, in the circumstances, refused [3 Moo. P.C. 385].

Semble. By the old French law, prevailing in Lower Canada, all *Ordonnances* not registered, are void [4 Moo. P.C. 383, 385].

This was an application for the reception of certain affidavits touching the validity of a claim, in an Appeal referred by the Judicial Committee under the provision of the 3rd and 4th Will. IV., c. 41, s. 17, made subsequent to and pending such reference: or for an Order, in the nature of a Commission, to examine witnesses, for the examination of the parties so deposing on affidavit, by the Court of Queen's Bench, in the district of Montreal, according to the practice of that Court, and pursuant to the provisions of the 3rd and 4th Will. IV., c. 42, s. 14.

The Appeal was originally heard before the Judicial [379] Committee in 1838, when an order of reference was made to Mr. Serjeant Channell, to take the accounts, and with liberty to report special matters (2 Moore's P.C. Cases, 243).

The facts of the case, so far as they related to the subject-matter of this Petition, were as follows:—

In the month of June 1825, the firm of John Spragg and William Hutchinson, of Montreal, in the district of Lower Canada, who were then in embarrassed circumstances, handed to one Lambe, goods which they held for the firm of William and James Hutchinson, with directions to sell them on account of that firm: and they also about the same time placed seventy-five promissory notes in the hands of certain commission-agents, with instructions to collect the amount and place it to the credit of James Hutchinson, the Appellant.

On the 5th of July 1825, the Respondents, as the creditors of Spragg and

* Present: Lord Brougham, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Hutchinson, caused a *saïsee arret*, or writ of attachment, to issue, and attached all the monies, goods, etc., in the hands of Lambe, and others therein named, as belonged or were due to John Spragg and William Hutchinson.

At the time of the execution of the attachment, Lambe had sold a great portion of the goods placed with him, and had the remainder on hand. The commission-agents had also collected the amount due on some of the notes deposited in their hands, and had restored the remainder to Spragg and Hutchinson.

The Referee proceeded to make the several inquiries directed by the Order, and, among others, respecting the validity of the transfer of the seventy-five promissory notes. The Respondents submitted that, according to the law of Lower Canada, the [380] transfer of these notes was invalid. Spragg and Hutchinson being, at the time of the transfer, *en deconfiture*, or notoriously insolvent, and they called upon the Referee to certify as to the propriety of issuing a Commission to examine witnesses, or to admit in support thereof affidavits obtained from, and sworn by, persons in Canada, for that purpose.

The Appellants resisted the application, contending that the transfer was valid by the law of Lower Canada, and brought in a statement as to this point.

The Arbitrator by his interlocutory report, bearing date the 27th of June 1843, certified and reported, among other things, that, being of opinion that the transfer of the seventy-five promissory notes was not, by the law of Lower Canada, void by reason of the previous *deconfiture*, or notorious insolvency, if any such existed, of Spragg and Hutchinson, he had refused a Commission to examine witnesses in Canada; but having regard to the power given to him, by the order of reference, to report from time to time, at the request of either party, or in his final report, such special matters as might arise connected with the subject-matter of investigation, he had reported the matters aforesaid, and the grounds upon which he refused to grant a certificate of the propriety of issuing a Commission to examine witnesses.

The Respondents, the Petitioners, then presented a Petition to the Judicial Committee, complaining of the findings of the Referee upon this point, and praying for a Commission to examine witnesses in Canada, for the purpose of proving that Spragg and Hutchinson were, at the time of the transfer, *en deconfiture*.

[381] Mr. Watson, Q.C., and Mr. Gordon, for the Petitioners.

The transfer of the seventy-five promissory notes by Spragg and Hutchinson, when *en deconfiture*, would, by the law of Lower Canada, be void. It will not be requisite to argue that the transfer was absolutely void; all we have to do is, to show that there were circumstances which create a suspicion of fraud. That will be sufficient to justify the issuing of the Commission. The Referee refused our application, because he conceived the transfer valid in law. He made the interlocutory report to enable your Lordships to determine whether an order should go out or not. The same powers are given him by the 3rd and 4th Wm. IV., c. 41, s. 17, as are exercised by a Master in Chancery. In the Master's Office, if the Master thinks a Commission necessary he certifies for one, and then it issues. [Lord Brougham: There is a direct reference in the order as to these promissory notes (2 Moore's P.C. Cases, 247). I take the order of reference as to an Arbitrator, not to a Master in Chancery.] As to their being the property of Spragg and Hutchinson, not as to the question of the transfer being *en deconfiture*. Our objections to the interlocutory order are, *First*, that no question of law was referred; and *Secondly*, that the Referee has proceeded upon an erroneous assumption of the law of Lower Canada, affecting transfers, *en deconfiture*.

The law of France was, down to the cession of Canada to England, in 1763, the law of Canada. By the 14th Geo. III., c. 83, it is declared that in all matters relative to property and civil rights, resort shall be had [382] to the laws of Canada for the decision of the same. Thus the law of Canada, as existing at the time of its cession to England, is the law to which we must resort to determine the question. Denisart, treating on the laws generally in use in the French Colonies, says, "*Il est certain que dans les Indes, en Amérique et par-tout ailleurs où les François ont des Colonies, Pon suit la Coutume de Paris*" (Denisart, Collection des Decisions, tit. Colonie). To the same effect writes Merlin, except that he includes also the laws and *ordonnances* of France:—*On doit juger, dans les Colonies, suivant les lois et les Ordonnances*

du royaume et conformément à la Coutume de Paris" (Merlin, *Repertoire Universelle*, tit. Colonie, § 1. iv.). These are the laws which apply to the French Colonies generally. With regard to Canada in particular, the *Édit* of Louis XIV. of 1663, provides:—"Lequel Conseil Souverain aura le pouvoir de connoître de toutes causes, civiles et criminelles, pour juger souverainement et en dernier ressort, selon les loix et ordonnances de notre Royaume de France, et y procéder autant qu'il se pourra, en la forme et manière, qui se pratique et se garde dans le ressort, de notre Cour de Parlement de Paris" (Edits Concernant Canada, Quebec, 1803-6, vol. i. p. 21). The law adopted by the Parliament of Paris, was the *Coutume de Paris*, the *Ordonnances*, and when they were silent, the Civil Law. The 179th article of the *Coutume de Paris*, is in these words, "*Toutefois en cas de déconfiture chacun créancier vient à contribution au sol la livre, sur les biens meubles du débiteur, et n'y a point de préférence ou prérogative, pour quelque cause que ce soit; encore qu'aucun des créanciers eût fait pré-*[383]*-mier saisir.*" Again by the 180th article:—"Le cas de déconfiture est quand les biens du débiteur, tant meubles qu'immeubles, ne suffisent aux créanciers apparens; et si pour empêcher la contribution, se met différent entre les créanciers apparens, sur la suffisance ou insuffisance desdits biens, les premiers en diligence qui prennent les deniers des meubles par eux arrêtés, doivent bailler caution de les rapporter pour être mis en contribution, au cas que les dits biens ne suffisent" (see *Coutume*, and see Ferrière's *Commentary*, 12mo ed. 1741). The provisions as to *deconfiture* were enacted as the general law of France, by Art. 165 of the *Ordonnance* of 1629 (Ferrière's *Diet. de Droit*, tit. *Déconfiture*), the *Ordonnance du Commerce*, tit. XI., Art. 4 (*Recueil General des Anciennes Loix Francaises*, par M. Isambert, vol. xix. p. 104), the declaration of 18th November 1702 (*Ibid.* vol. xx. p. 420), and declaration of the 11th and 16th June 1716. [Mr. Burge: None of these authorities prevail in Canada: they were never registered, as required by the *Édit* of Louis XIV., to become part of the law of Canada (Laws of Canada, vol. i. p. 1-19).] It is a question whether the laws of France, although not registered in Canada, are not binding in Canada. [Lord Brougham: It is a principle of the French law, that all *ordonnances* not registered, are void. They only take effect from the date of the registration.] The *Édit* of Henry IV., 1609, clearly shows that transfers in fraud of creditors are void—"nous avons par même moyen déclaré et déclarons tels transports, cessions, venditions et donations de biens, meubles ou immeubles, faits en fraude des créanciers, directement ou indirectement nuls et de nul effet et valeur" (*Recueil d'Edits*, etc., vol. i. p. 735, fo. Ed. Paris, 172). The [384] question then is one of fraud, which is one of fact, and must be so treated. The proximity of actual bankruptcy was the great test. This can only be known by granting the Commission.

Mr. Burge, Q.C., and Mr. Ellis, appeared for the Appellant to oppose the Motion, but were not called upon.

Lord Brougham.—Their Lordships entertain no doubt upon this Petition. Upon the Appeal coming before them in 1838, they thought fit, to save delay, trouble, and litigation, to settle the question, and referred the matter to Mr. Serjeant Channell. It was sent rather by way of reference, than as to a Master in Chancery to take accounts. We do not say that if it had been a material question of law we would have referred it; certainly not, without some specific declaration. The question of property in this case substantially gave the Referee authority to inquire into the question of law. It was necessarily raised before him on taking the accounts, and we think he could not have done otherwise than he has. The main question is, whether the Referee has formed a correct view of the law of Lower Canada, such as justified his refusal to receive the affidavits, or to report in favour of the Commission. He considered the question of *deconfiture*, in the circumstances, immaterial. It is clear, that, if this Commission was allowed to issue, it could only establish a fact, namely, the *deconfiture* of Spragg and Hutchinson at the time of the transfer. That, however, is totally immaterial in the view their Lordships take of the case. The *Coutume de Paris* applies to Lower Canada, but the 179th article, [385] relied upon, by the Petitioners' Counsel, does not go to establish their proposition. This article merely points out divers preferences given to creditors. Nor does the 180th article of the same code apply. No law has been proved to apply to Lower Canada upon

this point, except the *Coutume de Paris*. The *Ordonnances* cited do not apply; they were never registered, and it is a principle of the French law that all *Ordonnances* not registered, are void. Registration was necessary to give them authority. It is the check which the Parliament of Paris had over the *Edits* of the Crown. The *Ordonnance* of 1766 throughout assumes registration to be necessary. The mere fact, therefore, of the existence of certain *Ordonnances* is not sufficient to make them in force in Canada. The Petitioners say that there is fraud—they do not allege specific fraud—but it is immaterial. Upon the whole, we agree with the Learned Serjeant in the conclusion he has arrived at. Consequently we must refuse, as he has done, the issuing of the Commission.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America*. Approved on point as to necessity for registration of *Ordonnances* in *Symes v. Cuivillier*, 1880, 5 A.C. 138, 157; and cf. *Les Sœurs Hospitalières de St. Joseph v. Middlemiss*, 1878, 3 A.C. 1102, see also 11 Exch. 798.]

[386] ON APPEAL FROM THE PREROGATIVE COURT OF
CANTERBURY.

WILLIAM MEDDOWCROFT,—*Appellant*; HARRIET HUGUENIN,—*Respondent* *
[May 10 and 11, 1844].

The validity of a sentence passed in 1816, by the Consistory Court of London, decreeing a divorce, *a vinculo*, in a suit of nullity of marriage, may be impeached in a suit brought in 1842, in the Prerogative Court, for granting Letters of Administration, by the issue of the marriage, pronounced null and void by the sentence of 1816.

But in order to set aside such sentence, collusion between the parties, and fraud practised thereby, upon the Court, must be satisfactorily shown.

An allegation, impeaching a sentence, and pleading facts, which if proved, might amount to fraud, but not collusion, rejected

This was an Appeal from a decree of the Prerogative Court of Canterbury, and was, in the first instance, a cause of citing the Respondent, Harriet Huguenin, the wife of Louis Huguenin, theretofore calling herself Meddowcroft, and pretending to be the lawful relict of William Meddowcroft, deceased, the administratrix of the goods, chattels, and credits of the deceased, to bring in the Letters of Administration of such goods, etc., and to show cause why the same should not be revoked, as having surreptitiously, and under false suggestions, been obtained; and was promoted by the Appellant against the Respondent.

The allegation given in on behalf of the Appellant, pleaded, that William Meddowcroft, the party deceased, on the 28th of February 1815, duly intermarried with one Mary Gregory, widow, in the parish church of [387] Clerkenwell, and that an entry of such marriage was duly made in the register-book of marriages kept in and for the said parish; that the parties lived and cohabited together, and were reputed to be man and wife; that there was issue of the said marriage, one child, the Appellant, who was born in the year 1817, and in the month of February, in the same year, was baptized in the name of William, and an entry thereof made in the register-book of baptism kept for that purpose, in the parish of Saint-George the Martyr, in the county of Middlesex; but that in the said entry, Mary Meddowcroft, the wife of William Meddowcroft, deceased, and the mother of the Appellant, had been erroneously or fraudulently described as Mary Gregory.

The Respondent (defendant in the Court below) appeared and gave in a defensive allegation, in which she pleaded—That soon after the marriage in fact had

* Present: Lord Brougham, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

between the said William Meddowcroft and Mary Gregory, widow, on the 28th day of February 1815, being the marriage pleaded in the second article of the allegation given in and admitted on behalf of William Gregory, calling himself Meddowcroft, (the Appellant,) to wit, in or about the beginning of the year 1816, a suit of nullity of marriage by reason of minority, and the undue publication of banns, entitled, "*Meddowcroft v. Gregory*, falsely calling herself Meddowcroft" (see case reported, 2 Hagg. Cons. Rep. 207), was instituted in the Consistorial Court of London, by William Meddowcroft, the natural and lawful father of the said William Meddowcroft (then William Meddowcroft the younger), the party deceased, against the said Mary Gregory, falsely calling herself Meddow-[388]-croft, and pretending to be the lawful wife of the said William Meddowcroft the younger, and that, on the 12th day of July 1816, Lord Stowell, then Sir William Scott, by his definitive sentence, or final decree, in writing, made in the said cause, pronounced that the said pretended marriage, howsoever in fact had and solemnized, was null and void, to all intents and purposes in law whatsoever, pursuant and agreeable to the Statute passed in the 26th year of the reign of his late Majesty King George II., entitled, "An act for the better Preventing Claudestine Marriages;" that no Appeal was had or made against the said sentence or decree, and that the same is now a valid and subsisting sentence or decree. The sentence of Sir William Scott, in *Meddowcroft v. Gregory*, falsely calling herself Meddowcroft, was annexed in supply of proof.

This allegation was admitted without opposition.

A responsive allegation was then given in, on the part of William Meddowcroft, (the Appellant,) which was in substance, as follows:—

"That he, William Meddowcroft, the natural and lawful son of the said William Meddowcroft and Mary his wife, was born on the 15th day of January 1817, being subsequently to the time when the said proceedings were so had, and the sentence given in the said Consistorial Court of London, and that by reason thereof, it was "*res inter alios acta*," and that such sentence could not in law be held to be binding and conclusive on the said William Meddowcroft, who was necessarily a stranger to, and had no means or power of intervening in the aforesaid suit, by result of which, he both was, and is, most grievously damaged, both in estate and reputation.

"That by reason of the fraudulent suppression of [389] evidence in the said proceedings, and the erroneous evidence on which the said sentence was mainly founded, as thereafter pleaded, such sentence was not a valid sentence, nor binding against the interest and rights of the said William Meddowcroft; that previously to the publication of the banns of marriage between the said William Meddowcroft, the deceased, and Mary his wife, then Mary Gregory, widow, in the parish church of Saint James, Clerkenwell, in the county of Middlesex, a paper of instructions for such publication, containing the true names of the parties, as follows, 'William Meddowcroft, bachelor, and Mary Gregory, widow,' was delivered to Elizabeth Penry, spinster, the daughter of Joseph Penry, the parish clerk of the said parish, who was in the habit of receiving notices for publication of banns of marriage, at the house of the said parish clerk, and she, the said Elizabeth Penry, entered such names in a private book, preparatory to the same being entered in the regular banns' book; that in so doing, the said Elizabeth Penry wrote the initial and second letters, 'Me' of the name Meddowcroft, so as to resemble 'Wi,' and such were so mistaken by the said parish clerk, who not only in entering the said name in the said banns' book mistook such letters, but also omitted the second letter 'd,' and spelt the name 'Widowcroft.' That in consequence thereof, the banns of marriage of the said parties were published in the said church as between William Widowcroft, bachelor, and Mary Gregory, widow. That on the day of the said marriage, the said mistakes in the said banns' book, and which until such time were wholly unknown to the said William Meddowcroft and the said Mary Meddowcroft, then Gregory, were first discovered. That on such [390] occasion, the said mistakes appearing to have originated, as in fact they did, solely with the said Elizabeth Penry, and the said parish clerk, the same were corrected under the directions of the Rev. John Leese, the officiating minister of the said parish, in the said banns' book, and thereupon the said marriage was then duly had and solemnized between the said William Meddowcroft and Mary Meddowcroft, then Gregory, in pursuance of the publication of such banns.

"That at the time of the proceedings in the said Consistorial Court of London, as mentioned in the first article of this allegation, Elizabeth Penry, the daughter of the said Joseph Penry, to whom the paper of instructions for the publication of the said banns was so as aforesaid delivered, was not examined as a witness, although living at that time, she not having died until the month of August 1823, nor was such paper of instructions, nor the said private book, mentioned in the next preceding article of this allegation, produced, or any reason pleaded or assigned for the non-production of the same. That by such suppression and withholding of evidence, the true character of the case was concealed from the Court.

"That as well before as during the progress of the aforesaid proceedings in the Consistorial Court of London, the said Mary Meddowcroft, the deceased, by false representations of the said William Meddowcroft, her husband, and others, in respect to the advantages that would result to her from not contesting the suit, and more particularly from the solemn promise of the said William Meddowcroft, her husband, that in the event of a sentence of nullity of marriage being pronounced, he would again marry her, and the said Mary Meddowcroft being entitled to a pension of sixty-five [391] pounds per annum, as widow to John Gregory, her former husband, who had been Lieutenant in the Royal Navy, she, the said Mary Meddowcroft, was induced to carry on the suit collusively, and neither to administer interrogatories to the witnesses produced on behalf of the promoter of the said suit, nor to file any allegation on her own behalf; and she, the said Mary Meddowcroft, as well during the said proceedings as shortly after the termination of the same, so declared, or to the effect in this article pleaded to divers persons. And the party proponent further alleged and propounded, that in consequence of such withholding of evidence, the non-administration of interrogatories, and the omission to plead, and other the collusive conduct as aforesaid, there was no *bona fide* contestation of suit, and by reason thereof the true state of the facts was perverted or suppressed, and a surprise effected by the said William Meddowcroft, the promoter of the suit, upon the justice of the Court.

"That during the pendency of the proceedings in the said Consistorial and Episcopal Court of London, and for some days subsequently to the termination thereof, the said William Meddowcroft, the deceased, and the said Mary Meddowcroft, continued to live and cohabit together as husband and wife, when the said Mary Meddowcroft, suspecting, as she at that time declared, that the said William Meddowcroft did not intend to perform his aforesaid promise of again marrying her, had recourse to professional advice as to the expediency of an Appeal from the sentence of the said Court. That, on being informed that no fresh facts or other evidence could be introduced in an Appellate Court, which had not been brought forward in the Court below, on her behalf, and being otherwise dis-[392]-suaded therefrom, she, the said Mary Meddowcroft, returned to live and cohabit with the said William Meddowcroft, in the hope, as she repeatedly declared, of being able to induce him still to fulfil his promise of again marrying her, and did continue so to live and cohabit with him until the birth of their child, the said William Meddowcroft.

"That James Meddowcroft, the great uncle of the said William Meddowcroft (the Appellant), did, by his last Will and Testament, duly proved in this Court, on the 20th of October 1821, after making certain devises and bequests therein, give and devise to trustees, therein named, the residue of his freehold and personal estate, for the purpose of accumulation during the period of twenty-one years, and after the expiration of such time, upon trust, that they should convey the same to the use of the eldest male lineal descendant then living, of his nephew, William Meddowcroft, the father of the said William Meddowcroft (the Appellant). That such time expired in the month of July, in the present year, 1842, and that such property so accumulated amounts to the sum of £80,000, or thereabouts.

"That the said William Meddowcroft, (the Appellant,) was not fully apprised of the circumstances under which the aforesaid marriage took place, until the close of the year 1810, when his mother, the said Mary Meddowcroft, for the first time showed him certain papers and documents connected with the proceedings had as aforesaid in the Consistorial Court of London, and made sundry communications relative thereto, which induced him to institute the present proceedings."

This allegation was opposed by the Respondent; [393] and the learned Judge of the Prerogative Court (Sir Herbert Jenner Fust), by his decree, bearing date the 13th of February 1843 (reported 3 Curteis, 403), rejected the allegation upon which the Appellant protested a grievance, and appealed to her Majesty in Council.

The Appeal now came on for hearing.

Dr. Phillimore, and Mr. W. T. S. Daniel, for the Appellant.—The question is, whether an allegation impeaching a sentence of a Spiritual Court, on the ground that it was collusively obtained, and the party pleading it no party to the original sentence, ought to be admitted to proof. This resolves itself into three considerations: *first*, whether a sentence of a Spiritual Court, in a suit *a vinculo*, operates as an estoppel; *second*, whether this is the proper *forum* to try such a case; and, *thirdly*, whether the facts pleaded in the rejected allegation, if proved, would support the cause.

I. The sentence is in a matrimonial cause, instituted in a Spiritual Court, and is not conclusive. "*Sententia in causa matrimoniali nunquam transit in rem judicatam* (Gail's Obs. 112)." It is also laid down by Oughton (Oughton's Ordo Judiciorum, Tit. civ. iii. and iv): "*In isto casu, non obstat exceptio rei judicate, vel quod predicta sententia transivit in rem judicatam; quia sententia lata, in causa matrimoniali, contra matrimonium, nunquam transit in rem judicatam, et habet multa privilegia. Et quoties Ecclesia decipitur, pronunciando sententiam contra matrimonium, ex novis probationibus, [etiam aliquando ex eisdem] potest revocari prior sententia.*" In the Duchess of Kingston Case (20 Howell's State Trials, 355-8), the Judges gave it [394] as their unanimous opinion, to the question put to them by the House of Lords, that a sentence of a Spiritual Court, against a marriage, was not conclusive evidence, so as to estop the Counsel for the Crown from proving such marriage, in an indictment for bigamy. And so it was held in *Robins v. Crutchley* (2 Wilson's (Serj.) Rep. 118, 127). Again, in *Barrs v. Jackson* (1 You. and Col. New Rep. 585. This case was afterwards reversed, on Appeal, by Lord Lyndhurst, 1 Phillips, 582), the Vice-Chancellor, Knight Bruce, held, that the grant of Letters of Administration to an intestate's estate, by the Prerogative Court, was not conclusive evidence, in a suit for the distribution of the intestate's assets, in the Court of Chancery.

II. It was competent to the Appellant, who was an infant *en ventre de sa mere*, when the sentence was pronounced, which released the father and mother, *a vinculo matrimonii*, to impeach this sentence, whereby he was bastardized, as having been collusively obtained; and this was the proper *forum*. *Browning v. Reane* (2 Phillimore's Rep. 69), *Wilson v. Brockley* (1 Phillimore's Rep. 132), *Mellicant v. Fisher* (cited 3 Curteis Rep. 412).

III. The facts pleaded are sufficient. The allegation shows that the sentence of Sir William Scott, was obtained by fraud and collusion. In the Duchess of Kingston's Case (20 Howell's State Trials, 358), the second question put to the Judges was, whether, admitting the sentence to be conclusive upon such indictment, the counsel for the Crown might be permitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud and collusion; to which the Judges gave it as [395] their unanimous opinion that it was. In the opinion given by Mr. Hargrave (Hargrave's Treatise, concerning the effect of sentences of Courts Ecclesiastical, p. 484), previous to the Duchess of Kingston's Case, he reviews all the authorities for setting aside the judgments of both Temporal and Spiritual Courts, on the ground of collusion, and expresses the strongest opinion on their validity. In *The King v. The Inhabitants of Tibshelf* (1 Barn. and Adol. 190), Lord Tenterden lays it down, that if there be a total variation of a name, it is immaterial whether the misdescription has arisen from accident or design, or whether such design was fraudulent or not; but if there be only a partial variation of name, the supposed misdescription may be explained, and it is in this class of cases that it is material to inquire into the motives of the parties; and this is the principle recognised in *Pougett v. Tomkyns* (3 Mau. and Sel. 262, 3) and *Sullivan v. Sullivan* (2 Hagg. Con. Rep. 238, 254). Here it is a mere partial variation of the name. Sir William Scott's judgment proceeded upon the ground that the conduct of the parties showed a fraudulent intent. [Lord Brougham: You must not only show that the decision was wrong, and that the facts were otherwise than as proved, but that fraud was used to make it appear otherwise; and it was known

to be a fraud by the party propounding them. Admitting all the facts set forth in your allegation to be true, would that have altered the learned Judge's opinion?] Sir William Scott assumed that there was fraud, and our facts substantially aver sufficient to set aside the grounds for such an assumption.

[396] Dr. Addams, and Mr. Toller, for the Respondent.—The first and second points of the Appellant's argument are immaterial. The sole question is that raised by the third branch, which we submit must be decided against him; for if the allegation was admitted, and all the facts therein pleaded, proved, it would only be the same facts as Sir William Scott had before him, in the cause of *Meddowcroft v. Meddowcroft*, in 1816. The effect of reversing this sentence upon the mere allegation of fraud in the suppression of a witness, and that no interrogatories were exhibited by one of the parties to the cause, would be most serious. It would bastardize the offspring of the second marriage. The allegation makes out no case of any thing which deceived or misled the Court.

[Lord Brougham: The mere keeping back a witness, though a suspicious circumstance, is not sufficient to presume a fraud. The allegation states, that one party carried on the suit collusively. This is too general. It is not alleged that between the promoter of the suit, (the guardian,) and the wife, any collusion existed. If one party only suppresses evidence, that can be no collusion. It must be collusion between the promoter of the suit and the Defendant. The fraudulent suppression of evidence by one party, would be insufficient. It is when the two parties combine together, that it becomes collusion. In the words of Wedderburn, in the *Duchess of Kingston's Case* (20 Howell's State Trials, 478-9), "A sentence obtained by fraud and collusion is no sentence. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all [397] these requisites not one takes place in the case of a fraudulent and collusive suit: there is no judge; but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious case proposed to him: there is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian on this point, '*fabula, non judicium, hoc est, in scena, non in foro, res agitur.*'" This is not the fact in the present case. There is nothing in this allegation, which, if admitted, could prove that there was such fraud and collusion between the promoter and the defender to the suit, to deceive the Court. That alone is the fact upon which you can raise the question of fraudulent collusion.]

Dr. Phillimore in reply.—The objection that fraud and collusion in obtaining the sentence is not sufficiently specified, is technical. The question really is, whether the Court will allow a third party, not a party to the suit, to show that the sentence founded on that suit was collusive. Sir William Scott would never have decided the suit if he had known that the mother was *enciente*. The Court was deceived.

Lord Brougham.—In this case their Lordships do not see any substantial ground for differing with the Court below, and for reversing the judgment of that Court. It has been said by their Lordships, in the course of the argument, that the matter now before the Court has nothing to do with the original case before Sir William Scott. Objections are now taken for the first time, [398] that the sentence of Sir William Scott must be taken as a nullity, from the circumstances under which it was obtained from that learned Judge: those circumstances amounting to fraud upon the Judge and collusion between the parties. A collusive suit is not a real judgment; but something obtained by fraud from the Court, which is not binding. This doctrine was laid down by Lord Hardwicke, in *Thomas v. Ketteriche* (1 Ves. Sen. 333). It has been laid down in law and equity in reference to Ecclesiastical Cases, that collusion will make a nullity of a judgment, if it be between the parties.

Now this case arises on a demurrer to an allegation; and it is said in argument by the Respondent, that if the facts, as pleaded in the allegation, were proved, it would not amount to a nullity of the sentence of Sir William Scott, as it does not show collusion. The collusion alleged, is supposed to be supported by the averments, that the husband withheld a witness, and that the wife did not produce such witness; that Elizabeth Penry, who ought to have been produced, was kept back; that no interrogatories were administered, and that there was no appeal. It appears to

their Lordships that these circumstances are not sufficient. It does not show collusion that the husband's father kept back a witness, it rather negatives collusion, nor was it necessary that a party should cross-examine; because if she knew that there was no case to defend, exhibiting interrogatories would be unnecessary. It appears to us that these facts, if proved, would be insufficient; that all the circumstances which would have given materiality were brought before the Judge. Their Lordships do not think it necessary to go further than this particular case—they lay down no new principle; but, upon the grounds stated, pronounce against this Appeal; and the allegation is, therefore, rejected with costs.

[S.C. 3 Curt. 403. On point as to estoppel followed in *Perry v. Meddowcroft*, 1846, 10 Beav. 136, 137; and see *Needham v. Bremner*, 1866, L.R. 1 C.P. 583; *Concha v. Concha*, 1886, 11 A.C. 541; *Irish Land Commission v. Ryan* (1900), 2 I.R. 565; and notes to *Duchess of Kingston's Case*, 2 Smith, L.C. 10th ed. 755.]

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

CHARLES PIGGOTT,—*Appellant*: JOHN BEARBLOCK and RICHARD HARDING NEWMAN,—*Respondents* * [May 16, 1844].

By the statute 59 Geo. III., c. 134, s. 14, it is enacted, that it shall be lawful for the Churchwardens of any parish, with the consent of the vestry, to raise and borrow money upon the credit of the church-rates of any parish, for the purposes of defraying the expenses of any Church or Chapel. Held by the Judicial Committee of the Privy Council, (reversing the judgment of the Arches Court of Canterbury,) not to authorise Churchwardens to borrow money upon the credit of the church-rates, for repayment of a debt incurred in past years for repairs to the Church.

This was a suit for substruction of church-rates brought by the Respondents, the Churchwardens of the parish of Hornchurch, against the Appellant, an inhabitant of the Chapelry of Romford, in the same parish; and arose under the following circumstances:—

By the statute 59 Geo. III., c. 134, s. 14, it is provided, "That it shall be lawful for the Churchwardens [400] of any parish, with the consent of the vestry, or of the persons possessing the powers of vestry, and with the consent of the Bishop and Incumbent, to borrow and raise, upon the credit of the church-rates of any such parish, such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels; and they are thereby empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than 10 per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be repaid."

In the year 1826 the parish church of Hornchurch, (a peculiar and exempt jurisdiction) having fallen into decay, the Churchwardens were authorised, at a vestry meeting, duly convened, to cause the church to be repaired, which they accordingly proceeded to do; but were unable immediately to raise, by means of the ordinary church-rates, a sum sufficient to pay the whole expenses of such repairs. At a vestry held on the 3rd July 1832, pursuant to notice, it was ordered that the Churchwardens should be authorised to borrow the sum of £350, under the authority of the above Act of Parliament, for the purpose of defraying the expenses so incurred. In pursuance of such directions, the Churchwardens applied to, and obtained the consent of, the Official and Commissary of the Peculiar, as the person exercising the functions and office of Bishop, in respect of the said jurisdiction.

* Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

and likewise of the Incumbent of the parish, to such sum of £350 being raised upon the credit of the church-rates of the parish. The Churchwardens, [401] however, obtained from the Rev. James Bearblock, the loan of that sum; the repayment thereof was secured by a deed, dated the 29th day of September 1832, to which the Churchwardens, the Commissary and Incumbent, for the time being, were respectively parties; whereby the church-rates and assessments of the said parish were, in pursuance of the said Act of the 33rd Geo. III., c. 136, granted, and assigned, and made payable, in satisfaction of the principal and interest on such loan, in manner and at the respective times appointed and authorised by the before-mentioned Act of Parliament.

On the 29th of August 1839, and on the 22nd of October 1840, two several rates were made for repairing the parish church of Hornchurch, and for supplying the Churchwardens with necessary funds, to defray other incidental charges appertaining to their office for the then current year. These rates were duly confirmed; but the Appellant refused to pay the sum of three shillings and four pence, and five shillings, the amount of his respective assessments: the Churchwardens therefore, brought the present suit, and Hornchurch, being a peculiar and exempt jurisdiction, the case was brought by Letters of Request from the Commissary thereof, procured out of the Arches Court of Canterbury.

The Libel pleaded the making of the above rates, and the refusal of the Appellant to pay his assessments. The Appellant by his answer, pleaded, that the rates were null and void, for want of due notice of the vestries at which they were made; and he further pleaded that they were also void, not being made, as alleged, for and toward the repairing of the parish Church of the said parish, and for supplying the [402] Churchwardens with necessary funds to defray the incidental charges for the current year only, but being in part retrospective, the Churchwardens having paid to the Rev. James Bearblock £85, part payment of the sum advanced by him many years since, and £6. 2s. 6d. interest thereon: and having used and intended to use such rate not solely for the necessary incidental expenses of the year of office of the said Churchwardens, but for other purposes; and in making other payments, therein set forth, which he submitted could not be legally charged on a church-rate. The Appellant, also, brought in an allegation, pleading, amongst other things, the same facts as were alleged in his answer, to which the Respondents replied, denying that the notices for the vestries at which the rates in question were made, were not duly made and given: but admitting that the rates were not made for or intended to be used to defray incidental charges only, but also to defray the repairs of the Church, and they submitted that the visitation expenses and sidesman's salary were amongst such incidental expenses, as having, as they the Respondents verily believed, from time immemorial, been always defrayed out of the church-rates, without any objection having ever been raised thereto.

On the 11th day of January 1843, the learned Judge of the Arches Court, (Sir Herbert Jenner Fust) by an interlocutory decree, having the force and effect of a definitive sentence, pronounced that the libel had been sufficiently proved, and condemned the Appellant in the said sums of three shillings and fourpence, and five shillings, being the sums rated and assessed upon him, and sued for in the cause; with costs.

[403] From this sentence the present appeal was brought.

Mr. Roebuck, Q.C., and Mr. Mellor, for the Appellant.—This sentence cannot stand; the rates are invalid and illegal. *First*: No proof is given of the liability of the inhabitants of Romford, to the charge of the Hornchurch rates. Romford is a vicarage; and the inhabitants appoint their own parochial officers. In the Statute 26 Geo. III., c. 28, providing for the poor of Romford, it is called, the parish church of Romford. It is clear, therefore, that it is independent of Hornchurch, and that the churchwardens of Hornchurch have no right to impose rates upon the inhabitants of Romford, for the repair of the parish church of Hornchurch. *Secondly*: No due legal notices were given for holding the vestries, at which the rates in question were made. The 1st Vict., c. 45, provides, that notices be placed on or near the doors of all the churches and chapels in the parish. No satisfactory evidence has been given that these notices were so placed: the rates, therefore, must be quashed. *Regina v. Whipp* (10 Law Journal, N.S. 68), *Blunt v. Harwood* (8 Ad. and Ell. 610). But, *thirdly*, The substantial point is, that the rates are

partly retrospective, and partly for illegal objects, and, therefore, void. *The King v. The Churchwardens of Dursley* (5 Ad. and Ell. 10) is conclusive. It singularly resembles the present case. The sum borrowed, and to be repaid by the church-rates, in either case, was the same, namely, for expenses incurred in past years. There, however, it came before the Court of Queen's Bench, by way of an application [404] for a mandamus, to compel the Churchwardens to make a rate, which the Court refused, on the ground that such a rate, if made, would be illegal. So in *Chesterton v. Farler* (2 Moore's P.C. Cases, 330), this Court quashed a rate for being retrospective. *Lastly*: The rates are excessive, and therefore illegal. *Smith and Willis v. Dixon* (2 Curt. 268), *White and Jackson v. Beard* (2 Curt. 495), *Lambert and Simpson v. Weall* (4 Hagg. 91).

Dr. Addams for the Respondent. —The first objection, that Hornchurch is not part of the parish of Romford, cannot be supported; it is not the fact: but were it so, it is not open to the Appellant to raise it, for it is not pleaded, or alleged, that Romford is a separate parish; the allegation only states that they have distinct parochial jurisdiction, in the appointment of their officers. The objection to the notices for calling the vestries, if tenable, are too late; they ought to have been taken before the rates were confirmed. The same reason applies to the objections to the payments made: it is said that they are for past demands, that the rates are, therefore, retrospective, and, as such, bad. If the items complained of, were improper, they ought to have been objected to on the passing of the Churchwardens' accounts: that was the proper period at which to make the objection. The learned Judge below, said he would not give a party refusing to pay eight shillings, an opportunity of ripping up the parish accounts: the mischief and vexation, if such were the law, is obvious. *The King v. The Churchwardens of Dursley* [5 Ad. and E. 10], relied upon by the Appellant, is not conclusive. The present case is [405] distinguishable. The question there being, as to the fitness of granting a mandamus, under the particular circumstances of the case; and the refusal of it does not amount to a decision, that a rate for such purpose would be invalid. The sentence appealed from is justly founded, and ought to be maintained.

Lord Brougham. —Their Lordships do not think it necessary to decide upon the questions raised in the course of the argument, as to the liability of the inhabitants of Romford, as parishioners of Hornchurch, or as to the due publication of any of the notices required by law; for we are of opinion, that we have no option but to reverse the decision of the Court below, upon the more material ground, namely, that the payment out of the rates, of money previously borrowed or expended, makes the rates retrospective, and therefore illegal, and will vitiate such rates. This view dispenses with all consideration or discussion upon the other points. Take the accounts in any way, it appears, that the sums objected to, constitute a sixth of the whole rate. The case of *The King v. The Churchwardens of Dursley* [5 Ad. and E. 10] is conclusive; for, if the mandamus had been granted, it would have been equivalent to a declaration, that the rate in question was good; but the mandamus having been refused, the conclusion is equally clear, that the rate was bad. The Court, in that case, did not make or lay down any new law, but only declared the law as it existed before the Statute 59 Geo. III., c. 134, which did not except the operation of the previous known law, that a rate, if retrospective, was bad. Upon this ground, we have come to the conclusion, that we have no option, but to reverse the sentence appealed from, in-[406]-cluding, of course, that part which condemns the Appellant in the payment of the costs in the Courts below; but, in the circumstances of the case, no costs will be given on either side, either here or in the Court below.

By an Order in Council, bearing date the 23rd day of May 1844, it was ordered, "that the Appeal decreed from be reversed, and the principal cause returned; that the said John Bearblock and Richard Harding Newman, ought to be pronounced to have failed in proof of the libel, given in and admitted on their behalf, in the Court below; and that the said Charles Piggott ought to be dismissed from the original citation served upon him, and from all further observance of justice in this cause."

[As to church rates see now Compulsory Church Rate Abolition Act, 1868 (31 and 32 Vict. c. 109).]

[407] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM HANDLEY and THOMAS JONES,—*Appellants*; WILLIAM EDWARDS.
—*Respondent* * [May 17, 1844].

The rejection of a witness, in the course of the hearing of a cause, in the Ecclesiastical Court, on the ground of interest, is not of itself an appealable grievance: the hearing being one continuous act, and an Appeal being competent, after sentence, from any compartment of the cause [4 Moo. P.C. 414].

A party in a cause in the Ecclesiastical Court, in consequence of the rejection by the Court, of a material witness, withdrew himself from the further contest of the cause; the Judge decreed the cause in pain of his contumacy. Held by the Judicial Committee, that such withdrawal was not contumacious, so as to preclude him from his right of Appeal from the sentence [4 Moo. P.C. 415].

This suit came before the Court, on the protest of the Respondent against the Appellants' right of Appeal; and arose out of a cause, of proving in solemn form of law, the alleged last Will and Testament of John Edwards, of Leamington Priors, in the county of Warwick, bearing date the 2nd day of May 1835, and was depending in the Prerogative Court of Canterbury, between the Appellants, as the executors named in the alleged Will, the parties promoting the cause, and the Respondent, as the nephew and one of the next of kin of the deceased, against whom the cause was promoted. Allegations having been given in, and admitted, and several witnesses examined in support thereof on both sides, the cause was concluded, and [408] assigned for hearing on the second assignation, upon the petition of the proctors on both sides.

In the course of the hearing of the cause, objections were taken, by the Respondent, to the deposition of a witness, named Joseph Parkes, on the ground of interest. This witness had prepared, and was the subscribing witness to, the Will in dispute. On the 27th of February 1838, the learned Judge (Sir Herbert Jenner Fust) (reported, 1 Curt. 722) pronounced against his being a competent witness, and rejected his entire deposition. The proctor for the Appellant, thereupon, in the presence of the Judge, protested a grievance, and of appealing, with reference to such rejection, and the Appeal was at once recorded on the Court Book.

On the 5th of March, the Appellants' proctor wrote the following letter to the Respondent's proctor:—

"Dear Sir, I request you to take notice, that at the sitting of the Court to-morrow, I shall, by my counsel, move the Court to suspend the further hearing of this cause until the Appeal, interposed by me, from the rejection by the Court of the evidence of Mr. Parkes, has been decided by the Judicial Committee of Her Majesty's Most Honourable Privy Council."

On the following day, a motion was made in Court, in pursuance of this notice, which, however, was rejected by the Judge, who assigned the following morning for the further hearing of the principal cause. After this rejection, the proctor for the Appellants made and interposed, in due form, an Appeal, in writing, from the grievance of which he had protested; and on the following morning, the 7th of March, the proctor for the Appellants, at the sitting [409] of the Court, alleged that he had presented a Petition of Appeal to the Judicial Committee, and the counsel of the Appellants absented themselves from the cause. The Judge then directed the parties and their proctor to be thrice called, which having been done, and the parties, their proctor, and counsel, not appearing, the Judge, in due form, decreed to proceed, in pain of the contumacy of the said parties, and proceeded accordingly; and after hearing the counsel on behalf of the Respondent, in like

* Present: The Lord President (Lord Wharnccliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. T. Pemberton Leigh.

pain of the contumacy of the parties and their proctor, by his final interlocutory decree, pronounced against the force and validity of the alleged Will.

An appeal was interposed by the Appellants against this decree. But the Respondent entered a protest and petition against the hearing.

The Act on Petition, in extension of the protest, alleged and protested that the matter appealed from was not an appealable grievance. That, when the Appeal was made, the Judge expressly referred to the report of the Judicial Committee of the Privy Council, made and duly confirmed upon the hearing of the case of *Barry v. Butlin* (1 Moore, P.C.C. 98), whereby it was decided, "that, the hearing of a cause being one continuous act, the overruling and admitting by the Judge of objections taken to parts of evidence adduced in a cause, is not an appealable grievance; and that, after a cause was set down for sentence, on the second assignation, it is not competent for either of the litigant parties to interpose an Appeal, until sentence upon that assignation shall have been given; that when the said Judge distinctly stated, that in deference to that decision, he felt bound to proceed with the further hearing of the cause, the counsel for [410] the Appellants absented themselves, and having been thrice called, and refusing to appear, the Judge, in due form of law, decreed to proceed, in pain of the contumacy of the parties, and, by his final interlocutory decree, pronounced against the force and validity of the pretended Will. That it was not competent for the Appellants to prosecute such an Appeal; but that, even if such act or order had been an appealable grievance, the Appellants had pre-empted their right of appealing therefrom, by the notice sent to the proctor for the Respondent, and by the prayer made to and argued subsequently before the Judge, from whom they had so appealed, on the 6th of March. And it was further alleged, that it appeared that the present Appeal was from the final interlocutory decree; and that the Appellant having prosecuted another Appeal in this cause, and wilfully abandoned the further hearing of the cause, and contumaciously neglected and refused to appear, although thrice called for that purpose, and having accordingly left the Judge uninstructed, and without any prayer on their part, and there being no legal Appeal pending, nor other ground to justify their neglect to appear, at the time when the final interlocutory appeal was pronounced, and the Appeal having, accordingly, been pronounced expressly and duly, in pain of the non-appearance of the Appellants, it was not competent for them to appeal therefrom.

The Appellants to this replied, that the cause could not have been fairly or properly argued on its merits, or the circumstances made known to the Court, without referring to the evidence of Joseph Parkes, which had been rejected in the Court below; but that, although the Appellants absented themselves from the further [411] hearing, they had, at the commencement of the hearing, prayed the Judge to pronounce for the force and validity of the Will; and that such prayer was duly recorded on the Court book, and was before the Judge during the whole of the hearing of the cause; and, consequently, that there was no contumacy. That the deposition of Joseph Parkes, who was the confidential attorney of the deceased, and had prepared and was one of the subscribing witnesses to the Will, was necessary to the right understanding of the merits and circumstances of the cause. That the rejection of such deposition by the Judge, and his pronouncing Parkes, to be an incompetent witness, was contrary to law and justice; and that the Appeal made therefrom was a good and valid Appeal, and ought to have been heard by the Privy Council prior to the final hearing of the cause; and that such Appeal was not, and ought not, in point of law, to be pre-empted or prejudiced by the motion made to the Judge on the 6th March, to suspend the further hearing until the Appeal should have been decided, such prayer having been made, solely, that the parties might not be prejudiced by any act of the Judge pending the Appeal, and having no reference whatever to the merits of the cause; and that the Judge, in proceeding in the cause, prior to the Appeal being heard, had proceeded wrongfully and unjustly; and they, therefore, prayed the Judicial Committee of the Privy Council to overrule the protest, and to assign the Respondent to appear absolutely to the citation served on him, and to consolidate the cause with the cause of appeal and complaint of nullity from the rejection by the Judge of the entire deposition of Joseph Parkes.

The protest and petition now came on for hearing.

[412] Dr. Addams and Mr. Willes, for the protest against the Appeals. —There can be no question that the protest against the first Appeal must be allowed. *Barry v. Butlin* (1 Moore's P.C. Cases, 98) is conclusive upon that point. The protest against the second Appeal also, we submit, must follow the first. A contumacious person cannot appeal (Cod. lib. 7, tit. 65; 2 Clementines, lib. 2, tit. 1, v. Maranta Speculum Aureum, 425; Gail's Observationum Pract. 226-7). Here the final sentence was pronounced in pain, which precludes the right of Appeal. A party in contumacy can do no act. *Herbert v. Herbert* (2 Phill. 430); *Harrison v. Harrison* (3 Curt. Rep. 1). There is a wide difference between contempt and contumacy. No analogy exists in practice in Courts of Equity or Common Law. The practice in the Ecclesiastical Courts is to call the party three times, and then to pronounce the party *in poenam contumaciae*. [The Vice-Chancellor Knight Bruce: Could a party be excommunicated for absence?] No, he might plead to sentence of excommunication. In the Court of Chancery a person who allows a decree to be made absolute against him by his default can only have a rehearing on special grounds. *Booth v. Creswicke* (1 Cr. and Ph. 361). If any analogy could be drawn, the practice in the Court of Chancery is in favour of the doctrine contended for. A person in contempt in Chancery, can take no step in the same cause except to clear his contempt (Daniels' Chancery Practice, 655). He may resist hostile proceedings, because it is not of his choice, and may even take proceedings in the cause, not involving an [413] application to the court. *Wilson v. Bates* (3 Myl. and Cr. 197); but he can take no aggressive step. No case has been discovered where the right of Appeal has been asserted by a party in contempt in the Court of Chancery. Suppose a Bill for account against a trustee, and, on an admission in his answer, an order is made for payment of money into Court, and he is in contempt for disobedience to that order: then exceptions are taken to his answer, and allowed. He could not appeal without clearing his contempt. But in the Ecclesiastical Courts, the Canon Law has imposed a specific disability, that of not being able to appeal, when a decree in *poenam contumaciae* has been pronounced against him. Again, at Common Law, an outlaw could not appear in Court, for any other purpose, but that of reversing his outlawry or resisting a hostile proceeding. *Loukes v. Holbeach* (4 Bing. 419).

The Queen's Advocate (Sir John Dodson) and Mr. Erle, Q.C., for the Appellants. —*First*. A wide distinction exists between the case of *Barry v. Butlin* [1 Moo. P.C. 98]; and the present. There, the Judge merely expunged certain evidence. In this case the principal witness to the *factum*, is entirely excluded upon grounds which cannot be maintained—he was objected to, because he conceived himself liable to costs, if the party principal became insolvent, as he gave instructions to the proctor. It was clearly an appealable grievance, and even if we were wrong in then appealing, it is not now too late to assert such Appeal (Oughton's Ordo Judiciorum, tit. 277). *Secondly*. It is said that the judgment was pronounced in pain, [414] for contumacy, the Judge being uninstructed and without prayer: and that, therefore, the Appeal was pre-empted. If the case of *Barry v. Butlin* applies, it is clear that the prayer at the beginning was continuous: indeed, if the hearing is a continuous act, the party is still before the Court. The Appeal is against a definitive sentence, pronounced when we were not in contempt. *Fitzgerald v. Fitzgerald* (2 Lee's Reps. 263). The cases cited by the Respondents, of *Harrison v. Harrison* [3 Curt. 1], and *Herbert v. Herbert* [2 Phill. 430], do not, therefore, apply. In *Herbert v. Herbert*, the party had never appeared, but only made protest to the jurisdiction; he had no *locus appellandi*. Here there is no contumacious absence,—all that was done was to prevent pre-emption of the Appeal, from the rejection of Parkes's evidence. In *Harrison v. Harrison* there was an actual disobedience in refusing to allow inspection, but this Court, as there had been a waiver of the contempt, permitted the Appeal (*ante*, 96). It is distinguishable from the present case, no contempt in fact has been committed, no disobedience can be construed from the Appellants' letting the cause proceed unopposed. The first Appeal is by analogy to the *voire dire*, at common law, and the second Appeal is against the definitive sentence. The Appellant was not in contempt, and cannot be precluded from appealing.

Lord Brougham.—The case of *Barry v. Butlin* (1 Moore's P.C. Cases [98]) goes

to the full length of disposing of the first protest, that the Judge in the first proceeding in this cause was right; and the parties ought not to have inter-[415]-posed an Appeal after that case; which was well considered and disposed of, not only by Sir Herbert Jenner Fust, but also by Sir John Nicholl. Their Lordships are of opinion that that decision was founded, not only upon authority, but upon principles of great convenience. There may be various compartments of a cause, and the disposing of the cause does not prevent a party appealing from a grievance in any of its compartments; but the hearing is one continuous act, and there must be one objection to the sentence. Their Lordships are, therefore, of opinion, for the Protest and against the Appeal; and with costs. Upon the other ground, their Lordships are of opinion that there has been no such contumacy as to entitle the Respondent to exclude the Appellants from any benefit of Appeal. There is no authority for such a doctrine: on the contrary, in *Harrison v. Harrison* [3 Curt. 1], the learned Judge plainly intimated what his opinion upon that point was. That case does not go that length, nor is there any case that does. We are, therefore, called upon, for the first time, to say that a party, not having refused to do anything, and not having contumaciously disobeyed any order of the Court, but only having absented himself at the end of the hearing, at one part of which he had been present (the hearing being one continuous act), and having retired upon the rejection of the witness, whom he considered to be his important witness, thinking it useless to remain any longer, has been contumacious. Their Lordships are of opinion that there has been no case cited which would prove that such conduct is contumacious. The only question, therefore, is, what is to be done with a party who, at the hearing acted in such a manner as to [416] preclude himself from appealing from the original sentence, but yet is claiming the benefit of certain evidence which was rejected by the Court below? If we are to let him in to the benefit of the evidence, he must have some means of reversing the order, rejecting this evidence. That order was no part of the sentence; therefore, although by bringing his Appeal, if let in, he does raise the question as to the rejection of the evidence, yet he should amend his Appeal by asking the benefit of the evidence. He did not attend to the case of *Barry v. Butlin* [1 Moo. P.C. 98]; therefore, as he is let in by favour of the Court, it must be upon terms, namely, payment of the costs of the second Appeal up to the present time: and let the second Appeal be amended, so as to raise the question of Parkes's evidence.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principles on which Privy Council acts.* S.C. below, 1 Curt. 722. See *Barry v. Butlin*, 1836, 1 Moo. P.C. 98; and *Williams v. Salisbury (Bishop of)*, 1863, 2 Moo. P.C. (N.S.), 375. As to interested witnesses, see Evidence Act, 1843 (6 and 7 Vict. c. 85), s. 1.]

In re DEROSNE'S PATENT* [May 20, 1844].

Term of Letters Patent, for refining sugar by filtration through beds of granulated animal charcoal; extended for six years, on the ground of the advantage the public had reaped from the discovery, notwithstanding that the novelty of the invention was small [4 Moo. P.C. 418].

Where the party applying for an extension is resident abroad, and has no manufacture in England, advertising in the newspapers published in the towns or county where the persons to whom he has granted licenses are resident, is a sufficient compliance with the 4th section of the Act 5 and 6 Will. IV., c. 83 [4 Moo. P.C. 417].

This was an application, under the 5th and 6th Will. IV., c. 83, for an extension of the term of Letters Patent, granted to Charles Derosne, on the 29th [417] September 1830, for "a certain improvement or certain improvements to be used in the

* Present: The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

course of the process of extracting sugar or syrup from cane juice, and other substances containing sugar, and also to be used in the course of the process of refining sugar and syrup, for the purpose in either case of removing the colour from or whitening and purifying such sugar or syrup respectively, by filtration through beds of granulated animal charcoal."

The Petitioner resided in France, and did not carry on any manufacture in this country, and a question was raised by the counsel for the Crown, at the opening of the Petition, whether the requisites of the Statute 5 and 6 Will. IV., c. 83, s. 4, had been complied with. That section enacted, "that if any person who now hath or shall hereafter obtain any Letters Patent as aforesaid, shall advertise in the *London Gazette* three times, and in three London papers and three times in some country papers published in the town where or near to which he carried on any manufacture of anything made according to his specification, or near to, or in which he resides, in case he carried on no such manufacture, or published in the county where he carries on such manufacture, or where he lives in case there shall not be any paper published in such town, that he intends to apply to His Majesty in Council for a prolongation of his term." The petitioner had granted licenses to persons residing or carrying on business in London and Liverpool, and caused advertisements to be inserted in the *Gazette* and newspapers published in those places.

Their Lordships held this was a sufficient compliance with the terms of the 4th section of the Act.

[418] The Solicitor-General (Sir Frederick Thesiger) and Mr. Godson, Q.C., for the Petitioner, Called witnesses, who proved that the inventor had incurred upwards of £4000 in perfecting the invention, and that the profits derived from the licenses only amounted to £7920. That the public had derived very considerable advantage from the invention, inasmuch as the consumer was now enabled to purchase sugar 20 per cent. cheaper than he could have done before the invention was discovered.

No caveat was entered, and

Mr. Waddington, on the part of the Crown, offered no opposition.

Lord Brougham.—Their Lordships have always held it a clear rule, in applications for a prolongation of the term of Letters Patent, that it was anything rather than a matter of course, that the application should be granted under the Act, and they have uniformly required the party applying,—first, to show some invention; secondly, that the invention was of a nature to benefit the public; and thirdly, that the inventor had not received an adequate reward; their Lordships think that the present Patent, though useful, was very small in point of discovery; and it is in evidence that some considerable profit has been realized; but taking into consideration the great benefit the public had derived, their Lordships, under the circumstances, will recommend Her Majesty to grant an extension of the terms of the Letters Patent for six years.

[Mews' Dig. tit. PATENT, F. CONFIRMATION, &c., 2. *Renewal*, a. c. S.C. 2 Web. P.C. 1. The extension of patents is now regulated by s. 25 of the Patents Act, 1883 (46 and 47 Vict. c. 57), and rules scheduled to O. in C. of 26 Nov. 1897 (Stat. R. and O., 1899, p. 1837). On point as to extension not being granted as a matter of course, cf. *In re Hill's Patent*, 1863, 1 Moo. P.C. (N.S.), 258; *In re Norton's Patent*, 1863, *ib.* 339; *In re Pitman's Patent*, 1871, L.R. 4 P.C. 84.]

[419] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HENRY SPENCER COOPER,—*Appellant*; DANIEL SMITH BOCKETT, THOMAS COOPER, and the Rev. JERMYN PRATT,—*Respondents* [June 17, Dec. 17 and 18, 1844 *; Jan. 17, 1845; and February 7, 1846 †].

The *factum* of a Will, held under the circumstances of the case, to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that the testator wrote, only the large initial of his Christian name; and the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his Will, in their joint presence [4 Moo. P.C. 442].

Evidence of illiterate witnesses as to acts not affecting their interests, when opposed to the probable acts of an educated man, no fraud being in question, is to be received with great caution [4 Moo. P.C. 438, 439].

The Will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to:

Held by the Judicial Committee, in the absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that such alterations and erasures were made after the execution of the Will, and Probate of the Will granted in its original form [4 Moo. P.C. 452, 453].

This was an Appeal from the Prerogative Court of Canterbury, in a cause of granting Letters of Administration of the goods, etc., of Robert Henry Spencer Cooper, a retired Captain of the Royal Engineers, who died on the 17th of April 1843. After his death a Will was found in his writing-desk, enclosed in a sealed envelope, endorsed, or superscribed, "The Will of Robert Henry Spencer Cooper, 9, Pall Mall East, 7th January 1843." It occupied one page of a sheet of letter paper, and was wholly in the handwriting of the deceased, was subscribed by him, and bore date [420] the 7th January 1843, and purported to have been executed in the presence of two subscribing witnesses: it had several obliterations and alterations, and was as follows:—

"This is the last Will and Testament of me, Robert Henry Spencer Cooper, a retired Captain of Royal Engineers. I will all my property, after my decease, and funeral expenses paid, to be converted into those funds of the Bank of England yielding now £3 per cent. per annum; and the annual proceeds, after deducting the following life annuities, to go to my brother, Henry Spencer Cooper, barrister-

† *die without issue*

at-law, and, at his death, to the lawful issue he may leave. If he leave none, I will such

family Captain Symonds, of Lyminster, Hampshire,
to go to the persons of the Pratt family, of Norfolk, not to that one married to Lord Rendlesham, nearest related to my mother's family, whose father resided formerly at Bury St. Edmund's, Suffolk. Out of the said annual proceeds I will an annuity of one hundred pounds sterling, clear of duty, to my aunt, Mrs. Charlotte Moyle, of Croomshill, Greenwich, during the term of her natural life. Also, I will an annuity of one hundred pounds sterling yearly to the sister of my late father, Mrs. Caroline Randall, duty free, during the term of her natural life. Also, I will an annuity of seventy pounds sterling, duty free, to Mary Jenkins, niece to the above Mrs. Moyle, during the term of her natural life, duty free. *Also, I will twenty pounds sterling, duty free, yearly, to [421] Thomas Cooper, son of ———, uncle Thomas Cooper, during the term of his natural life, and while he is in distress and unem-*

* Present: Lord Langdale, Mr. Baron Parke, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

† The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

‡ The words in italics were written upon those underneath, but not so as to render the latter illegible.

*played.** And, in the event of Mrs. S. Skyring, of Somerset House, dying, and leaving her father and mother in distress, I will yearly to the said parents of Skyring, J. and S. Stonoham, thirty pounds yearly for their natural life, and to the survivor, free of duty. I name executors to this my Will, Daniel Smith Bockett, *whom I*

of the Law Life Assurance Society, 60, Lincoln's Inn, and to I will one hundred pounds sterling, and my brother, Henry Spencer Cooper above named.

(L.S.)ade at 9, Pall Mall East, this seventh Jan. 1843."

"Codicil: To my man, Wm. Cobbett, I will fifty pounds, clear of tax.

Witnesses to	}	GEORGE CRITTENDEN.	R. H. S COOPER.
the said will.		MARY CRITTENDEN.†	9, Pall Mall East.
Signature.			Servants at house."

A caveat having been entered by the Appellant, the natural and lawful brother and only next of kin of the deceased, the Will was propounded in solemn form of law. The ground on which the Appellant opposed Probate, was, that the testator had not signed the Will until after the witnesses, and, consequently, had not complied with the requirements of the Statute, 1 Vict., c. 26, s. 9. An allegation having been asserted and [422] brought in on behalf of the Respondents, the two subscribing witnesses, George Crittenden and Mary Crittenden, his wife, were examined in chief: and on interrogatories. To the first article of the allegation, George Crittenden deposed: "I am porter at the house, No. 9, Pall Mall East. I have been there about ten or eleven months. It is a house let out in private chambers; my wife is portress there. Captain Robert Spencer Cooper was living in the house when I went there, and he continued there until his death. I and my wife attended him, but he had a servant of his own. At first, a female servant, but latterly, and at the time of his death, a man servant. I recollect witnessing his Will perfectly, but the day or the month I could not say; as near as I can tell, it was about three months before he died. I had been out for him with a letter to Mr. Cooper, his brother, in the Temple, and on my return, about one o'clock, I went to his room to tell him that I had not found Mr. Cooper at home, and that I had put the letter into the letter-box. I found him writing at a table, and when I had delivered my message, he desired me to sit down, and when I had been sitting so about five or ten minutes (and he was writing during that time), he said to me, that he wished me to put my name to something; his words were, 'I want you to sign your name to this paper' (that was the paper before him); 'will you?' I said, 'I don't know what I am going to sign, Sir.' He said, 'Oh, you need not be afraid, for this is my Will.' I then rose up for to sign, and he then said, 'You had better fetch your wife up stairs first,' and I said, 'Shall I do so, Sir?' and he said, 'Yes.' From that I went, and fetched her up, and when we went into his room, we found him standing at the table which he had been writing at, with a pencil in [423] his hand, and as he was standing he wrote my name and my wife's name in pencil. My wife asked him if he knew how to spell her name, and he said 'Yes,' and repeated it, 'Crittenden,' and my wife said, that was right. Then he sat himself down, and called us to the table, and he put the Will towards me, and said, 'You sign your name there,' pointing to my name, which he had written in pencil, and I took the pen, and wrote my name over the pencil-mark. Then he said to my wife, 'Now, you sign your name on this pencil-mark,' pointing to the one under mine; 'you'll write your name better than he has done his;' then my wife signed her name. Then Captain Cooper took the pen from my wife, and wrote, and when he had done so, he said, looking up at me, 'This is my name, in your presence,' and I understood then that he was writing his own name. I did not see all he wrote, but I saw him make the large 'R' of

* The sentence printed in italics was erased by zig-zag scratches of the pen, but was not illegible.

† On the left of the witnesses' names was a bracket, from which a circumflex line was drawn, intended, apparently, to enclose a space for their signatures, but the space not being sufficient, the line was passed by the last letter of the first witness's name.

his name, and there was a black seal at the left-hand corner quite, but there was nothing said about that, and after he had wrote his name, he said, 'Now you have done some good for yourselves,' and nothing more passed. He said, 'Mrs. Crittenden, I don't want you any more; you can go;' and my wife went down stairs. I stopped a few minutes afterwards, when he told me that he did not want any thing more with me, and I went away, and when I left the room the paper was still lying before Captain Cooper, and what became of it I cannot say, for I never saw it afterwards. Captain Cooper was in his perfect senses at the time, and fully capable of giving instructions for, and of making and executing his Will, and of doing any act requiring thought, judgment, and reflection. He was only about forty-nine years old, and he was perfectly sensible to the last almost. He [424] wrote nothing but his name, at least I believe it was his name, in our presence. As soon as he had done, he put down the pen, and wrote no more. Before he signed his name he made a mark round ours. The Will which was produced to me by the Examiner, is the Will which I and my wife signed our names to, as I have deposed, and the large 'R' in Captain Cooper's signature is what I saw him write after I had signed my name, and my wife had signed hers. The words, '9, Pall Mall East, Servants at house,' were not written in my presence, to the best of my belief. Captain Cooper wrote nothing in my presence but his name. I have no doubt, that as the Will is dated the 7th of January 1843, it was executed on that day; it was a Saturday, I remember."

To the second article, he deposed: "I do not recollect the day on which William Cobbett came into Captain Cooper's service; but if Captain Cooper had lived to another Wednesday, Cobbett would have been in his service a month, I think. Captain Cooper never took the least notice of his Will, or of the execution of it after it had taken place, at least in my presence. As to the alterations which I now see on the Will, I cannot say whether they were or were not on the Will when I signed it. I have something on my mind, that there was something of the kind too, but I was confused and flurried at the time; for though I was but signing my name to a Will, yet I had never done so before, and I did not know but that trouble might come of it, and the Captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, or what appearance the Will had. I do firmly believe, however, that there was some black scratching on the Will when I signed it."

[425] To his examination on interrogatories, the same witness stated: "I have not been given to understand in any way that it was wished to be made out by my evidence that Captain Cooper signed or acknowledged his signature to his Will in my presence, my fellow-witness being also present; I will swear that no such directions or instructions have been given to me, and that I have not received any hints to that effect. Captain Cooper did sign his Will in my presence; I believe that he did: and he certainly acknowledged it in my presence, for he said, 'That is my name.' He signed it, as I have stated, after I and my wife had signed our names to it. The very words he used were, 'This is my name in your presence;' and he looked up to me as I was standing on his right-hand side at the time; my wife was present at the time, standing behind me; it was after we had signed our names. I do not believe that Captain Cooper's signature was to the Will when I and my wife signed it. There was a blank space where his signature now is when I signed my name. I have never admitted or declared that such was the case until now, nor has my wife, that I am aware of. When I have been questioned about the matter, I have stated, and it is the fact, that Captain Cooper had a pencil in his hand, and wrote my name and my wife's on the place where we afterwards signed our names. I have said that he was writing with a pencil when we went into the room. I have never said, and it is not the fact, that I first signed my name to the Will in question at the request of Captain Cooper, and then called up my wife, who also signed. I have never said, and it is not the fact, that Captain Cooper signed his name to the Will in question after my wife had signed her name to it, and left the room; I have never told my [426] wife so: I will swear that I never have. We were all three in the room together when we signed our names. I cannot say for a certainty whether there were or were not any alterations in the Will in question when I signed

it. I have a notion of some black scratching upon it, and that is all I can say about it."

Mary Crittenden deposed: "I am portress to the house No. 9, Pall Mall East, and my husband is porter. It is a house let out in chambers to single gentlemen. I have been there nearly a twelvemonth. Captain Cooper, the deceased, was living in chambers there when I went to the house, and he remained there until his death. He had a female servant of his own, and latterly a man servant, too; but I cooked for him during his illness, and helped in his rooms; and my husband went errands for him. I recollect witnessing his Will perfectly well; it was on a Saturday, early in January last, soon after he was taken ill, and it was about one o'clock in the day; he dined at two regularly, and I know that it was before his dinner. The way I came to be a witness to Captain Cooper's Will was this: my husband had been out on an errand for him, and soon after he returned he came to me and said, 'The Captain wants you to sign a paper with me;' and so I went with my husband to the Captain's room, and there the Captain was standing at his table, with a piece of paper before him, and he took a pencil, and said that he wanted us to sign our names, and that he would pencil them first where we were to sign; and so I said I would take the liberty of asking him if he knew how to spell our name, and he spelt it, and spelt it right; and when he had written the names, he gave my husband the pen, and told him to write his name over the pencil-mark, and my husband wrote his name [427] as he was told; and when he had written it, the Captain gave me the pen, and told me to write mine, and said, 'I dare say you will write it better than he has,' but I don't think I did write it better: however, I wrote my name as the Captain told me, over where he had pencilled it, and then the Captain took the pen and made a kind of circle round our names, and then he wrote something, but what it was I cannot say, for my husband was standing near him, and in the way; but the Captain said, 'This is my Will and my name in your presence, and you have done some good for yourselves;' those were the words he used, as well as I recollect, and he said nothing more, except to tell me to go down stairs, as he did not want any more with me; and so I went, leaving my husband with him: and that is all I know or recollect about it. I have no doubt that Captain Cooper was, at the time this took place, of perfect sound mind, memory, and understanding, and fully capable of making and executing his Will, and of doing any act requiring thought, judgment, and reflection. The Will now produced to me by the examiner is the Will which I and my husband signed as requested by Captain Cooper, as I have deposed; but whether he wrote the words '9, Pall Mall East, Servants at house,' after we had signed our names, or what he wrote, I cannot say, for I did not see; it was a blank space all to the right, as well as I recollect now, when I signed my name, and I so well recollect the black seal at the left corner, and I should have known it was a Will even if the Captain had not said so, though I had never seen one before, by that seal; I remarked it so at the time."

To the second article she deposed: "William Cobbett came into Captain Cooper's service on the twenty-[428]-third of March last, I believe; I never saw Captain Cooper's Will after the time I signed it, and I did not notice whether there were or were not any of the alterations which I now see in it."

The same witness on her examination upon interrogatories stated: "I cannot say whether Captain Cooper signed his Will in my presence, or not; I did not see what he wrote, but he said, 'This is my name in your presence,' and so I suppose he had written his name when he said so. I do not recollect the words he used better than I have told them; my husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the Will. I cannot say that Captain Cooper's name was signed to the Will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature. I have admitted such to be the fact, and so has my husband, I believe, when asked about it. My husband had not signed Captain Cooper's Will before I was called into the room to sign it; I will swear that my husband signed it afterwards in my presence. My husband has never told me that Captain Cooper signed the Will after I had left the room; it was after I had signed my name, and not before, that Captain Cooper made the mark round about our names."

The Respondent also brought in the affidavit of Joseph Netherelift, a fac-similist

and lithographer, who deposed as to the erasures and the words previously written, as printed in italics in the copy of Will above given.

The learned Judge of the Prerogative Court, by his sentence, on the 8th of August 1843 (reported 3 Curt. 618), pronounced [429] for the force and validity of the Will, and decreed Probate thereof, with the several alterations now appearing therein, to Daniel Smith Bockett and Henry Spencer Cooper, the executors thereof appointed, or either of them.

From this sentence the present Appeal was brought by Henry Spencer Cooper, who prayed that it might be reversed, and the cause retained; and that the Court would pronounce against the validity of the Will, that the deceased was dead intestate; and decree Letters of Administration of the goods and chattels of the deceased to be granted to him.

The Appeal was argued (17th June 1844 *) in the first instance, by Mr. Erle, Q.C., and Dr. Addams, for the Appellant: and Mr. Turner, Q.C., and Dr. Jenner, for the Respondent, Bockett.

It was argued on both sides as a question of fact, upon the evidence of the witnesses, whether, having reference to the probable circumstances under which the Will was produced and witnessed, the deceased had signed the Will before their subscription. *Blake v. Knight* (3 Curt. 547), *Moore v. King* (3 Curt. 243), *Gove v. Gaven* (3 Curt. 151), *Chambers v. The Queen's Proctor* (2 Curt. 415), were referred to.

At the conclusion of the argument, their Lordships said, that the question raised, involved not only one of fact, but also one of law, and directed the Appeal [430] to be re-argued with reference to that opinion. The Appeal was accordingly again argued.

Mr. Wigram, Q.C., and Dr. Addams, for the Appellant (14th Dec. 1844 †).—From the testimony of the witnesses to the *factum*, it is clear that this Will was not executed pursuant to the requirements of the Statute, 1 Vict., c. 26, s. 9. The witnesses must have subscribed before the testator. This is not a good execution; the signing and witnessing being simultaneous acts, nothing can satisfy the terms of the 9th Section, but the testator signing first. The words are, that "it shall be signed at the foot or end thereof by the testator, or some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the Will in the presence of the testator." It has been uniformly held by the Court, upon the construction of this Section, that the signature of the testator must precede the execution by the witnesses, and that such fact must be strictly proved. The *onus probandi* lies on the other side. *Hott v. Genge* (4 Moore's P.C. Cases, 265), *Hudson v. Parker* (1 Rob. Ecc. Reps. 14), *Burgoyne v. Showler* (1 Rob. Ecc. Reps. 5). The Statute of Frauds, and the 9th Section of the New Will Act, differ in many essentials. The cases of *The British Museum v. White* (3 Moore and Payne, 689; 6 Bing. 310), and *Peate v. Ougley* (Comyn, 196), and the other cases under the Statute, do not apply.

[431] Sir Thomas Wilde, Mr. Turner, Q.C., and Dr. Jenner, for the Respondent.—It is not necessary to give affirmative evidence by the subscribing witnesses of the fact of signing. The Court will judge from the whole of the case, and presume the execution by a testator upon the circumstances. *Blake v. Knight* (3 Curt. 547). Suppose the witnesses were dead, the Will on the face of it would appear a good Will. Too much importance must not be given to the evidence of the attesting witnesses, who are illiterate persons; it would be dangerous to the interests of society, if witnesses of the class here subscribing were enabled to cut down a Will when called upon to depose to the exact order of circumstances attending the execution. It is neither safe nor reasonable to suppose that the Legislature intended that minute facts should be deposed to by the witnesses. No form of attestation is required, and yet it is said by the Appellant, that the witnesses are to depose to, or attest, those facts in a particular order. The witnesses do not in

* Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

† Present: Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

fact say, that the testator wrote his name after they had signed. They say, speaking only to the best of their knowledge and belief, that they saw him write something; it is clear from inspection of the Will, that if he wrote anything, it must have been the words, "9, Pall Mall East, Servants at house," and this will account for their mistake. The circumstance of there being a blank space after the names of the witnesses, is satisfied by the space being blank where the words "9, Pall Mall," were afterwards written. [The Vice-Chancellor Knight Bruce: There seems to be some difference in the colour of the ink in which the words [432] "9, Pall Mall East," etc. are written, and that in which the words "R. H. S. Cooper" are written.] The probability is, that some blotting-paper was used, and this would be another reason for thinking that those were the words written, after the signature of the witnesses. Much reliance cannot be placed upon the evidence of a witness, who admits, that at the time when the act which he is deposing to was done, he was hurried, and not at his ease. There can be no doubt, that upon the words of the 9th Section of 1 Vict., c. 26, this Will has been acknowledged in the presence of two witnesses, present at the same time. This distinguishes the case from *Hott v. Genge* [4 Moo. P.C. 265]. The only other requisition of the section is that the witnesses who signed must be the same witnesses to whom the testator acknowledged the Will. [Lord Campbell: The witnesses do more than sign, they must attest.] They must attest the Will, but that is to prevent the substitution of a fictitious instrument. No form of attestation is required by the 9th Section. The words are "attest and subscribe:" that is, subscribe as witnesses. The meaning of the word "attest" is not that the witnesses are to attest every circumstance, which would be sufficient to make valid the Will. It simply means that they attest a paper, that has been declared a Will. [Baron Parke: It must mean that they attest a paper which he declares to be his Will. That is to be complete so far as the testator can make it complete by his own act.] The question is, are the witnesses to subscribe an instrument as perfect as it possibly can be; or are they to subscribe an instrument, which is in its ordinary sense a Will? What is meant by the word "Will," and in what sense is it used? The argument of the Appellant must be that the word [433] "Will," changes its meaning, in its different positions in the Act. The first section says, no Will shall be valid unless it shall be executed; there it is used in the ordinary sense: but in a subsequent part of the section, the other side must contend that it possesses an additional quality, namely, that it must be signed by the testator. [The Vice-Chancellor Knight Bruce: Did the Legislature intend by the 9th Section, the events to take place in the order in which they are enumerated; that is, the signature of the testator to precede the attestation?] Signing and acknowledging bespeak their own order, it does not appear that the witnesses must necessarily sign after the signing by the testator. In the Court of Chancery, it is the practice never to ask who signed first, in order to set up a Will. *White v. The British Museum* [3 Moo. and P. 689; 6 Bing. 310], was expressly decided on the ground that the testator had by his conduct acknowledged the signature.

Dr. Addams in reply.

Previous to giving judgment (17th Jan. 1845*), their Lordships called before them a witness of the name of Donough, who deposed to having been in the habit of examining and comparing writings, and so employed by the Bank of England for eleven years and upwards; and being shown the original Will, and required to state whether in his opinion the circumflex line surrounding the witnesses' names was made previous to or after their signature, replied that in his opinion the circumflex was made previous, and the name signed over it.

[434] The Vice-Chancellor Knight Bruce (Feb. 3, 1845).—The question in this case is, as to the testamentary validity of the instrument which was propounded and, after opposition, admitted to Probate in the Prerogative Court of Canterbury, as the Will of Robert Henry Spencer Cooper, who was, or had been, a Captain in the Royal Engineers. He died on the 17th of April 1843, and is admitted to have

* Present: Lord Langdale, Mr. Baron Parke, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

been a bachelor, or, at least, not to have had a wife living at the time of his death, and to have left his brother, the Appellant, his only next of kin.

Captain Cooper's testamentary capacity is undisputed, and it is clearly proved, or admitted, that the instrument propounded was signed at the foot, or end of it, by himself; that he so signed it *animo testandi*; that this signature was made by him on or before the 7th of January 1843; on which day, in the presence of two witnesses, present at the same time, he acknowledged that signature as his, and the instrument as testamentary; and that, on the same day, the same two witnesses, at his request, in his presence, and in the presence of each other, subscribed the instrument as witnesses.

The Appellant, however, not disputing these facts, contends that they do not satisfy the requisites of the 9th Section of the Act of 1837, "for the amendment of the law with respect to Wills," inasmuch as the signature by the witnesses, as he contends, preceded in time the signature of the alleged testator. The Respondent denies this, but contends, further, that if the facts were so, it is immaterial. These two points, one of fact and the other of law, form the whole matter of the contest between the parties. The Appellant has [435] to maintain both points, it being sufficient for the purpose of the Respondent if he is right upon either.

Their Lordships think it convenient first to consider the question of fact, and, in doing so, to assume the point of law to be in the Appellant's favour.

There is not any evidence applicable to the matter of fact in dispute, except the document itself and the testimony of the two subscribing witnesses, the only persons who, besides Captain Cooper himself, were present when they subscribed it. The document, with the exception of the witnesses' signatures, is admitted to be wholly in Captain Cooper's handwriting. It is admitted, on the face of it, to be such, that had the two subscribing witnesses, by the accident of their death in Captain Cooper's lifetime, been rendered incapable of being examined, the other evidence in the case, with proof of the handwriting of the three signatures, would have been sufficient to establish it as a valid Will; a circumstance, however, which amounts to no more, and is of no more weight, than that there is on the face of the instrument, nothing to create or lead to an opinion that the testator's signature was preceded in time by the signatures of the witnesses. The agreed facts then standing, as I have said, and the law being assumed to stand as the Appellant contends that it does, is the instrument shown by the testimony of both or either of the subscribing witnesses, to be invalid as a Will? Now, first, as to Mary Crittenden, their Lordships are of opinion that her testimony taken alone cannot be considered as proving that the signature of either of the witnesses preceded in time the signature of Captain Cooper. It is consistent with her evidence, at least so far as her evidence is positive, to suppose that what she saw him write was—"Witnesses to the said [436] Will Signature," or "9, Pall Mall East, Servants at house," and not his name. She says—"He wrote something, but what it was I cannot say, for my husband was standing near him, and in the way;" and it is not to be necessarily inferred from the words which she says were spoken by him, that it was his name that he then wrote. The same may be stated of what she says of the blank space to the right: when she first mentions it, she says,—“It was a blank space all to the right, as well as I recollect when I signed my name.” And she answers the third and fourth interrogatories thus:—"I cannot say whether Captain Cooper signed his Will in my presence, or not; I did not see what he wrote, but he said, 'This is my name, in your presence,' and so I suppose he had written his name when he said so. I do not recollect the words he used better than I have told them. My husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the Will. I cannot say that Captain Cooper's name was signed to the Will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature. I have admitted such to be the fact, and so has my husband, I believe, when asked about it." She is not certain what Captain Cooper wrote; she is not positive as to the blank space, whether where "9, Pall Mall East, Servants at house" is now written, may have been blank when she signed. Their Lordships are of opinion that, assuming the law to be as the Appellant asserts it to be, assuming George Crittenden's evidence to be out of the case, and assuming the rest of the evidence to be the only evidence,

it would be a miscarriage not to conclude that Captain Cooper's signature preceded in [437] time the signature of each of the subscribing witnesses.

With regard, however, to the testimony of George Crittenden, he must be taken certainly to depose that Captain Cooper's signature was subsequent in time to each of the other signatures. And, as both the witnesses ought and are to be considered as respectable persons, speaking honestly and sincerely, this does create difficulty. In the first article, he deposes thus. [His Honour here read the whole deposition, as above given, and also his answers to the third and fourth interrogatories.]

Now, perhaps, it may be thought that the main difficulty as to the matter of fact, is substantially created by the statements of this witness, as to the letter "R" at the commencement of Captain Cooper's name. If these passages had been out of the case, saying, as the witness does, that he did not see all that Captain Cooper wrote, and adding afterwards, as the witness does, "He wrote nothing but his name, and at least I believe it was his name, in our presence," it may be that the evidence of the husband would, in effect, have left the matter much as it is left by the evidence of the wife. But, however this might have been, the particularity at least with which he mentions the letter "R" (certainly a conspicuous letter as written by Captain Cooper) does give his evidence an importance plainly beyond hers. Still, what he says on the subject, though to be received with the consideration, and attention, justly due to the assertion of a respectable man, must also be received with the caution which the interests of society require, to be used with regard to the evidence of a witness, in any rank or class, deposing to such a fact under such circumstances. The [438] mere remark, that had it not been practicable to obtain the evidence of either of the two subscribing witnesses, it is admitted; and that had it been impracticable to obtain the testimony of George Crittenden, it is not improbable, that the instrument in question must have been established as Captain Cooper's Will, may of itself be of little or no weight; still, whatever its value, it belongs to the case. But certainly it is not to be forgotten that fraud is out of the question; that Captain Cooper certainly intended the instrument to be his Will; intended it to be effectual as his Will; that he knew, or believed, his own signature to the paper to be essential, or advisable, and desirable at least; that he knew, or believed, the signature of two subscribing witnesses to be also essential, or advisable, and desirable at least; that the purpose for which, and the object with which, he summoned these two servants to his room, and caused them to sign their names, was merely to substantiate the instrument as his Will; that if they have not attested it effectually, their presence—their signature—and the whole transaction, was idle and useless, and the intended testator's design and wishes, have been absolutely and irremediably frustrated. It is the duty of a Court of Justice not to allow undue weight to these considerations. It seems equally its duty not wholly to lose sight of them.

Their Lordships have next had to consider whether, independently of them, the supposed fact thus stated by the porter is, or is not, in its nature improbable. Their Lordships think it in its nature very improbable: they think that it is not according to the general notions or habits of men of the world, or well-educated or well-informed persons, whether profes-[439] sional or unprofessional, to have a document, which requires a party's signature, attested or subscribed by a witness before its signature by the party, and for the party to sign it afterwards. It appears to their Lordships that such a course is neither business-like nor customary, and that it does not need that a man should be a lawyer or a merchant, to be startled by such a mode of proceeding. Their Lordships find themselves unable to think it consistent with probability that Captain Cooper, on the occasion in question, could have acted, or allowed the witnesses to act, or could have been capable of acting, or allowed them to act, in such a manner; not that it is their opinion that he was fully aware, or accurately informed, of the legal formalities or ceremonies essential to the sufficient execution or attestation of a Will. Their impression, especially when they consider the short, unattested Codicil, is rather that he was not so.

The improbable, however, is not always the untrue, and their Lordships have thought it right next to inquire, whether it may reasonably be supposed as not unlikely, that the exact particulars and course of the transaction may not have been accurately remembered by the witness; they think that it may. They cannot

avoid observing his station in society, his probable habits of life, his probable degree of education and knowledge; they cannot but be aware how very difficult it is for any man, of whatever rank or class, (not gifted with uncommon faculties of mind,) to remember with precision and clearness the exact particulars and order of a set of circumstances, not involving his own feelings or interests, at a distance of some months from their occurrence; where no memorandum has been made, and where the circumstances are not of a kind or description, with which [440] his own studies or habits of life have rendered him conversant or familiar. To these considerations must be added those due to George Crittenden's deposition. To the second article, which is thus [His Honour read the answer as above set forth].

Their Lordships are satisfied that the evidence of this witness, however respectable, with regard to the minute particulars of the transaction to which he deposes, and especially as to the order of the signatures, ought to be received with caution and great reserve, if it were open only to the observations that have been made. There remains, however, another remark. It is inconsistent, their Lordships think, with a right interpretation of the evidence of George Crittenden, and inconsistent with that of his wife, to suppose that the long line drawn above the testator's signature and continued in a curve between the signatures of the witnesses on the left, and the signature of Captain Cooper, was made with his pen after George Crittenden had signed. Upon careful and repeated inspection, however, of the original document, their Lordships saw reason for thinking it probable that the last letter of his name is written upon (that is over) the line. If so, unless the signature was retouched with ink after the line had been drawn, the unavoidable inference is, that the signature was in time preceded by the line. But it is not, in their Lordships' opinion, reasonable to suppose, upon the materials before them, that the name was retouched with ink after the line had been drawn; and if it was not, and if they are not deceived in the appearance of the document, there is a mistake in the evidence, of the witness or each of the witnesses, upon whose precise and accurate recollection, of the particular nature and order of the minute facts in question, the Appellant is obliged to rely.

[441] Their Lordships thinking this not an immaterial consideration in a case such as the present, and unwilling to trust entirely to their own impression as to the aspect of the paper, have submitted it to the inspection and opinion of a witness professionally conversant with the examination of writings and experienced in that employment. The witness views it as their Lordships were and are disposed to view it.

Upon this evidence, and the appearance of the document, their Lordships think he had signed his name: and that if some part of the circumstances of the transaction George Crittenden is in error when he states the line to have been made after action is impressed on his recollection in an inaccurate manner, his memory cannot be trusted as a safe guide with respect to the rest of the details.

It may possibly be, as has already been intimated, that if the testator signed first, and the witnesses afterwards, the testator, after their signatures, when writing something on the paper, or looking down upon it, may have said, "This is my name, in your presence," for the purpose of a more clear recognition of his signature, or of making a stronger impression upon the minds of the witnesses, and that they may have been misled by this as to the order and time of his signature. But, without relying or laying stress upon any mere conjecture as to the cause or causes of error, their Lordships, after weighing all the considerations properly belonging to the case, and without giving, as they do not mean to give, any opinion upon the disputed point of law, have, upon the point of fact, come to the conclusion that they ought not to rely upon George Crittenden's recollection as to the order of the signature, and that the sentence of the [442] Prerogative Court ought not to be disturbed, and they must advise Her Majesty accordingly. But the Appeal seems to them sufficiently reasonable to warrant them in recommending that the costs of it, on both sides, should be paid out of the estate.

They have heard no argument, and give no opinion, upon the question still open, whether the erasures and alterations, on the face of the instrument, are to be considered as made effectually, so that the Probate should recognize them.

In accordance with this Judgment, their Lordships reported their opinion to

Her Majesty, against the prayer of the Appellant, viz., that the deceased had died intestate; and further, that they were of opinion, that the principal cause ought to be retained, and that the Will of the testator ought to be pronounced to have been executed; but that the question of the validity of the interlineations, obliterations, and alterations, now appearing therein, ought to be reserved, and that a Monition for the transmission of the original Will ought to be issued.

The effect of the Judgment being to determine the preliminary question, by establishing the validity of the Will; Thomas Cooper, a legatee, and the Rev. Jermyn Pratt, one of the ultimate contingent residuary legatees named in the Will, two of the parties cited to see proceedings, appeared as interveners, and asserted separate allegations. The intervener Cooper, in the tenor of his allegation, asserted that the alterations and obliterations occurring in the Will, affecting his interest, were made by the deceased prior to execution. The Rev. Jermyn Pratt also alleged that the alterations and obliterations occurring in the said Will, affecting his interest, [443] were made by the said deceased prior to the execution thereof. He examined two witnesses, Henry Adlard and Joshua Bacon, engravers by trade, and experienced in examining, comparing, and decyphering writings of all kinds. To the third article exhibited to him, Adlard said, "According to my judgment, the whole of the Will produced to me was written throughout at one time, without any of the alterations which now appear in it, except the word 'whom,' which appears to have been written at the same time. I say so, because the ink in which that word is written blends with the ink written underneath, showing that it must have been written before the other word was dry; and, according to my judgment, the signature 'R. H. S. Cooper' was written at the same time as the rest of the Will; and I come to that conclusion, because I observe the upper part of the capital letter 'R,' that the ink blends, or runs, with the ink of the letters 'dred' in the word 'hundred,' showing that the signature, or that portion of the signature, at least, was written before the letters 'dred' were dry. According to my judgment, the words in the ninth and tenth lines (relating to the substitution of Captain Symonds for the Pratt family), which I have specified, and by which the words originally written are defaced, were written at a different time, and after the Will was completely written—some time afterwards, according to my belief, because I can separate the two inks: therefore the ink of the words defaced must have been completely dry before the words written upon them were written: it must have been perfectly dry before the words written over them were written. The outline of the words superscribed is as sharp and marked upon the ink underneath, as upon [444] the paper itself. The ink itself is a different ink, in my opinion, but there is nothing to guide me in saying whether the signature of the witnesses was made before or after the alterations." To the fourth article, he said: "The Will which I have deposed to has the appearance of having been at one time enclosed in a different envelope from that now produced to me by the examiner. Folding up to enclose it in that envelope, I find that the wax not forming part of the impression, the other part of which is on the envelope, has no corresponding mark or stain on the envelope, and must have been made by the use of wax when the Will was sealed in some other envelope."

The other witness, Bacon, confirmed and agreed in this opinion.

The intervener Pratt prayed that Probate of the Will might be granted to the executors, as originally written in the 9th, 10th, and 11th lines, for the following reasons:—

Because the alterations in question were made after the execution of the Will; because the presumption and policy of the law is opposed to all unattested alterations, and it cannot be held in this case that "the words or effect of the Will before such alterations" is not "apparent," within sect. 21 of Stat. 1, Vict., c. 26.

The evidence entered into on behalf of the intervener Thomas Cooper, went only to prove that he was a cousin to the testator, and that the testator was in the habit of occasionally visiting him, and of giving him pecuniary assistance. He prayed their Lordships to pronounce against the obliteration of the legacy to him, and that it should stand as part of the last Will and testament, for the following reason:—Because [445] the presumption in law, as well as the result of the evidence in the cause, is, that the obliteration of the words in question was made after the execution of the Will. The Respondent prayed (in pain of parties cited) their

Lordships to affirm the sentence of the Court below, which decreed Probate of the Will, with the several alterations appearing therein.

The case now came on to be argued (Feb. 7, 1846 *), upon the question as to the validity of the alterations.

Mr. Peacock and Dr. Bayford for the intervener Thomas Cooper.—The question now before the Court is, in what form the Will is to be admitted to Probate, whether with or without the alterations. The party who upholds the validity of alterations, or obliterations, is bound to give some explanation as to their having been made, at the time of the execution of the Will. But the evidence he has given amounts to nothing, for there could not have been the extensive obliterations on the Will at the time of its execution, and the witnesses not have taken notice of them. [The Vice-Chancellor Knight Bruce: The presumption should rather be, that the testator did make the alterations before the attestation of the Will.] We admit, that prior to the Statute, 1 Vict., c. 26, if an alteration was made in the handwriting of the testator, the presumption was in favour of its having been made prior to the attestation; but that presumption was only raised because it was in the handwriting of the testator: but how is it since the statute? The 21st section says, that alterations [446] made prior to execution, are to be noticed by the testator and the witnesses, at the time of the execution; the presumption of law, therefore, is, that the statute would have been complied with in this respect if the alterations had been made before execution. The effect of the statute is to do away with the validity of handwriting. The consequence of holding that the old presumption in favour of alterations, applied to a Will in circumstances like the present, would be, that a Will duly attested according to the late Act might be altered by an alteration not attested in accordance with that statute. [Lord Brougham: The same reason holds, why a second stamp is necessary in an altered Bill, as why a second attestation is necessary in an altered Will: it is a new instrument.] So, if alterations or obliterations appear in any material part of a Bill of Exchange, the alteration in which might, by possibility, have been made after the Bill was completed, the Plaintiff would be nonsuited unless he gave some evidence to show that the alterations and obliterations were made before the Bill was completed. *Knight v. Clements* (8 Add. and Ell. 215; 3 Nev. and P. 375). In Gilbert on Evidence (p. 92), it is said, "Formerly, if there were any erasures, or interlineation, the Judges determined, upon perusal of the deed, and view of it, whether the deed was good or not; for they were contrivances of solemn contract, such as deeds are, and their preference to verbal contracts was founded on this, that the intent of the parties is there manifestly settled in express words, and entirely authenticated, and there such contracts are totally referred to the Court, if the truth of the solemnities, viz., of the seal and the delivery, be admitted, [447] and therefore must be destroyed by a contract of equal solemnity; because, how they are destroyed and avoided must appear to the same Judges that are, by the law, to determine them. From whence, also, it came to pass, that if a deed was rased, or interlined, they adjudge it a void deed, because it did not certainly appear to the Court, that were the Judges of these solemn contracts, whether the mind of the party was contained in such a mangled contract or not."

Mr. Wigram, Q.C., and Dr. Harding, for Pratt, the other intervening party. The 21st section of 1 Vict., c. 26, enacts, that "no obliteration, interlineation, or other alteration made in any Will after the execution thereof, shall be valid, or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will." The inference here is, that these alterations were made subsequently to the execution; and in the absence of evidence to the contrary, such must be the presumption of law. *Burgoyne v. Showler* (1 Rob. Ecc. Rep. 5). Every Act of Parliament should be construed in reference to the law existing at the time of the passing of the Act, and with reference to the evil it was intended to remedy. Now before the 1st Vict., c. 26, the presumption was, that Wills in the handwriting of the testator were valid. The

* Present: The Lord President (The Duke of Buccleuch), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

21st section declares such alterations in handwriting of no effect. The only other question is, what is the meaning of the word apparent, likewise [448] occurring in the 21st section of the statute? It does not mean "apparent to the Court." The Court will not take upon itself to say whether the words obliterated can be made out; but will act on evidence. It is only in cases of complete obliteration that passages in a Will can be held to be revoked. *Townley v. Watson* (3 Curt. 761). The evidence shows that the words intended to be obliterated are apparent. Probate should be granted with the original words inserted.

Mr. Turner, Q.C., and Dr. Jenner, for the Respondent.—In the absence of evidence, interlineations in a deed will be presumed to have been made at the time it is executed, and not afterwards (12 Vin. Ab. p. 58; 2 Starke on Evidence, 271). [Lord Brougham: A distinction exists between alterations and interlineations, and between erasures and interlineations. Saunders on Evidence, p. 18.] The evidence produced is not sufficient to overrule the presumption that the alterations were made at the time of the execution of the Will. They cited *Trowel v. Castle* (1 Keble. 21, 22), *Fitzgerald v. Lord Fauconberge* (Fitzgibbon, 207-220), Comyn's Dig. tit. Fait, F. 1.

Mr. Peacock, in reply.—No ground of argument has been brought forward to sustain the Respondent's case, that a different rule as to alterations in a Will must be applied than as in Bills of Exchange. In Gilbert, Evidence, p. 89, erasures and interlineations are treated as standing on the same grounds.

[449] Lord Brougham (August 1, 1846).—His Lordship having stated the facts of the case, said:—In these circumstances two questions arise, one of fact and one of law. First, at what time were the alterations made, by cancelling, superscription, and interlineations: were they made before or after the execution and attestation? Secondly, if that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as parcel of it, upon the ground that the proof was on those who would impeach them; and that, until proved to have been made after the execution, they must be taken to have been made before?

Upon the question of fact, it is clear, and all their Lordships are of that opinion, that there is no proof sufficient to show at what time the alterations were made. Of the two subscribing witnesses, one (George Crittenden) says, that he cannot say whether they were upon the Will, or not, when he signed it: he adds, "I have something on my mind that there was something of the kind, too; but I was confused of mind at the time; for though I was but signing my name to a Will, yet I had never done so before, and I did not know but that trouble might come of it; and the Captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, and what appearance the Will had. I do firmly believe, however," he concludes, "that there was some black scratching on the Will when I signed it." He repeats the same thing in his examination on interrogatories. The other witness, Mary Crittenden, says, "I did not notice whether [450] there were or were not any of the alterations which I now see in it."

It is, however, not immaterial to observe, that there is evidence of the testator having taken the Will out of the cover in which he had inclosed it when he executed it, for two witnesses swear to the clear opinion that the cover had been changed, as there is a wax mark on the Will which has nothing corresponding to it in the seals of the cover in which it was found.

There is, then, no proof whatever of the time at which the alteration was made, nor have we any means of ascertaining whether they were made before the execution. The belief of one witness, George Crittenden, that there was some black scratching on the Will when he signed it, amounts to nothing; for grant it to be so, we have no means whatever of knowing whether it was one of the smaller or of the larger erasures and superscriptions; and if it was, as is most likely, the larger, we cannot tell whether it was the alteration of the residuary legatees' names, or the erasure of the annuity to Thomas Cooper; therefore, we are to take it as wholly unknown whether the alterations were made before execution or after. This brings us to the question of law, and here it is obvious to remark that the alterations are most material: they amount, indeed, to reversing the whole Will, for the entire Will is a gift of the legacies, subject to certain annuities; and the first alteration is an entire

change of the residuary legatee, and the last is an erasure of one of the annuities. Can anything be more clear than that we ought to know whether the testator executed, and the witnesses subscribed, this [451] Will as it now exists, or a former Will? for that is precisely the question before us.

If it be said, that whoever impeaches an instrument must prove his grounds of objection, it is obvious to any one, that whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds, and clear up the doubts. If a Will, or a note, be tendered in evidence, by a Defendant, as a receipt in proof of payment, and there appears an alteration of the sum, or if the party's name be changed, then there must be proof given, of the alteration having been made, before the signature, else the instrument cannot be regarded as genuine.

In the case of a deed, it was formerly the rule, that, when the Court saw, upon inspection, that there was a material erasure or interlineation, the instrument was on that plea refused, and held null, as being a kind of demurrer. But it is said in the books, that afterwards, when deeds became so long, that clerical errors crept, often almost unavoidably, into them, the matter was made a question of evidence, and so left to the jury. We find it, however, laid down by all the authorities, that, even in the case of a deed, the effect of an erasure is important; for, says Buller, J., (N. P. 255 a.) "If there be any blemish in the deed by rasure or interlineation, the deed ought to be proved though it were above thirty years old, by the witnesses if living, and if they be dead by proving the hand of the witnesses, or at least one of them, and also the hand of the party, to encounter the presumption arising from the blemish of the deed, and this ought more especially to be done, if the deed impute a fraud;" and to the same purport is the passage in Gilbert's Treatise on Evidence, p. 89.

[452] That an alteration, if made, though by the testator himself, after execution, and without republication, would be fatal to the Will, is clear, and no authority is required to support such a proposition. The Court of Common Pleas so held expressly in a case sent from the Court of Chancery for their opinion. (*Larkins v. Larkins*, 3 B. and P. 16.)

If, indeed, we for a moment consider the consequences of holding a contrary doctrine, we must at once be convinced how fatal this would be to the authority of documents, how entirely subversive of the rights of parties, and how completely abrogatory of the Statute. A party might change the sums of all the legacies left in a Will; he might change the parties' legatees; he might change the parties, the parcels, and the devises, in a Will of lands, and all this might be effected without the least knowledge on the part of the testator, who, having given one gift to one person, might be made to give another to the same, or the same to another person. Even if a testator made the alteration after the execution and attestation, it would be a bequest or devise not witnessed; and it is obvious to remark, that he might be of sound and disposing mind at the one period, when the *factum* took place, and wholly incompetent when he made the alteration. The whole protection thrown round parties by the Statute, would thus be taken away.

One of their Lordships, the Vice-Chancellor Knight Bruce, differs in this conclusion of law: but the rest of their Lordships consider that this sentence must be reversed, and probate granted to the Will as it appears, and is proved, to have been originally made, before the alterations. It is satisfactory to us, that we find that the attention of the Court below [453] had not been directed particularly to the question now disposed of; for the whole report of the case in Curteis goes on the question of the *factum*, and not on the alterations. Whether that last point was argued at all, does not appear. The report says, that, after deciding on the *factum*, the Court directed evidence of the nature of the alterations, and thereon decided for probate of the Will so altered.

[Mews' Dig. tit. EVIDENCE; II. PRESUMPTIONS, 5. d.; tit. WILL; II. TESTAMENTARY INSTRUMENTS, n.; IV. EXECUTION, b. *Attestation*; IX. CONSTRUCTION, c. *Erasures*. S.C. 10 Jur. 931, and, below, 3 Curt. 648. On point (i.) as to sufficiency of acknowledgment (4 Moo. P.C. 442), followed in *In the Goods of Huckvale*, 1867, 1 P. and D. 378; and see *Pascoe v. Smart*, 1901, 17 T.L.R. 595: (ii.) as to pre-

sumption in regard to alterations (4 Moo. P.C. 452, 453), followed in *In the Goods of Cadge*, 1868, 1 P. and D. 545; and see *In the Goods of Sykes*, 1873, 3 P. and D. 27; *Wright v. Sanderson*, 1884, 9 P.D. 153, 154; (iii.) as to re-arguing appeals (4 Moo. P.C. 430), see note to *Frankland v. McGusty*, 1830, 1 Knapp, at p. 310; (iv.) as to expression of existence of difference of opinion among members of Judicial Committee (4 Moo. P.C. 452), see O. in C. of 4th Feb. 1878, and authorities collected in *Phillimore Eccl. Law*, 2nd ed. p. 975.]

ON PETITION FROM THE SUPREME COURT OF JAMAICA.

IN RE GEORGE BARNETT * [Nov. 29, 1844].

Appeal allowed, under the 7th and 8th Viet., c. 69, direct from the Court of Assize of the Island of Jamaica, to Her Majesty in Council, without bringing a Writ of Error, in the Court of Errors (the intermediate Court) in the Island. Such appeal is not of course, but requires special grounds to be shown to warrant the application [4 Moo. P.C. 456, 457].

This was a Petition, under the 7th and 8th Viet., c. 69, for leave to Appeal direct to Her Majesty in Council, from a Judgment of the Court of Assize, in the Island of Jamaica, in an action of Assumpsit, without bringing a Writ of Error, in the Court of Errors, in the Island, the intermediate Court of Appeal.

The Petition alleged, that in the October term of the Supreme Court of Jamaica, 1842, James Steadman and John Henry Kock, gentlemen, administrators of one [454] Patrick Newland, late of Glasgow, a merchant, filed a certain action of trespass on the case in assumpsit, against the Petitioner, George Barnett, and William Girod, attorneys-at-law, and surviving co-partners of John Lynch, deceased, for the recovery of monies alleged to have been received on the 30th of June 1837. That the Petitioner, and William Girod, having severed in their pleas to the said declaration, the cause came on for trial at the Assize Court at Kingston, in November, before Sir Joshua Rowe, the Chief Justice, and a jury. That Girod did not appear, but allowed Judgment to go by default. That, at the trial it appeared, among other things, that the administration had not been granted unto the Plaintiffs, until many years after the death of Lynch, and that there was no evidence of an account stated, or acknowledgment made to the Plaintiffs, as administrators after his death. That it further appeared, that the money being in part payment of a Judgment, at the suit of Patrick Newland, had been received by the said William Girod, in his character of attorney of and for the said Patrick Newland, or his estate, while the said John Lynch, and the Petitioner, were not included therein, and had never been accounted for by him, the said William Girod, to the Petitioner, and the said John Lynch, and that they had no knowledge of it. That it was contended, by the said Petitioner, at the trial, among other things, that the said action could not be maintained by the Plaintiffs, as administrators, there never having been any contract or privity, between them and the Petitioner, and the said John Lynch, during his lifetime; and there was no evidence to sustain any of the counts in the declaration for monies had and received: and it was further contended, [455] that William Girod had no authority from his co-partners to receive the money on account of the said co-partnership; and that it must be taken to have been received by him as the attorney of the deceased Newland, in which character he was alone entitled to receive it; and that the Chief Justice ought to have directed the Jury accordingly. That the Chief Justice refused to nonsuit the Plaintiffs, on the first point, or to direct the jury, as aforesaid, on the second point, but left the question to the jury, whether the said William Girod received the money as one of the firm of Lynch, Barnett, and Girod, and as attorneys-at-law of the parties entitled to the money, or as the procuring attorney: and directed the jury, that if they should be of opinion that he received it in the former character, to find their verdict for the

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Plaintiffs, and if in the latter, to find a verdict for the Defendant, the Petitioner. That the jury gave their verdict for the Plaintiffs, with £1619 12s. damages. That the counsel for the Petitioner excepted to the charge of the Chief Justice, and prepared and tendered a Bill of Exceptions to the ruling of the Chief Justice to the jury. That the said Judge had not sealed the said Bill of Exceptions, up to the date when the Petitioner left the Island; and that they were still unsealed, in consequence of some difference of opinion between the counsel. That the expense and heavy security required by the rules of the Court of Error in Jamaica, almost amounted to a prohibition against an Appeal. That the non-sealing of the Bill of Exceptions, deprived him from obtaining his Writ of Error; and that if he had done so before the said Bill of Exceptions had been sealed, it would have been a waiver of the said Bill of Exceptions. That an action on the [456] Jamaica Judgment, had been instituted in the Court of Exchequer of Pleas in England, against the Petitioner, and Judgment entered up thereon, subject to an order of the Court, on the application of the Petitioner, staying execution until leave of the Court, or of the Judge thereof, should be granted.

The Petitioner then set forth the 1st and 9th sections of the 7th and 8th Vict., c. 69 (Appendix, p. xix.), and prayed that the said Bill of Exceptions, when sealed, might be returned to the Judicial Committee of the Privy Council, to be by them read and disposed of, without an intermediate Appeal, to the said Court of Appeal in Jamaica, and to make such further order thereupon.

Mr. Dysart for the Petitioner.—This is the first application under the new Act, 7th and 8th Vict., c. 69, for leave to Appeal directly from the inferior Court in Jamaica, and as there has been no Order in Council issued to carry the provisions of this Act into effect, it is necessary that there be a Special Order. [Lord Langdale: If you come here for a Special Order you must show special grounds; you must state sufficient to induce the Court to let you have such indulgence. It is not an order of course.] The Petition sets forth sufficient grounds. [Baron Parke: You ask for leave to appeal, but do not undertake to give security.] The Act of Parliament does not provide for that, but we are willing to abide any order your Lordships may think right to make.

Mr. Willes, *contra*.—The Court ought not to receive this Appeal. If the application be admitted without special grounds, it [457] will operate as a general order, to abolish the Court of Error in Jamaica. Nothing has been shown in the Petition to warrant such a course. There is a Court of Error in the Island, which can take cognizance of the matter. But if this Court is inclined to grant such leave, it will impose such terms upon the Petitioner as will put the party in the same position as he would be in the Island. The Jamaica Statute, 17 Geo. III., c. 16, does not go beyond the Statutes in force in this country, for regulating security to be given on Appeal in Writs of Error. Security ought, also, to be given for costs.

Lord Langdale.—Their Lordships are of opinion, that the prayer of the Petitioner ought to be granted; but it must be upon terms. He must give security for the debt, and for £300 for costs. If he gives security for the debt in the Court below, he is not to give such security here. The order is not to affect the right of the parties in the meantime.

By an Order in Council, it was ordered that leave ought to be granted to the said George Barnett, to enter and prosecute his said Appeal, or Bill of Exceptions, to the said charge and opinion of the said Chief Justice of the Supreme Court of Judicature of the Island of Jamaica, before Her Majesty in Council, without the intermediate Appeal to the Court of Appeal in Jamaica, and in pursuance of the Act of the 7th and 8th of Her Majesty, cap. 69, upon lodging in the Council-office a certificate of recognizance to Her Majesty, in a penalty of £1919 12s. (being the amount of the verdict of £1619 12s., given for Plaintiffs in [458] the said cause, with £300 for security for the costs of the Appeal), to be entered into by some proper person or persons, before one of the Barons of Her Majesty's Court of Exchequer, conditioned to stand and abide such determination as may be made or awarded by Her Majesty in Council, in the said cause, and pay such costs as shall be awarded in case the said Appeal be dismissed; provided that, in case good and sufficient security

for the said sum of £1619 12s. shall have been, or shall hereafter be, given into the said Court of Exchequer, and approved by a Master of the said Court, in pursuance of an order of the said Court of Exchequer, then the said Petitioner should be relieved from such further security for the said sum of £1619 12s., for the prosecution of his said Appeal before Her Majesty in Council, and should have leave to prosecute the same, on giving the said security hereinbefore mentioned, in the said sum of £300 only, for the costs of his Appeal; and it was further ordered, that nothing therein should suspend or interfere with any proceeding in the said cause, in the Island of Jamaica, and that the Petitioner, or his agents, ought to be permitted to take from the proper officers of the said Supreme Court of Judicature, copies, properly authenticated, of all records and proceedings which may be deemed necessary to lay before Her Majesty, in support of the said Appeal, upon payments of the usual fees for the same.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 1. *When appeal lies generally.* Cp. *Harrison v. Scott*, 1846, 5 Moo. P.C. 357; *A.-G. of Jamaica v. Manderson*, 1848, 6 Moo. P.C. 239; *Hitchins v. Hollingsworth*, 1850-52, 7 Moo. P.C. 228.]

[459] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE
AT MADRAS.

HOSANNA ARATHOON KERAKOOSE.—*Appellant*; WILLIAM AMBROSE SERLE
and Others.—*Respondents* * [Nov. 29 and 30, 1844].

Heard *Ex parte*.

By a General Order, made on the Equity side of the Supreme Court of Madras, it was ordered that, "whenever it shall appear, that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court, or a Judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property." In pursuance of this order, the Registrar of the Supreme Court, upon Petition, obtained an order, giving him liberty to file a Bill in the Equity side of the Supreme Court, as the next friend, and on behalf of infants, for an account of the estate of their father, who died intestate, against their mother, the administratrix; and notwithstanding an Appeal against such order, such bill was filed, to which the Defendant put in a plea, which being overruled, a further Appeal from such decision was interposed to Her Majesty in Council [4 Moo. P.C. 470].

By the practice of the Supreme Court, the Registrar is entitled to a commission of 5 per cent. on all sums of money paid into Court.

Held by the Judicial Committee, that the order of the Equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not under the Statute 2 and 3 Vict., c. 34, was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and the orders made in pursuance thereof, reversed [4 Moo. P.C. 476].

This was an Appeal from two orders of the Supreme Court at Madras, bearing date, respectively, the 26th of September 1843, and the 13th of February 1844. The first order was made on the Petition of the Registrar of the Supreme Court, giving him authority to institute a suit, as the next friend of the infant children of the Appellant, against her. The second was [460] an order of the same Court,

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

disallowing a plea put in by the Appellant, to the Bill so filed by the Registrar, on behalf of the infants.

These orders were made, under the following circumstances:—

Arathoon Kerakoose, an Armenian, inhabitant of Madras, departed this life intestate, on the 21st of May 1832, leaving the Appellant, his widow, and the Respondents, Moses Kerakoose, Arrahechal Kerakoose, Barbara Kerakoose, Harapeat Kerakoose, Katherina Kerakoose, and Jacob Kerakoose, respectively, under the age of twenty-one years, his only children, him surviving.

On the 16th day of August 1832, letters of administration to the goods, chattels, credit, and effects of the intestate were granted on the Ecclesiastical side of the Supreme Court at Madras, to the Appellant, as the widow of the intestate. And the Appellant gave the proper security required by the Charter or Letters Patent establishing the Supreme Court, in a bond, with sureties for the sum of £100,000.*

[461] No citation or demand for filing any accounts of, or relating to the estate or effects of the intestate, was [462] ever served, or made upon the Appellant, previously to her filing such accounts as hereinafter mentioned.

* By the Charter or Letters Patent of his late Majesty, King George the Third, dated the 26th day of December 1800, after reciting a Charter of his late Majesty, King George the Second, erecting a Court, to be called the Mayor's Court of Madraspatnam. And reciting, also, an Act of Parliament passed in the thirty-seventh year of the reign of his late Majesty, King George the Third, entitled, "An act for the better administration of justice at Calcutta, Madras, and Bombay, and for preventing British subjects from being concerned in loans to the native princes of India," whereby it was, amongst other things, enacted, that it should be lawful for his said late Majesty, by Charter, to erect a Court of Judicature at Madras, to be presided over by a person, to be styled the Recorder of Madras. And that the said Court should have full power and authority to exercise and perform all civil, criminal, ecclesiastical, and admiralty jurisdiction, and to appoint such ministerial officers as might be necessary, and to form and establish such rules of practice, and such rules for the process of the said Court, and to do all such other things as should be necessary for the administration of justice. And reciting, also, that by Letters Patent, dated the 20th day of February, in the thirty-eighth year of the reign of his late Majesty, King George the Third, the said Court of the Recorder at Madras was erected in pursuance of the said last-mentioned Act of Parliament. And also reciting an act of Parliament, passed in the fortieth year of the reign of his said late Majesty, entitled, "An Act for establishing further regulations for the government of the British territories in India, and the better administration of justice within the same," whereby his Majesty was empowered to erect and establish a Supreme Court of Judicature at Madras, as in the said Act of Parliament mentioned. His Majesty, King George the Third, did grant, direct, ordain, and appoint, that there should be within the settlement of Fort St. George, a Court of Record, which should be called the Supreme Court of Judicature at Madras. It was by the said Charter (amongst other things) declared, that the said Supreme Court of Judicature at Madras should have full power and authority, to hear, try, and determine all and all manner of suits and actions, either civil or criminal, which, by the authority of any Act or Acts of Parliament, or under the authority of the said letters patent, of the thirty-eighth year of the reign of his said late Majesty, might then be tried or determined by the said Court of the Recorder at Madras, and that all powers, authorities, and jurisdictions of what kind or nature soever, which, by any Act or Acts of Parliament, or by the said letters patent might be, or were directed to be exercised by the said Court of the Recorder at Madras, should and might be as fully and effectually exercised by the said Supreme Court of Judicature at Madras as the same might have been exercised and enjoyed by the said Court of the Recorder at Madras. And by the said Charter of the said Supreme Court of Judicature at Madras, is (amongst other things) appointed a Court of Ecclesiastical Jurisdiction, with power to commit letters of administration, under the seal of the said Court, of the goods, chattels, and all other effects whatsoever, of persons who should die intestate. And it is by the said Charter enjoined and required, that every person to whom such letters of administration should be committed (other

[463] On the 6th of May 1843, certain rules of the Supreme Court, on the Ecclesiastical side thereof, were passed, which were as follows:—

“Supreme Court, Ecclesiastical side, 6th May 1843.

“It is ordered, that the following rules on the Ecclesiastical side of this Court do take effect immediately:—

“1st. In all cases in which letters of administration have been taken out since the 1st of January 1823, and in which the time for filing accounts has expired, such accounts shall be filed within two months, after the publication of this order in the *Fort St. George Gazette*; and in default of such accounts being so filed, the Registrar may issue the necessary citations and other process to compel the filing thereof, charging the parties making default, with the costs of such citations and process.

“2nd. The Registrar shall publish in the *Fort St. George Gazette*, on the first Tuesday in every month, a schedule or list, of all accounts filed in his office during the preceding month, showing the balance of each account in the hands of the administrator.

“3rd. In all cases in which administrators shall hereafter neglect to file their accounts for two months beyond the time allowed to them by law, the Registrar is ordered to issue the necessary citations, and other process to compel the filing thereof, charging the parties making default with the costs of such citations and process.

[464] “4th. Administrators shall pass their accounts before the Master, and obtain the Master's certificate of his allowance of the same; in all cases, in which

than the Registrar of the said Court taking administration under the authority of the Act of Parliament of the fortieth year of the reign of his late Majesty, King George the Third, mentioned in the said Charter), should, before the granting thereof, give sufficient security by bond to the Registrar or chief clerk of the said Court, for the payment of a competent sum of money, with two or more able sureties, respect being had in the sum therein to be contained, and in the ability of the sureties to the value of the estate, credits, and effects of the deceased. Which bond should be deposited in the said Court among the records thereof, and there safely kept, and a copy thereof should also be recorded among the proceedings of the said Court. And the condition of the said bond should be to the following effect (that is say):—“That if the above bounden administrator of the goods and effects of the deceased do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, credits, and effects of the said deceased, which have or shall come to the hands, possession, or knowledge of him, the said administrator, or the hands of possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the Supreme Court of Judicature, at Madras, at or before a day therein to be specified. And the same goods, chattels, credits, and effects of the deceased at the time of his death, or which at any time afterwards shall come to the hands or possession of such administrator, or to the hands of any person or persons for him, shall well and truly administer according to law. And further, shall make or cause to be made a true and just account of his said administration at or before a time therein to be specified. And all the rest and residue of the said goods, chattels, credits, and effects which shall be found remaining upon the said administration account, the same being first examined and allowed of by the said Supreme Court of Judicature at Madras, shall deliver and pay unto such person or persons respectively, as shall be lawfully intitled to such residue. Then this obligation to be void and of none effect, or else to remain in full force and virtue.”

And by the said Charter, it is provided that in case it should be necessary, to put the said bond in suit, for the sake of obtaining the effect thereof, for the benefit of any person or persons, who should appear, to the said Supreme Court, to be interested therein, such person or persons, from time to time, paying all such costs as should arise from the said suit, or any part thereof, such person or persons should, by order of the said Court, be allowed to sue the same in the name of the obligee. And that the said bond should not be sued in any other manner. And the said Supreme Court was authorized to order, that the said bond should be put in suit, in the name of the Registrar or chief clerk, or his executors or administrators.

the Court or a Judge shall think fit to make an order to that effect; such order to be made either at the suggestion of the Registrar, or on the application of any person interested in such accounts.

"5th. In all cases where an administrator shall be required to pass his accounts, the Master shall publish a notice, in the *Fort St. George Gazette*, of the day and hour when such administrator is required to attend before him, at which time all persons interested may appear by themselves or their attorneys, and make their objection to such accounts."

On the same day, the following General Order of the Supreme Court was made on the Equity side:

"It is ordered that the following order on the Equity side of this Court do take effect immediately:—

"Whenever it shall appear that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court or a Judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property."*

[465] In pursuance of the first of the aforesaid Rules, on the Ecclesiastical side of the Supreme Court, the Appellant, on the 25th of August 1843, and before the

* By the Charter, it is ordained and established, that the said Supreme Court of Judicature at Madras should also be a Court of Equity, and have full power and authority to administer justice in a summary way, according, or as near as might be, to the rules and proceedings of the High Court of Chancery in Great Britain, and upon a bill filed, to issue subpoenas and other process, under the seal of the said Court, to compel the appearance and answer upon oath of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such manner and form, and to such effect, as the Lord High Chancellor of Great Britain did, or lawfully might, under the Great Seal of Great Britain, or as near the same as the circumstances and conditions of the places and persons under their jurisdiction, and the laws, manners, customs, and usages of the native inhabitants, would admit. And the said Supreme Court of Judicature at Madras was thereby authorized to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England.

By an Act of Parliament made and passed in the 2nd and 3rd years of the reign of her present Majesty [c. 34], after reciting that the Supreme Court of Judicature at Fort William in Bengal, on the 15th day of June 1837, and the Supreme Court of Judicature at Madras on the 22nd day of February 1837, had made and passed certain rules and orders, whereby the modes of pleading in the same Courts respectively, were in some respects altered, and that doubts had arisen as to the powers of the same Courts to make such alterations without the authority of Parliament, it was enacted that the said rules and orders, so far as they altered the modes of pleading in the said Supreme Courts at Fort William and Madras respectively, should be deemed and taken to all intents to have been lawfully made, and to have had, and still to have, the force of law. And it is by the same Act also (amongst other things) enacted, that the said Supreme Court of Fort William and Madras should and might, by any other rules or orders to be from time to time passed by the said Courts respectively, make such further alterations in the mode of pleading in the said Courts respectively or in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, or suits in equity, or any civil or ecclesiastical causes, and such regulations as to the payment of costs, and otherwise for carrying into effect any such alterations as to the said Courts respectively might seem expedient, and that such rules, orders, or regulations should be submitted for confirmation or disallowance to the Governor-General of India in Council, immediately upon the making of the same, and every such rule, order, or regulation, should to all intents and purposes have full effect after it should have been confirmed by the said Governor-General of India in Council; but every such rule, order, and regulation, when so confirmed, should be transmitted to her Majesty, her heirs, or successors in Council, and should be subject at any time to be altered or rescinded by her said Majesty, her heirs, or successors in Council.

expiration of two months from the publication of the [466] rules, filed her account, as the administratrix of the estate and effects of the intestate.

Shortly after filing the aforesaid account, the Appellant received a letter, dated the 31st of August 1843, from William Ambrose Serle, as the Ecclesiastical Registrar of the said Supreme Court, in the following form:—"Supreme Court, Madras, Registrar's Office, 31st August 1843. Madam.—Adverting to your account of the late Arathoon Kerakoose, Esq., deceased, filed this day, I am sorry to observe that it is altogether objectionable, inasmuch as it is more an abstract of the account, than a full and perfect account, required by the Court: I have therefore to request that you will be pleased to file an account of the estate fully and separately, particularizing the dates and amounts of the several items of your receipts and disbursements thereof respectively, and this I beg you will do on or before the 12th day of September next, otherwise I shall be obliged, under the orders of the Supreme Court, dated 6th May last, to apply to the Court, or a Judge thereof, that you do pass your accounts before the Master, and oblige you to obtain the Master's certificate of his allowance thereof.—I am, Madam, your obedient servant, W. A. SERLE, Registrar.—To Mrs. Hosanna A. Kerakoose, Administratrix of the estate of the late Arathoon Kerakoose, Esq., deceased."

The Appellant being advised that she was not bound to render accounts of or relating to the estate of the intestate in the Ecclesiastical side of the said Supreme Court, except at the instance of some person interested in such estate, and no proceedings having been taken against her, nor any application made to her by or on behalf of any person interested in such estate to [467] render such accounts, the Appellant declined to render such further accounts as required in the aforesaid letter.

In consequence of this refusal, Serle, as Registrar of the Supreme Court, on the Ecclesiastical side, on the 12th day of September 1843, presented a petition to the Court, for liberty to file a bill as the next friend, and on behalf of the infants, the children of the intestate, praying for an account of the estate of the intestate, and that their shares might be secured for their benefit respectively.

This petition came on to be heard before the Supreme Court, on the 22nd of September 1843: when the Appellant objected that no such order as prayed for ought to be made, and insisted particularly, that such order ought not to be made in the exercise of the equity jurisdiction of the Court, on the petition of Serle, as the Registrar of the Court, on the Ecclesiastical side thereof. That if any proceedings were to be taken by Serle, as such Registrar, to compel the Appellant to render her accounts as such administratrix, such proceedings ought to have been taken by such Registrar, of the nature and in the manner pointed out by the fourth of the above rules.

On the 26th of September 1843, the Supreme Court ordered and directed, that the petition of Serle, so far as regarded the addition to the name of William Ambrose Serle therein, should be amended, by striking out therefrom the words "on the Ecclesiastical side thereof," and substituting the words "for the time being," in lieu thereof. And that Serle, as the Registrar of the Supreme Court for the time being, should be at liberty to file a bill in the Court, as the next friend of, and on behalf of, the said infants, praying for an account of the estate of [468] Arathoon Kerakoose, deceased, and that the shares of the infants should be secured for their benefit respectively.

The Appellant presented a petition to the Supreme Court, praying for leave to appeal from this order of the 26th day of September 1843, to her Majesty in Council, and such leave was given accordingly, by an order dated the 13th day of October 1843.

Notwithstanding the appeal against this order, of the 26th September 1843, a bill of complaint was, on the 7th day of October 1843, filed in the Supreme Court, on the Equity side thereof, in which Moses Kerakoose, Arracheal Kerakoose, Barbara Kerakoose, Harapect Kerakoose, Katherina Kerakoose, and Jacob Kerakoose, by the said William Ambrose Serle, as the Registrar of the Supreme Court for the time being, their next friend, were Plaintiffs, and the Appellant was Defendant, praying that an account might be taken of the estate of the deceased, which had been possessed by or come to the hands of the Appellant, or which had been possessed by or come to the hands of any other person or persons, by her order or for her use; and that an account might be taken of the deceased's funeral expenses and debts,

and that the same might be paid out of the personal estate; and that an account might be taken of the deceased's houses and lands, which had come to the hands of or been received by, or by the order, or to the use, of the Appellant; and that the surplus of the personal estate of the deceased, and the rents, profits, and produce of the houses and lands, might be applied in a due course of administration; and that the shares of the Plaintiffs therein, and in the said houses and lands, might be secured for their benefit respectively; and that some proper person [469] might be appointed by the Court, to collect in and receive the outstanding personal estate and effects of the intestate, and the interest of the Government and other securities, and the rents, issues, and profits of the houses and lands for the time to come; and that a guardian of the persons and fortunes of the Plaintiffs might be appointed by the Court, and that a suitable allowance might be made for the maintenance and education of the Plaintiffs for the time past and to come; and that the Appellant might be restrained by the order and injunction of the Court from trading with the funds of the estate, and from lending out or investing the same or any part thereof, in or upon any securities other than Government or real securities; and from further collecting the rents, issues, and profits of the real estate of the intestate, and the interest on the Government and other securities belonging to the estate; and for further relief.

The Appellant having been served with process, duly appeared to the bill, and on the 4th day of December 1843, filed her plea thereto, whereby she showed and alleged that the said William Ambrose Serle, as the Registrar on the Ecclesiastical side of the said Court, had no right to demand such account of administrations to be filed, as he had by his letter of the 31st day of August last, to the Appellant, demanded; that the said William Ambrose Serle had not any right whatever, as such Registrar on the Ecclesiastical side of the Court, or otherwise, or in any other capacity, to present to the Court such petition as therein and hereinbefore stated, for leave to file such a bill as prayed by his petition, nor any right whatever to file such a bill as he had filed, to prosecute the said [470] suit against the Appellant; that the Court had no jurisdiction to grant such order, whereby the said William Ambrose Serle was permitted to commence and prosecute such suit as aforesaid; that no person could or ought to be allowed to sue as a *prochein ami* except upon his own responsibility, and the responsibility of costs, in respect of the grounds of such suit, and his conduct in the same, and not upon any leave or order of the Court, to sue by the bill as *prochein ami*, without limitation as to the nature or quality of the bill, and the allegations and charges therein contained, or to be contained, and without any responsibility as to costs, and at the cost either of the Appellant or of the estate, he, the said William Ambrose Serle, having no interest in maintaining the suit, except the fees which in the progress of the suit would become payable to him as the Registrar. Whereupon, for want of a proper person entitled to sue as a *prochein ami*, who would be responsible for costs, the Appellant humbly prayed the judgment of the Court, whether she ought to be compelled to make any further or other answer to the said bill of complaint.

This plea was argued before the Supreme Court, and on the 13th day of February 1844 it was ordered by the Court that the plea should be overruled.

The Appellant presented her petition to the Supreme Court, praying for leave to appeal from this order to Her Majesty in Council, and such leave was given accordingly.

[471] Mr. F. Kelly, Q.C., Mr. Teed, Q.C., and Mr. Dickenson, for the Appellant in the first Appeal.—The Supreme Court of Madras had no authority by virtue of the charter of December 1800 (*ante* [4 Moo. P.C.], p. 464), or by the 2nd and 3rd Vict., c. 34 (*ante* [4 Moo. P.C.], p. 465), to have made, on the Equity side of the Court, the order of the 6th of May 1843, inasmuch as such order did not relate to the practice or rules of pleading of the Court, or to process, to be issued by or under the authority of the Court. Such an order is against public policy. The appointment of an officer of the Court who is pecuniarily interested in the institution of suits, to be the next friend of infants, is in itself contrary to law. Here the Respondent, as Registrar of the Court, is entitled not only to fees on all business transacted by him as such Registrar, but also to a commission of five per cent. on all money paid into Court; and if the suit instituted by him, in pursuance of the order of the

6th September 1843, he prosecuted, he will receive by way of commission on the amount so to be paid into Court, the sum of £3500, in addition to other fees payable to him as such Registrar. By reason of this large commission, the suit, and the proceedings by the order directed to be instituted, are for his benefit, and will not be beneficial for the infants. Another and equally strong reason exists against such order: the Registrar is not made by such order responsible for the costs, of any suit instituted by him, as the next friend of any infant or infants, but such costs must be borne, either in part or wholly by the Defendant or the infant's estate. And in case such infants attain their majority, and desire [472] such suit to be discontinued, they must pay to the Registrar his costs up to that time. No suit ought to be instituted by any person, as next friend, for an infant or infants, unless such next friend is made responsible for the costs of such suit. Irrespective of such order being void as against public policy, it is irregular and contrary to the practice of the Court of Chancery. The Supreme Court had no authority to make such order on petition.—The only jurisdiction of the Court was by Bill. [Lord Langdale.—Suppose the Registrar had filed a petition for leave to file a Bill. Petitions for guardians are of every-day occurrence without a Bill being filed. The practice here is to appoint a guardian, and if the guardian thinks it for the benefit of the infant that a suit be instituted, he petitions the Court for leave to file such. A Bill is in truth a Petition.] Even if the Court had jurisdiction to make such an order, on the petition of the Registrar, on the Equity side of the Court, yet no such order ought to have been made on the petition of the Registrar on the Ecclesiastical side of the Court. The petition ought at once to have been dismissed, and ought not to have been amended by striking out the words “on the Ecclesiastical side thereof,” and substituting the words “for the time being,” in lieu thereof. [Lord Campbell.—Has the order of the 6th May 1843 ever been confirmed, as required by the 2nd and 3rd Vict., c. 34? I think it never ought to have been confirmed.] No; but it may be said that the order was not made under that Act, but under the general jurisdiction of the Court as a Court of Chancery.

The second Appeal, which disallowed the plea to the Bill, was not argued. The same counsel appeared in support of that Appeal.

[473] The Right Hon. T. Pemberton Leigh (Dec. 19, 1844).—These appeals are brought by a lady of the name of Kerakoose, against two orders of the Supreme Court of Judicature of Madras. The first order complained of was pronounced on the 26th September 1843, and was made on the petition of the Registrar of the Court. It gave the consent of the Court to the institution of a suit in Chancery against the Appellant by the petitioner on behalf of the infant children of the Appellant. The second order is dated the 13th February 1845, and disallows a plea put in by the Appellant, to a Bill filed against her by the Registrar, in the name of the infants, in pursuance of the liberty given by the preceding order.

It has been argued at the Bar that the first order, independently of all other objections to it, is invalid, as having been made upon petition without the existence of any suit to found the jurisdiction of the Court. We cannot concur in this objection.

By a general order of the Court, made on the 6th of May 1843, the Registrar was directed to institute proceedings, with the previous consent of the Court, in all cases where the property of infants should appear to be unprotected. With a view to obtain this consent in the present case, the Registrar presented a petition to the Court, and it is plain that this was the only proper mode of making the application.

No question of jurisdiction arises. Notice of the application was given to the Appellant for the purpose of enabling her, if she thought fit, to appear and show cause against it. She did think fit to appear, and did offer reasons against the order, which the Court held to be insufficient. No process was issued to compel [474] appearance, nor was any order sought to be made upon her. It is perfectly familiar to the practice of the Court of Chancery, when an order is applied for, which may be made *ex parte*, to direct notice of the application to be given to the party who may be affected by it, to the intent that such party, though not subject to the jurisdiction of the Court, may appear, if he pleases, to protect his interests, and this is what in substance appears to have been done in this case.

It was then said, that upon the merits of the case, as they appeared before the Court, there was no ground for permitting any Bill to be filed against the Appellant, in order to protect the property of the infants.

We are not of that opinion. This lady had rendered an account which was neither full nor satisfactory, and she had refused, when called upon, to give the further detail, without which it was impossible to see either that the assets which she had parted with, had been properly disposed of, or that which remained, so far as it belonged to the infants, was properly secured.

But upon general principles, we think that the order in question must be reversed. It is founded on the general order of the 6th of May 1843, and the merits of that order appear, therefore, to be involved in the present appeal. We understand this order to have been made under the general jurisdiction of the Court to regulate its practice, and not under the powers given by the Statute of the 2nd and 3rd Vict., c. 34. The order does not appear to have been transmitted to this country, and we are informed, that it has never been submitted to the Governor in Council.

Upon the general policy of this appointment of a public officer to institute suits on behalf of infants, in all cases where their property appears to be unprotected, [475] we are not called upon to give an opinion. In this country the protection of such interests, is left to persons who may be willing to come forward at the risk of costs, and, subject to that risk, any person is permitted to do so. That this practice gives rise to many improper suits is well known to all who have any experience in the Court of Chancery; and it is very probable that it leaves many cases unprovided for, when the interests of the infants would require the protection of a suit. It may well be, that the abuses which prevail in Madras, in the administration of infant estates, and the state of society in that country, may require measures which have not been deemed necessary in England, and this consideration seems to have dictated the order of the 6th of May. But the question is one of very great public importance, regarding not the conduct of suits after they are instituted, but the appointment of a public officer to institute suits, and if it was considered by the Court that it was advisable to make such a representative, and that it had authority to make it, we think it should have been done under the provisions of the Statute of Victoria [2 and 3 Vict., c. 34], in which case the Regulation would have been subject to be altered or rescinded, by Her Majesty in Council.

But whatever may be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed for that purpose, of whom even a suspicion can exist, that he may be biassed by any personal interest, either in the institution of the suit or in the mode of conducting it. It is stated to us that Mr. Serle, by reason of the office which he holds, will both receive fees [476] upon the different proceedings in this cause, and a commission upon the amount of the monies paid into Court. This fact is adverted to in general terms by the Appellant in her papers in the Court below, and is urged as one of the objections to the institution of the suit. It does not appear from any of the orders, or from the judgment of the Court, that any provision had been made, or is intended to be made, with respect to the fees, or the commission which may become due to Mr. Serle, in this or other cases in which he may sue as next friend. It is plain, therefore, that he has a strong personal interest both in the institution of suits, and in the mode of conducting them, and especially in one of the most delicate points upon which a next friend can be required to exercise a discretion, viz., the propriety or impropriety of requiring the payment of money, or transfer of funds into Court.

It is of great importance in all countries, and more particularly in a country like India, that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration; and although we see no reason to think that the proceedings in the present case have been at all affected, either in their origin, or their conduct hitherto, by such considerations, yet when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties.

For these reasons, our humble advice to Her Majesty will be to reverse the first order complained of, that of the 26th September 1843, and all further proceedings

in the suit will of course be stayed. It does not appear necessary, therefore, to make any order upon the second appeal.

[S.C. 3 Moo. Ind. App. 329. The Statute 2 and 3 Vict. c. 34, was repealed by the S. L. R. (No. 2) Act, 1874. See Indian High Courts Act, 1861 (24 and 25 Vict. c. 104), s. 9; letters patent of 28th Dec., 1865, establishing the High Court of *Madras*, Art. 17 (Stat. R. and O. Rev. iv. 101), and cf. as regards (i.) *Bombay*, letters patent of 28th Dec., 1865, Art. 17 (*ib.* 114); (ii.) *Calcutta*, letters patent of 28th Dec., 1865, Art. 17 (*ib.* 88); and (iii.) *North-Western Provinces*, letters patent of 17th March, 1866, Art. 12 (*ib.* 125). As regards necessity for disinterestedness of officials in India, cf. Ilbert, *Government of India*, p. 259 (Digest, Pt. XI., Art. 117).]

REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1845-47. By EDMUND F. MOORE, Barrister-at-Law. Vol. V.

ON APPEAL FROM THE PROVINCIAL COURT OF APPEALS FOR THE
PROVINCE OF LOWER CANADA.

FRANCES ERMATINGER,—*Appellant*; BARTHOLOMEW CONRAD AUGUSTUS
GUGY,—*Respondent* * [Nov. 30, 1844].

A. being the clerk and manager of B., the Sheriff of Montreal, received and paid in that capacity various sums of money on B.'s account, in the course of the business of the office. B. brought an action against the representatives of A., for an account of the receipts, and application of the monies, which passed through A.'s hands, while in B.'s office. Held, in such circumstances, by the Judicial Committee, reversing the Judgment of the Court of Appeals of Lower Canada, that such action would not lie against A.'s representatives [4 Moo. P.C. 15].

Appeal abated by the death of the Respondent, whose heirs renounced the succession, and a Curator having been appointed by the Court below, to the vacant succession, the Appeal was revived against such Curator [5 Moo. P.C. 8].

The Respondent was the Curator of the vacant succession of the Honourable Lewis Guky, deceased, who, previous to the year 1837, was the Sheriff of the district of Montreal, in the province of Lower Canada. [2] The Appellant was the widow and tutrix of the infant children of Francis Perry, who was employed by Lewis Guky, as principal clerk and manager of the business of the Sheriff's office: and as such, permitted to draw cheques in the name of the Sheriff.

The question in the appeal was, whether the representatives of Perry were liable to account for the receipts, and application of the sums of money which passed through his hands in the office, during the period of his being such managing clerk.

On the 1st of February 1837, Lewis Guky instituted an action in the Court of King's Bench for the district of Montreal, against the Appellant, in her quality of tutrix to Jenima Perry, Charles Ermatinger Perry, and Francis Perry, the minor children issue of her marriage with the late Francis Perry, and his heirs-at-law; for an account of all fees, emoluments, and sums of money received by him, and of all business done by him as such managing clerk and agent, and for payment of such value as, upon rendering such account, should appear due to Lewis Guky.

By the declaration in the action, the Plaintiff set forth, in substance, that the late Francis Perry, for a long space of time previous to his decease, was, on the retainer of him, and by his appointment, his deputy, and did exercise the office of Deputy-Sheriff, and became and was, upon the like retainer and appointment, his

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

agent, attorney, clerk, book-keeper, and receiver; and that, as such Deputy-Sheriff, or as such agent, attorney, clerk, book-keeper, and receiver, he, Francis Perry, did receive into his hands divers fees, emoluments, sum and sums of money, belonging or payable to him, Lewis Gagy, as such Sheriff, and did various matters of business relative to the affairs and [3] duties of the said late Respondent as such Sheriff: that Francis Perry had died intestate, leaving Jemima Perry, Charles Ermatinger Perry, and Francis Perry, his minor children, his heirs-at-law: and although, by the law of the land, Francis Perry was bound to render a just and faithful account of all fees, emoluments, and sums of money received by him, and of all business done by him, as such managing clerk and agent, yet although thereunto often requested, he did not, at any time during his life, render any such account: and that the Appellant, his widow, had not, since the decease of Francis Perry, although thereunto often requested, rendered to him, Lewis Gagy, any such account, but refused so to do.

The Appellant filed a plea of exception, and a plea of the general issue; these pleas were as follows:—"And the said Defendant, for plea to the action, and declaration of the said Plaintiff, not admitting any of the allegations in the said declaration contained to be true, by this, her exception, saith that the said late Francis Perry was, for a long time, to wit, for and during the time specified in the said declaration, the deputy of the said Plaintiff, then Sheriff of the district of Montreal, and did keep and superintend the keeping of the books of account of the said Plaintiff, as Sheriff, and during the said time did receive and pay out for the said Plaintiff, large sums of money; and the said Defendant saith, that the said receipts and payments are entered and specified in the said books of account, and in certain vouchers and receipts, all of which have ever been, and still remain, in the possession of the said Plaintiff, and that she, the said Defendant, by reason thereof, cannot, nor is she bound by law to [4] render an account of the said monies, in manner and form as the same hath been demanded, in and by the said action and declaration; wherefore she prays judgment, that her exception may be maintained, and further prays, that the said action may be hence dismissed with costs; and the said Defendant, without waiver of any matter or thing by her, in the said cause heretofore pleaded, for further plea in this behalf saith, that all the allegations in the said Plaintiff's declaration contained are, and each of them is, unfounded in fact, false and untrue; wherefore she, the said Defendant, prays that the said action may be hence dismissed with costs."

The following admission was agreed on:—"The parties in this cause admit the statement in the plea firstly pleaded contained to be true, and that it be considered and held to be evidence in the cause, with this exception, that the said Plaintiff does not admit the accuracy or sufficiency of the said books and accounts, but only that he has them in his possession."

The Plaintiff, by his answer to the Defendant's plea of exception, admitted that the facts therein set forth were true: without this, that the books of account, so kept by Perry, were correct, alleging, as he thereby expressly did, that the said books and accounts were incorrect and insufficient; that he was ready and willing to place them in the hands of the Appellant, and, persisting in the conclusions of his declaration and by his answer to the Appellant's plea, the Respondent generally alleged the truth of the matters stated in his said declaration.

Evidence was gone into on both sides, and at the *enquête*, upon the filing of exhibits, it was admitted by [5] the parties that Francis Perry departed this life at New York, in the United States of America, some time in July or August then last past: that certain cheques (which were produced and filed), were produced to show the mode in which Perry drew cheques for the Plaintiff, and that most of the cheques were charged to the persons in whose favour they were drawn; and that Perry received from the Plaintiff a yearly salary of £250 currency.

It appeared, from the evidence of the Plaintiff, that Perry, as the confidential clerk of the Plaintiff, was allowed to draw cheques in his name upon the Bank of Montreal, where his money was placed, and that the Plaintiff himself also drew cheques in his own name upon the bank. It appeared, also, from the Defendant's witnesses, that the Plaintiff was generally attendant in his office, in which the business of the Sheriff, and particularly the pecuniary matters relating thereto, was carried on, and that all the books of account, and all the transactions of the office, were open to the superintendence of the Plaintiff. That Perry always conducted himself as liable

to be controlled by the Plaintiff, and that the money received in the office was always at the control, and subject to the disposal, of the Plaintiff. That the accounts received, and from time to time remaining in the office unapplied, were (with the exception of the process money which was taken by the Plaintiff) placed in the Bank of Montreal, to the account of the Plaintiff. That on the decease of Perry, the books and papers in the office were taken possession of by the present Respondent, as representing the late Plaintiff.

From the examination of the Appellant on the *faits* [6] *et articles*, it appeared, that Perry kept no books or accounts, except a book relating to his private affairs, and access to which was offered to the Plaintiff by the Appellant.

On the 20th day of February 1838, the cause was heard in the Court of King's Bench, and judgment pronounced, whereby it was declared that, "adjudging upon the merits of the action of the said Plaintiff, the Court doth dismiss the same with costs in favour of the said Defendant, saving to the Plaintiff his recourse as he may be advised."

From this Judgment the Plaintiff appealed to the Provincial Court of Appeals for Lower Canada. The appeal was heard on the 30th of July 1839, when that Court reversed the Judgment of the Court of King's Bench, and "proceeding to give such judgment as the Court below ought to have given in the premises, adjudged that the Respondent (the now Appellant) should, in her said quality of tutrix, make and render to the said Appellant a true and faithful account of all and every the fees, emoluments, sum and sums of money, received by the said late Francis Perry, as the deputy, agent, attorney, clerk, book-keeper, and receiver of the said Appellant, as Sheriff of the district of Montreal, in anywise concerning the transactions, writs, processes, oppositions, proceedings, matters, and things performed, done, and executed, or returned by the said late Francis Perry, for or on behalf of the said Appellant, as Sheriff, as aforesaid, and generally of the whole administration by him, the said late Francis Perry, had of the affairs, matters, and things aforesaid, which account should be supported by all necessary and proper vouchers, evidence, and documents, and should pay [7] and satisfy to the said Appellant such balance or sum of money as, upon the rendering of such account, should appear due to the said Appellant, with interest; and in default of rendering such account, the said Defendant, in her said quality, was thereby adjudged and condemned to pay and satisfy to the said Appellant the sum of £5000, for and instead of the balance, sum and sums of money which, if such account were rendered, might be coming and due to the said Appellant. And it was further considered and adjudged, that the said account be so made and rendered within the period of six months next after the day upon which the said Appellant shall have delivered over to the said Respondent, in her said quality, the books, papers, vouchers, documents, and receipts, relating to the office of Sheriff as aforesaid, between the 1st day of February 1827, and the 6th day of July 1836, when the said late Francis Perry ceased to have the management and gestion of the affairs and business of the said Appellant in the office of Sheriff as aforesaid, and which have in any manner or way come into the custody, power, or possession of the said Appellant, or his agent or agents, or others acting for or under him, and which in any way related to the business and transactions with regard to, or in respect of, the said office of Sheriff. And the said Francis Ermatinger, in her said quality, was thereby required, held, and adjudged, to give security, to the satisfaction of one of the Judges of the said Court of King's Bench, to return the same when and so soon as final judgment shall have been rendered upon the said account."

From this Judgment the present appeal was brought.

[8] Pending the appeal, the Respondent died, and his heirs and also his widow having renounced succession, and the same having in consequence become vacant, the present Respondent was, by an Order of the Court of Queen's Bench of the district of Montreal, duly appointed Curator of the vacant succession; whereupon he presented a petition to Her Majesty in Council, praying that the appeal and the proceedings therein might be revived, and that he, as such Curator, might be a party thereto, and stand as Respondent in the place of the late Respondent.

Mr. Charles Buller (Nov. 27, 1843 *), in support of the petition, produced the

* Present: Lord Cottenham, Lord Campbell, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, and the Right Hon. Dr. Lushington.

certificate from the Court of Queen's Bench, of the heirs and the widow having renounced the succession, and the appointment of the Petitioner, as Curator, to the vacant succession, and moved that the same might be revived, which was ordered accordingly.

The appeal now came on for hearing.

Mr. Teed, Q.C., and Mr. Renshaw, for the Appellant.—It is impossible that the Judgment of the Court of Appeals can be supported. An action of account cannot be maintained: the parties did not stand in the relation of principal and agent. Perry was only a clerk and servant, in the employment of the Sheriff, and any sums of money received by him in the course of his employment in the office of the Sheriff, became and were, on such receipt, at the control, and subject to the Sheriff's disposition, as the principal in [9] the office; and being in such control, Perry cannot be held answerable for their application. It is shown by the evidence in the action, that the late Sheriff did, in his own person, apply and appropriate some of the sums received by Perry, during the period of his employment in his office; and the Appellant has no means of knowing what sums of money or to what amount were so applied or appropriated by the Sheriff. He was present in his office during all the period for which Perry was employed therein, and had, during that period, possession and inspection, or opportunity of inspection, of all books and accounts kept in relation to the business of the office, and the receipts and payments on account thereof, and had, therefore, full knowledge of all matters and transactions which took place in the office. It is not pretended that the Appellant has any books, accounts or documents relating to the receipts and payments of Perry, during his employment in the office, or any adequate or satisfactory means of ascertaining what were his receipts and payments. The late Sheriff, upon the decease of Perry, retained and kept possession of the books, papers and vouchers relating to the receipts and payments on account of the office, and the Appellant has no means of being satisfied that the whole of the books, papers, and receipts, relating to such payments, would be forthcoming and available in taking the account, as directed by the Judgment of the Court of Appeals, and in ascertaining the balance thereon, or that such of the books and accounts, relating to the receipts and payments, as would be forthcoming and available, would be in the same state as they were in at the time when the employment of Perry in the office ceased.

[10] We submit, therefore, that the Judgment of the Court of Appeals is contrary to the law of the province, and the account directed cannot be taken upon any fair or equitable principle. But even if any subject of account does exist between the estate of Perry and the late Sheriff, which we insist is not the case, the direction of the Judgment of the Court of Appeals is not proper with reference to such account; it is more extensive in its nature than any which ought to be taken between the parties. *Edwards v. Lord Chadworth* (8 Ves. 46).

Mr. Charles Buller, and Mr. Fleming, for the Respondent.—According to the laws of Lower Canada, Perry's acts as agent bound himself and his legal representatives, duly to account with his employer for his receipts, disbursements, and general administration, and he and they are liable to pay and discharge the balance which, upon a full examination of the accounts between him and his employer, should be ascertained to be due. The ordinance of Louis XIV., A.D. 1667, title 29, "*De la reddition des comptes*," art. 1 (Isambert, *Anciennes Lois Françaises*, vol. 18, p. 158), is conclusive upon this obligation. "*Les tuteurs, procureurs, curateurs, fermiers, juges, seigneurs, séquestres, gardiens, et autres qui auront administré les biens d'autrui, seront tenus de rendre compte aussitôt que leur gestion sera finie; et seront toujours réputés comptables encore que le compte soit clos et arrêté, jusqu'à ce qu'ils aient payé le reliquat, s'il en est dû, et remis toutes les pièces justificatives.*" Sallé, in his *Espirit des Ordonnances de* [11] *Louis XIV.* (vol. i. pp. 352 and 353), lays it down that this ordinance obliges all persons who have the management and administration of the property of others, duly to account; and that the fact of administering the affairs of the principal, imposes upon the agent, or person employed, the obligation of duly accounting to his employer. Pothier, tit. "*Du Contrat de Mandat*," chap. 2, No. 51, Domat (lib. 1, tit. 15, sec. 3 and 8), and Loisel (lib. 1, tit. 5), states the law on the duties and obligations of an agent to the same effect. The passage from Pothier (No. 61), expressly mentions an action similar to

that brought by the late Respondent, as the proper mode of enforcing the claims of the principal against the agent. "*De l'obligation, que contracte le mandataire par le contrat de mandat, naît l'action mandati directa qu'a le mandant contre le mandataire, aux fins que, dans le cas, auquel le mandataire, sans une juste cause d'empêchement, aurait manqué d'exécuter le mandat dont il s'est chargé, il soit condamné envers le mandant aux dommages et intérêts résultans de l'inexécution du mandat, comme il a été dit en l'article premier; et que, dans le cas, auquel il aurait exécuté le mandat, il soit condamné à en rendre compte au mandant et à lui remettre ce qu'il en retient, suivant ce qu'il a été dit en l'article précédent.*" And under the same title, No. 64, Pothier adds—" *Cette action peut s'intenter non seulement par le mandant, mais par ses héritiers et autres successeurs, et elle peut pareillement s'intenter non seulement contre le mandataire, mais contre ses héritiers: car quoique le mandat finisse par la mort du mandataire, et que les héritiers du mandataire ne succèdent pas à l'obligation, que le mandataire avait contractée, d'exécuter le mandat, [12] lorsque le mandataire est mort, avant que d'avoir été en demeure, et d'avoir eu le loisir de l'exécuter; au contraire, lorsque le mandataire n'est mort qu'après avoir exécuté le mandat au moins en partie, ou qu'après avoir été en demeure de l'exécuter, ses héritiers succèdent à l'obligation de rendre compte de sa gestion, ou à celle des dommages et intérêts résultans de la demeure, en laquelle a été le défunt, d'exécuter le mandat dont il s'était chargé.*" These authorities clearly establish that the duty to account and discharge the balance due, necessarily results from the relation between the agent and his principal: that the obligation to account and pay the amount due by the agent devolves, on his decease, upon his legal representatives: and that an action to account is the proper proceeding to be taken by the principal to enforce that obligation.

The sole question, therefore, is, whether the first plea pleaded by the Appellant, affords any answer to the late Respondent's action. The plea is pleaded to the whole of the declaration; but to that part of it which consists of a demand for the payment of the balance which should be found due to the late Respondent, it cannot be alleged that that plea or those reasons afford any answer; because, whether the books of account were or not in the late Respondent's custody, and whether the monies of the late Respondent were or not legally in his possession, the agent must have been equally liable to make good such sums belonging to the late Respondent as he had applied to his own use or for his own purposes. We, therefore, submit that this plea does not extend to, or cover, the demand made by the declaration, and that the plea is, for that reason, altogether insufficient. But, independently of this ground of ob-[13]-jection, the plea affords no answer to the demand for an account. It appears upon the record that the late Respondent offered the books and all other accounts, vouchers, and papers, which had been in the possession of Francis Perry at the time he ceased to act for him, to the Appellant, to enable her to make out the account. The custody of those documents being with the late Respondent at the time he brought the action, formed, therefore, no impediment to the due rendering of the account. As to the objection, that the Appellant could not know or be assured that the documents were in the same state as at the time of Francis Perry's decease, it is altogether futile, as the late Respondent might, according to the laws of Lower Canada, have been examined; and the Appellant was, in fact, examined in this action.

The allegation that the materials necessary for the preparation of the account demanded are in the custody of the Plaintiff, can never exonerate a Defendant from liability to account for balance due by him. Such an allegation may form a ground for giving the Defendant leave to examine those materials, and time to enable him to do so; but it cannot be a sufficient reason for the dismissal of the Plaintiff's action, as insisted upon by the Appellant's first plea. It does not, in fact, allege a defence to the action. The argument of the Appellant, that the monies received by Francis Perry were received by him as clerk to the late Respondent, and that they were in the possession, under the control, and at the disposal of the late Respondent, does not appear material to, or to aid the first plea of the Appellant, and is certainly no bar to the late Respondent's demand. A similar statement might be made as a defence [14] to every proceeding brought by a principal against his agent, as the possession of the agent is legally that of the principal; and if the

monies received are placed in a bank to the credit of the principal, he undoubtedly has the control of them, although, as in the present case, he may permit and authorise the agent to draw cheques for, and to receive sums from that account to an unlimited amount. It cannot be pretended that the agent would not be liable to account for such sums as he so drew out and received; nor can such reason form an answer to an action of account, which would, of course, extend to such monies as the agent received on behalf of his principal, and which the agent never placed under the control or at the disposal of his principal. We submit, therefore, that the last-mentioned ground of defence is altogether insufficient, and that it has no bearing upon the question between the parties to the action. The Appellant in the Court below altogether failed in supporting her plea of the general issue, *The Earl of Hardwicke v. Vernon* (14 Ves. 505), *Lupton v. White* (15 Ves. 432), *Massey v. Banner* (4 Mad. 413; 1 Jac. and Wal. 241).

Lord Campbell.—The question in this appeal is, whether Perry's representatives are liable in an action, which is in the nature of an action of account, brought by Gagy, his late employer. This depends upon the relation subsisting between the parties, whether in fact they were agent and principal, or master and servant. There is no doubt that where a person is employed by another to transact business for his employer, and is allowed to have money in his hands, in the character of agent or clerk, he is liable to account for such money. But there is a great difference between a party so circumstanced, and one who, being immediately under the eye of his employer, and subject to his daily control,—keeping, in fact, not his own, but his employer's accounts, entering them in his master's books, and giving over vouchers and receipts to his custody. Whether such a dealing can constitute the relation of agent and principal, so as to make the former liable to an action, or bill for account, must depend on the especial facts of the case: *prima facie*, such liability would not exist. In this case it appears to their Lordships that it is sufficiently established by the pleadings and evidence, that Perry was only the clerk of Gagy, the Sheriff, and that there is no pretence for calling him the Deputy-Sheriff. Now, in such character, it is true that he received and paid large sums on account of his employer, and it is alleged, as the ground of the action, that he did not account for such sums. But the books in which all his transactions were entered were in the office of the Sheriff, open at any time to his inspection, and as he was in the daily habit of attending the office, he must be considered to have been cognizant of their contents. The vouchers and receipts, and banker's book, were all in his custody, and were so during the whole time of Perry's being employed by him; and after nearly ten years' employment and acquiescence in these accounts, it is too late to seek to open them in an action for an account. Their Lordships think that no action of account can be sustained, in the circumstances of this case; and, therefore, that the decision of the Court of King's Bench was right, and ought to have been [16] affirmed. Their Lordships give no opinion as to the right of the Respondent to any other remedy he may be advised to seek, by bill or otherwise; but they will advise her Majesty to reverse the decision of the Court of Appeals, and to affirm that of the Court of King's Bench of Lower Canada.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, b.; tit. MASTER AND SERVANT, I. A. *Contract of Hiring*, 8.]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

PRYCE JONES,—*Appellant*; FRANCIS GODRICH,—*Respondent* *

[Dec. 4, 5, 6, 9, and 11, 1844].

Principles, upon which a Court of Probate proceeds in the admission of

* Present: Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

testamentary papers of persons of alleged incapacity, from age or infirmity [5 Moo. P.C. 19, 20].

Testatrix being of the age of eighty-six, and, as alleged, of feeble and impaired mind, having no near relations, by her Will and two Codicils gave to her medical attendant (who was a stranger to her in blood, but in whose house she resided) the bulk of her property, appointing him sole Executor and residuary legatee. The Will was executed in his house, and prepared by his attorney, and was at variance with her previous testamentary dispositions, which were in favour of her distant relatives. The Prerogative Court being satisfied of the testamentary capacity of the Testatrix, upon the balance of evidence negating the alleged fraud, admitted the Will and Codicils to proof. On Appeal, the sentence, so far as it related to the Will and first Codicil, affirmed by the Judicial Committee of the Privy Council; but a further allegation, pleading facts, *noviter ad notitiam perventa*, being brought in, the second Codicil was pronounced against, and the sentence of the Prerogative Court to that extent, reversed [5 Moo. P.C. 47].

An attorney who prepared a testamentary paper, at the instance of the party benefitted by it, is not privileged, on the ground of professional confidence, to withhold from the Court, facts relating to contemporaneous acts, upon which he founded his opinion of the testamentary capacity of the party making the Will [5 Moo. P.C. 46].

This was a business of proving, in solemn form of law, the Will and two Codicils of Harriet Loyd, late of Little Chelsea, in the county of Middlesex, spinster. [17] The Will was dated the 13th of February 1836, and the Codicils were respectively dated the 13th of December 1836, and the 5th of September 1838. The particulars of these instruments it is not necessary to state further, than as they are set forth in the Judgment.

The cause was promoted by the Respondent, the sole Executor and residuary legatee named in the Will, against the Appellant, who was one of the Executors named in a previous Will of the deceased, bearing date the 22nd of December 1834.

The deceased went to reside at the house of the Respondent, Mr. Godrich, a surgeon, in 1835, and died there on the 25th of September 1838, at the age of eighty-six. The personal property of the deceased was above £9000. This amount, however, was exclusive of leasehold premises claimed by the Respondent under an assignment, dated the 7th of November 1835, in consideration of £980, and exclusive of £1200 11s. three per cent. Consols, also claimed by him under a transfer, by power of attorney, dated the 5th of September 1838, and also exclusive of six Exchequer Bills for £800, claimed as a gift from the deceased on the same 5th of September 1838. The above stock was stated by the Respondent to have been given to him in consideration of his maintaining the deceased for the remainder of her life, and the Exchequer Bills as a present, with a view to save legacy duty at her death.

[18] The Respondent also obtained a power of attorney for the transfer of £448 8s. 10d. Long Annuities, in the same month of September 1838, which were then of the value of £7060, or thereabouts; but the transfer of such stock was demurred to by the authorities at the Bank of England, and the same remained standing in the name of the deceased at the time of her decease, forming the bulk of her personal estate.

The facts and circumstances of the case were pleaded at great length, and witnesses examined on both sides: the material allegations and proofs are fully stated in the Judgment.

The grounds on which the testamentary papers were opposed in the Court below, and upon the appeal, were, that the Testatrix was, at the respective dates of the papers propounded, of very advanced age, and enfeebled mind, and under the undue influence of the Respondent, in whose house she lodged, he being her medical attendant, the sole Executor and residuary legatee; that under such circumstances, coupled with his conduct generally in regard to her property, and that the papers propounded (which were at variance with her former testamentary dispositions) were prepared from his instructions and by his attorney, and executed in his house, the evidence was insufficient to entitle them to probate.

The Appeal was argued by Mr. Turner, Q.C., and Dr. Haggard, for the Appellant; and The Solicitor-General (Sir Frederick Thesiger), and Dr. Addams, for the Respondent.

The following cases were cited and referred to:—[19] *Paske v. Ollat* (2 Phill. 323). *Ingram v. Wyatt* (1 Hagg. Ecc. Rep. 384; and 3 Hagg. Ecc. Rep. 466). *Middleton v. Forbes* (cited 1 Hagg. Ecc. Rep. 395). *Barry v. Butlin* (2 Moore's P.C. Cases, 480). *Durling v. Loveland* (2 Curteis, 225). *Gibson v. Jeyes* (6 Ves. 266). *Pratt v. Barker* (1 Sim. 1; S.C. 4 Russ. 507). *Hunter v. Atkins* (3 Myl. and K. 113). *Durnell v. Corfield* (1 Robertson, Ecc. Rep. 51). *Gibson v. Russell* (2 Y. and Coll. N.R. 104). *Welles v. Middleton* (1 Cox, 112).

The Right Hon. Dr. Lushington (January 17, 1845).—Harriet Loyd, the Testatrix in this cause, died on the 25th of September 1838. She left several testamentary papers. Mr. Godrich, the sole Executor and residuary legatee in a Will dated the 13th of February 1836, propounded that Will, and also two Codicils thereto, bearing date the 13th of December 1836, and the 5th of September 1838.

Mr. Pryce Jones, an executor in a Will dated the 22nd of December 1834, opposed the probate of the Will and Codicils propounded by Mr. Godrich.

The Judge of the Prerogative Court, on the 3rd of December 1841, pronounced for the validity of the Will and Codicils set up by Mr. Godrich, and from that decision, Mr. Pryce Jones appealed to Her Majesty in Council, and their Lordships have now to determine, whether that decree ought to be in whole or in part reversed, or, in other words, whether the Will of 1836 and the Codicils thereto are sufficiently proved.

The *quantum* of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case. Three things must be proved; capacity, testamentary intention, and execution.

[20] Before we consider the evidence (which in these Courts is called the evidence to the *factum*) of these papers, we must first look to the admitted facts in the cause, and this for the purpose of forming an opinion, as to what degree of proof is necessary to sustain the validity of the Will and Codicils. The deceased, at the time of making the Will, was of a very advanced age, certainly not less than eighty-six. She was resident in the house of Mr. Godrich, who was her medical attendant, and the Will and Codicils give the bulk of the property to him, who was no relation to the Testatrix. The Will was made by Mr. Lane, a stranger to the Testatrix, and the solicitor of Mr. Godrich.

Now all these circumstances necessarily awaken the vigilance of the Court, and require that the proof shall be full and satisfactory. The *onus probandi* is always upon those who set up a testamentary instrument; and when facts like these appear, the evidence to prove the affirmative must be stronger than in ordinary cases. The extreme age of the deceased will require stronger proof as to capacity, because at periods so advanced, the mental faculties are often found to decay and fluctuate; so when a Will is made in favour of a medical man in whose house the testatrix is resident, the Court must be upon its guard against undue influence, for practising which there is so much opportunity: and where a Will under such circumstances is made by a solicitor who had no previous knowledge of the deceased, the Court must be sure that he distinctly understood her, and acted as her agent, and not as the agent of the legatee, who sent him.

The law of England has prescribed no restrictions upon testamentary dispositions, as to who may be the legatees. Where that power is exercised in favour of [21] guardians, trustees, solicitors, medical attendants, or persons standing in a similar relation to the deceased, the degree of proof required will be greater or less according to circumstances; but if the Court be satisfied that there was adequate capacity, testamentary intention, untainted by fraud, and a due execution, the instrument is valid. Fraud cannot be presumed, but the circumstances may render fraud so probable, that the Court will require stronger proof, than in cases where all natural presumptions are in favour of the disposition, and the free will of the Testator.

With reference to these principles, we will consider the evidence with respect to the preparation and execution of the Will propounded.

The Will of 1836 was prepared by Mr. Lane, an attorney of Argyle Street, and attested by him and Mr. Foy, a schoolmaster, residing in Little Chelsea. Mr. Lane states that Mr. Godrich was his friend and client; that Mr. Godrich applied to him to attend Mrs. Loyd for the purpose of altering her Will—in fact, to appoint him (Godrich), her residuary legatee; that he had been led to do this in consequence of a letter from Mr. Mellish, informing her that she had a considerable residue undisposed of.

On the 13th of February, Mr. Lane goes to Mr. Godrich's house in the evening, and Mr. Godrich shows him, as he deposes, a Will dated in 1834, in which the residue was not disposed of. This was a mistake, for the Will of 1834 gives the residue to Mr. Pryce Jones: in the Will of 1835 there is no residuary bequest; and from the subsequent part of the evidence it appears that it was the Will of 1835. From Mr. Godrich, Mr. Lane then receives certain instructions, and especially that Godrich was to be the sole executor and residuary legatee.

[22] Mr. Lane states that he felt that the matter would require great caution on his part; and most assuredly it did, for here was a solicitor, unknown to the Testatrix, about to be introduced to her, a person of very advanced age, for the purpose of making Godrich residuary legatee of a considerable property; he, Lane, being the friend and solicitor of such intended legatee. Of the capacity of the Testatrix, of her former testamentary dispositions, of her relations, if any, of all circumstances, indeed, relating to her, Lane knew nothing, save from the statements of Godrich; an interested person.

Mr. Lane is then introduced to the Testatrix, and Godrich very properly withdraws. It is not necessary to go through the evidence: if it be true, the Testatrix certainly gave instructions for the Will of 1836. It would have been more cautious had Lane suggested who was to be residuary legatee, and it would have been more prudent to have reduced the instructions into writing, and read them over to the Testatrix. These are ordinary precautions in such cases, and ought not to have been neglected; still the neglect of them is not fatal.

Mr. Lane then goes down stairs, prepares the Will, and Mr. Foy is sent for. The Will is read over, and approved by the deceased. According to Lane, then, this Will is prepared partly from the Will of 1835, partly from the suggestions of Godrich, and partly from new instructions given by the Testatrix, but the whole of it adopted, and approved by her. In the whole conduct and demeanour of the Testatrix, as described by this witness, there is no trait of incapacity or imbecility, no appearance of control or fear; and, considering her age, she takes as active a part as could [23] be reasonably expected. If the evidence be true, there is adequate proof of the *animus testandi*.

The next step will be to consider, how far Lane is supported by the testimony of Foy, the other subscribing witness. Foy was a schoolmaster in the neighbourhood, and, according to the evidence given of the opposing witnesses, his character and integrity stand very high. He, too, was a stranger to the deceased, a friend of Godrich's, and a client of Lane's. Foy having come to the house in consequence of being sent for by Lane or Godrich (it matters little which), finds the Will already prepared, and goes up with Lane to the room of the Testatrix, which Godrich immediately leaves. The Will is then read over, and the Testatrix appeared to pay great attention; and he states a strong proof of this, for he says that the Testatrix, during the reading, asked, "Who did you say was my residuary legatee?" Mr. Lane said, "Mr. Godrich;" and she answered, "That's quite correct."

Now, this inquiry and subsequent observation, affords very strong proof both of capacity and testamentary intention; and testamentary intention, too, in a very important particular, namely, the bequest of the residue to Godrich. The remainder of the evidence of Foy tends to support both these conclusions, and of its truth there is no reason to doubt; for though in mere matters of opinion he might be biassed by his intimacy with Godrich, and confidence in Lane, yet in a person of integrity, such as he is admitted to be, no bias can be supposed to induce him to invent circumstances, or to state facts, differently from what occurred. It is manifest, too, from the comparison of his evidence with that of Lane, that there was no preconcert as to the evidence they should give.

[24] The result, then, of the consideration of the two subscribing witnesses is,

that *prima facie*, the Will is proved to have been duly executed; but whether that ought to be the final determination of their Lordships, will depend on the examination of all the other facts and circumstances in the case.

Before proceeding to these facts, let us consider of what description the circumstances must be, and what the evidence, to have the effect of invalidating the testimony already discussed. First. Evidence to affect the credit of Lane. Second. Evidence proving general incapacity, so strong as to show that the witnesses to the Will must have been mistaken, or have deposed untruly. Third. Proof of fraud, if practised in other transactions, so connected with the Will, as to justify the inference that the Will was tainted with it. Fourth. Proofs of control and intimidation, such as would show that the Testatrix was not a free agent. These circumstances, or some of them, especially if combined with others,—as unnatural and irrational change of intention, abandonment of objects long cherished,—may satisfy the Court, that the Will is not the act of a capable Testatrix.

With respect to the credit due to Lane, reference should be had, in the first instance, to his evidence, which, in this case, has been twice taken (*a*). He states that immediately after the execution of the Will, "I [25] folded the Will up, and laid it down on the desk or the table before her, and left it there; and immediately after, Foy and myself came down stairs, and, after exchanging a few words with Mr. Godrich, we left." And at the end of that article of the allegation, he states that the execution of the Will occupied "about ten minutes or a quarter of an hour."

In this view of the case, there is nothing in Lane's evidence, on the second article, which relates to the first Codicil, to call for observation.

The second Codicil is dated on the 5th of September 1838. The deceased died on the 25th. Lane, after stating the circumstances attending the making it, gives the following evidence:—"I had other conversation with the deceased on the said occasion; but as that related to private business between herself and Mr. Godrich, not connected with her Will or Codicil, and I am the solicitor of both parties, I do not think it necessary to state it; I only allude to it as giving me the further means of judging of her mental capacity."

Here it is necessary to observe, that whatever might have been the nature of this business, Lane had no right to conceal it, and the examiner ought to have required him to state it. If there is any rule in testamentary law firmly established, it is this, that the witness shall state all the facts from which he draws his conclusion, that a Testator was of sound mind at the time of the execution of a testamentary instrument. The Court forms its judgment principally from the facts, and not from the opinion of witnesses; and many instances have occurred in which the decision of a Court of Probate has been opposed to the conclusion drawn by the witnesses, though the foundation of each opinion was the same facts. Here the [26] witness actually keeps back the very facts upon which he professes to ground his opinion. When examined on interrogatory, the witness does mention having delivered a deed to the deceased on the 5th of September, when the second Codicil was executed; but this incidental mention of this transaction, one out of three, as will presently appear, is more calculated to mislead and deceive than inform. When examined a second time, he repeats in substance the same evidence, adding, however, expressly that the concealment arose, because he was solicitor for Godrich (see *Godrich v. Jones*, 2 Curt. 671).

On the cross-examination of this witness, when last examined, it appears that on this 5th September 1838, several other instruments were executed, and certainly of a tenor which may satisfactorily account for Lane's anxiety to conceal them.

The first (mentioned in the original examination) is a deed of covenant, by which, in consideration of the sum of £1200 11s. Consols, Godrich covenanted to

(*a*) Mr. Lane, when examined in the first instance, admitted himself answerable to the Proctor in the cause, for costs; the Prerogative Court held that he was incompetent, but allowed the conclusion of the cause to be rescinded, for the purpose of having the witness released, which was accordingly done; and thereupon he was re-produced and re-examined, and his evidence admitted.—See *Godrich v. Jones*, 2 Curteis, 630; and see *Clark v. Carter*, 4 Moore's P.C. Cases, 207.

maintain the deceased during her life. The second is a power of attorney to Lane to sell these Consols.

These transactions occurred twenty days before the death of the deceased, and are stated by Lane to have been the last transactions, and to have taken place immediately before or after the execution of the Codicil of September 5th.

These facts are elicited in consequence of interrogatories, administered on the second examination, the facts not being known to the party opposing the Will before; but there is another transaction of a still more extraordinary complexion, which does not appear in any part of Lane's evidence; or rather is most studiously concealed by him. On this same 5th [27] of September, a power of attorney was executed under the superintendence of Lane, empowering Godrich to transfer into the joint names of the Testatrix and himself, the sum of £448 Long Annuities, which formed the bulk of the property of the deceased.

All these transactions are of a very suspicious character; but at present we only advert to them for one purpose: for the purpose of showing that Lane not only improperly withheld these circumstances from the Court, but, with respect to the last power of attorney, purposely shaped his evidence, so as to induce a belief that the deed of covenant, and power of attorney to sell the £1200 Consols, were the only transactions on the 5th of September, besides the execution of the second Codicil.

In weighing the credit which may be due to Lane, we must look at the nature of the business in which he was engaged for the deceased.

The Testatrix was possessed of property of the value of from £9000 to £10,000, and had besides an annuity of £600 per annum. Her income very greatly exceeded her expenditure; she had no near relations who had, from the ties of kindred, or other causes, natural demands upon her: nor did any reason exist why she should be anxious to augment her income: but from the execution of the Will commences a series of investments of a very different character from those which, so far as appears, the Testatrix had been accustomed to, and manifestly not for her security or benefit, but that of the residuary legatee: there are two annuities bought, a mortgage, and the sale of India bonds, one half of the produce lent on personal security, and the other half paid to Godrich; all this done in consequence of communication with Godrich [28] in the first instance, though said to be confirmed by the Testatrix. It would have been well if Lane could have stated what were the reasons the deceased gave for these investments, or whether he explained to her how unnecessary they were, for a person in her circumstances.

With regard to the deed of covenant, by which Godrich undertook to keep the deceased in his house, and to provide her with food and medical attendance, as long as she lived, it is abundantly clear that it was a mere colourable device to get possession of the money, of the same character as its cotemporary, the power of attorney to transfer the Long Annuities.

In all these transactions, Lane forgot the position in which he stood; he acted as the attorney of the Testatrix, but not for her benefit or protection; he was the agent of Godrich, and acted for his advantage.

During the argument, our attention was called to the entries in Lane's books. These entries were manifestly made with a view to a particular purpose: they are not in that ordinary form; we do not think they assist Lane's credit.

We will now advert to the evidence of Sarah Cooper, for the double purpose of ascertaining how far she supports the execution of the Will of 1836, and whether she contradicts or supports the evidence of Lane.

Sarah Cooper was the nurse and attendant on the deceased, and, when examined, was still a resident in Godrich's family.

With respect to the capacity of the Testatrix, and the *animus testandi*, this witness gives very strong affirmative evidence; especially that the deceased expressed her intention to give all her property, save a few legacies, to Godrich, and declared, that she had [29] desired him to send the gentleman who was to make it (the Will); that Godrich was very neglectful, and that if anything happened to her, and he lost it, it would serve him right.

Looking at the station in life of this witness [cf. *Cooper v. Bockett*, 1845, 1846, 4 Moo. P.C. 419], and the time which elapsed between this conversation and the

period she gave her evidence, it is probable that all may not have happened precisely as she stated it, particularly as her bias is clearly in favour of Godrich; but making all other allowances, unless we wholly disbelieve the witness (which we are not justified in doing), this is strong evidence in favour of the Will; it supports capacity, it tends to show testamentary intention, and the absence of urgency on the part of Godrich.

As to the making the Will, the evidence of this witness, in many respects, does not agree with the account given by Lane. Sarah Cooper speaks of two interviews, of her being present at the giving the instructions, of their being written down, and read over: this statement does not accord with Lane's, but we see no reason to conclude, either that this witness intended to give false evidence, or that such contradictions affect Lane's testimony. Precise uniformity, especially in witnesses so different in class, never could be expected; indeed, it would rather be a badge of fraud. We think that the transaction of making the Will is supported by Cooper's testimony, though some deduction must be made from it, both on the ground of defective memory, and strong ties.

Our view as to the execution of the Will, judging only from the evidence we have hitherto examined, is this:—that Lane's credit, from the mode in which he has given his evidence, and from the transactions to which he has lent himself, is subject to much suspicion, [30] but that his account of the preparation and examination of the Will is, in essential particulars, confirmed by Foy and Cooper, and that, if the case rested solely upon the evidence upon the *conditit*, we should feel ourselves bound to pronounce for the validity of this Will.

We now proceed to examine the allegations given in on the part of Pryce Jones against the Will, and the circumstances subsequently pleaded in support of it.

One of the leading averments contained in the first allegation, is impaired capacity, and occasional delusion.

It is scarcely necessary to observe, that in a person so far advanced in years, the vigour and energy of mind found in earlier life, cannot be expected or required, but there must exist that which the law requires—"It is not sufficient that the Testator be of memory when he maketh his Will, to answer to familiar and usual questions, but he ought to have a disposing memory, so that he be able to make dispositions of his estate with understanding and reason." The Marquess of Winchester's Case (6 Co. Rep. 23 a.).

As to delusion, different considerations arise; the act done under the influence of delusion is void, for then the mind of the Testator was unsound, but delusion may precede or succeed an act, without affecting its validity.

There are several witnesses examined on the article which pleads impaired capacity. It is alleged to have commenced in 1835, while the deceased was resident at Rose Cottage, and to have continued whilst she was under Godrich's roof, till her death.

Of these witnesses, the one by far the most entitled to consideration is Mr. James: he has no personal interest in the case, and does not show the same bias as [31] some of the others do. He expresses his opinion, that the deceased, from the spring of 1836, was quite incompetent to the management of her business, or to make her Will; she was quite in second childhood: the period to which James speaks, is rather after the date of the Will, but yet so close to it, that his opinion, if correct, may have a strong bearing upon the question of capacity, when the Will was executed.

It is necessary to examine his evidence, and especially the grounds he assigns for his opinion.

Mr. James's acquaintance with the Testatrix commenced in 1831, when he introduced himself to her at Rose Cottage, for the purpose of befriending, by his interposition, Thomas Jones, of Merthyr; he used to visit her about four times a-year, and until the spring before her death, in 1838.

He then deposes to her partiality for Pryce Jones, and to her declaration, that she would give him money to set him up in business, and, by her Will, the bulk of her property. He says, that it was, to the best of his recollection, in the year 1835, that she said that she had given Pryce Jones £5000 to set him up in business, and that she spoke with evident delight of his marriage. Subsequently, James deposes to his visits to the deceased, at Godrich's, commencing somewhere about the spring of

1836; he was much struck with the alteration in the deceased, and he specifies three circumstances, as showing (to use his own expression) that her conversation was of quite a different turn; she observed how like he was to the Royal family; she told a story of two snuff-boxes given by her to the two Mr. Mellishes; that the most marked alteration was, as to Pryce Jones; that she accused him of having robbed her of £5000, pro-[32]-mising he would not marry, but keep a carriage for her, and so forth; and that all this was in direct contradiction to her former conversations. James details the expressions of the deceased with respect to Godrich, her satisfaction of his taking care of her and her property; and says that she stated, that Mrs. Godrich came to her every morning, knelt down on her knees, and asked her blessing.

From these circumstances, thus set forth by James, he draws his conclusion, that the mental faculties of the deceased were impaired; and he especially relies upon the change as to Pryce Jones, as the leading reason for his opinion.

Their Lordships entertain no doubt but that James has correctly described all the facts which occurred to the best of his recollection; but the first question is, assuming the representation to be correct, will the facts stated, when fully considered, support his conclusion; and even if they will, is he confirmed by other testimony?

Now we think it extremely probable that, looking at the extreme age of the deceased, there was some gradual decay of her mental faculties, and that such diminished power might strike James, who saw her only at intervals, more forcibly than those who were accustomed to her; but such diminution of mental power is perfectly consistent with adequate testamentary capacity.

As to the facts, it is quite clear that the alleged resemblance to the Royal family, and the story of the two snuff boxes, cannot be deemed proof of incapacity, even if constantly asserted on the visits of James. Such repetitions are the constant concomitants of old age, and do not necessarily show a want of testamentary capacity, especially where a person being confined [33] to the house, with a very narrow circle of acquaintance, has little novelty or fresh topics for conversation.

With regard to the deceased submitting to the conduct of Godrich, it is a fact not altogether unimportant, for whatever allowance may be made for the difference of age, it is not probable that the Testatrix, who appears to have been originally a shrewd woman, would have received such absurd adulation as the witness speaks to, without expressing disapprobation; but, though this may be so, still it is only an incidental circumstance, from which, standing alone, no conclusion could be safely drawn.

As to the displeasure expressed against Jones, was there a cause reasonably to account for it? We think that this question must, without doubt, be answered in the affirmative. That the deceased had grave cause of displeasure against him, and that she manifested that displeasure most strongly, the more so, perhaps, and not unnaturally, because she had previously conferred so many benefits upon him. It is not necessary to enter into the particulars of the evidence showing the ground of the displeasure and the manifestation of it. It is enough to say that there was ample cause, reasonably to produce the result, and that this is proved by the evidence of Whittemore and Everett, and many others; and especially the fact of that displeasure is admitted by Charles Jones, the father of Pryce Jones (a).

[34] No wonder, then, that the deceased was loud in her complaints of Pryce Jones's conduct, and rational complaints they were; and if so, nearly the whole foundation on which James's opinion is built, falls to the ground, and the change in the deceased's conversation is fully justified by the circumstances which had occurred. James, no doubt, was ignorant of these occurrences, and hence his erroneous conclusions.

We have thought it right to enter thus fully into James's evidence, because the

(a) The circumstances deposed to by these witnesses were the general displeasure evinced by the deceased at Pryce Jones's marriage; and her final quarrel and separation from him just before she went to reside with Godrich, in consequence of his asking her, after dining with her, to give him £2000, and trying to get her to consent by making her tipsy, as she alleged, and the witnesses believed.

question of impaired capacity is always an important one in persons of great age, and also because from James's position in life and legal habits, his testimony is entitled to grave consideration; but as to the rest of the evidence on this subject, we think a few observations will satisfactorily dispose of it.

The witnesses examined on the twenty-first article, pleading incapacity (*a*), are, Alice Keep, Catherine Smith, [35] Charles Jones, Wm. Toby, jun., John Smith, and Charles Jones, the younger. We are of opinion that, considering the facts to which they depose, and the reasons assigned for their conclusion, they do not prove that the mental faculties of the deceased were so impaired as to render her incapable of a testamentary act. On the contrary, the true result of the evidence is, that the deceased, at the time of making the Will of 1836, possessed a capacity as perfect as usually falls to the lot of persons of her age. Having formed our opinion as to the capacity of the Testatrix from the evidence brought to prove that she was not capable of a testamentary act, it is not necessary to make any observations on the evidence brought to prove the affirmative.

The delusions alleged in the plea, are spoken of by Catherine Smith, and are borne out by Mrs. Keep; they depose that, on one occasion, the Testatrix imagined that she had lost her thumb. Mrs. Keep thinks this occurred about four or five years before her death; Catherine Smith fixes the time to about six weeks before she left Rose Cottage, in 1835: other strange occurrences are mentioned by Catherine Smith, as that the deceased, on one occasion, had Bank notes on her head; on another, that she pointed to the cruet-stand, as if she wished to have the teapot filled from the vinegar-cruet; and in the 13th article, as alleged, to mistaking the foot for the head of the bed; but she signs the Will next day as a witness. Now, assuming that all the circumstances took place as stated, and that no explanation could be offered as from intoxication, deli-[36]-rium or otherwise, it must be recollected that these delusions are wholly unconnected with the Will in question—that they occurred many months before the date of the Will, and that there is no evidence to show that they were of a permanent nature, or even that they ever took place. Again; we think that facts so isolated cannot effectually be brought to bear upon capacity where the Will was executed, and, consequently, cannot affect its validity.

The next head for consideration, is the alleged improbability of the Testatrix (if of sound mind), executing the Will of February 1836 voluntarily; and this improbability is based upon her former testamentary acts, and the presumed state of her affections.

The Will of December 1834, gave Charles Jones £1000. James, his brother, the interest of £500 for life. The interest of £1000 to the widow of T. Jones of Merthyr, and the capital to her children. After some small legacies, the Testatrix gave the residue to Pryce Jones, and appointed him Executor with Mr. Toby, who took a legacy of £200.

The Will of October 1835, appoints Toby, jun., and Godrich, Executors: to Mrs. Jones of Merthyr, it gives £2000, instead of the interest of £1000, and the capital

(*a*) This article pleaded, "That in and ever after the year 1835, the deceased was of weak and imbecile intellect, from her very advanced age and infirmities, and incapable of giving instructions for, or making and executing her Will or any Codicil thereto, or of doing any other act, requiring thought, judgment, and reflection; that Francis Godrich, for the purpose of making the pretended Will propounded in this cause, did, without her knowledge, employ Richard Kirkman Lane, his own friend and solicitor, and a total stranger to the deceased, and thus was prepared, from his own instructions, the pretended Will, pleaded and propounded in this cause; that the deceased being then under the influence of Francis Godrich, executed the same in the presence of Richard Kirkman Lane and William Foy, an intimate friend, (of him, Godrich, but a total stranger to the deceased,) who was directed to attend at Godrich's for such purpose. That she was ignorant of, or unable to understand, the contents thereof, and particularly the disposition of the residue of her property, therein contained, and had, since the pretended execution thereof, when asked respecting the same, expressed herself in words showing or indicating such her entire ignorance thereof."

thereof to her children. James Jones takes £500 absolutely, £500 is given in charity, and £3000 to each of the Executors: the residue is undisposed of.

The main distinctions between these two Wills are, the omission of Charles and Pryce Jones, the introduction of Godrich, as Executor and Legatee, and the legacies to him and Toby.

There was much argument at the Bar respecting the execution of this Will; the importance of the paper, and the circumstances attendant upon it, are pertinent [37] to the present issue only, because the Will of 1835 was, as deposed by Lane, the substratum of the Will of 1836.

This Will of 1835, was prepared by Mr. Robert Chambers, who describes himself as a Barrister-at-law, and it is attested by him and Catherine Smith. Mr. Chambers was an entire stranger to the Testatrix till the morning of October 7th, 1835, when he was called in by Toby, to make this Will, Mrs. Loyd being then resident at Rose Cottage. If the evidence of Mr. Chambers is to receive full credit, there can be no doubt, but that this was the Will of a willing and capable Testatrix, and there are several circumstances in support of it. At this period Mr. Pryce Jones had forfeited all claims upon the deceased, who warmly and not unreasonably resented his conduct. There was, therefore, an urgent cause for the revocation of the Will of 1835, by which he would have taken the bulk of the property. The residue was then to be disposed of. Whether the deceased had next of kin or not, there were none whom she recognized as having claims upon her, besides those mentioned in the Will of 1835, and Pryce Jones, with whom she was offended, and most probably also, at that time, with his father. It was not improbable, therefore, that she should increase the legacy to Toby, and not knowing what to do with the residue, confer a benefit on Godrich, who was becoming intimate with her.

It is true that both Catherine Smith, the other attesting witness, and William Toby, jun., who brought Mr. Chambers, and assisted in making this Will, now depose that the deceased at the time of making it was not of sound mind; but we cannot confide in [38] their evidence, for not only are they deposing against their own acts, but they assign no satisfactory reason for their opinions: and, further, their evidence is in opposition to all those witnesses whose testimony has, we think, satisfactorily established general capacity.

On the whole, therefore, we have come to this conclusion, as to the Will of 1835, that there are no circumstances attending it which should prevent its being fairly used as the substratum for the Will of 1836.

We must now contrast the contents of the Will of 1836 with the Will of 1835.

There are some very material alterations. The Will of 1836 reduces the legacy to Mrs. Jones, of Merthyr, from £2000 to £100: now only five months had elapsed between the making of these two Wills, and the good will of the Testatrix towards this Mrs. Jones, is manifested not only by the legacy of £2000 in the Will of 1835, but Mr. Chambers deposes that the deceased then said "much about" the Jones, of Merthyr. We have sought in vain for any solution of this reduction.

Next comes the reduction of James Jones' legacy from £500 to £300. Toby's legacy is diminished from £2000 to £500, and he is no longer an Executor.

The reason suggested for this alteration is, that after the deceased went to Godrich's, and he became acquainted with her affairs, her attention was drawn to the fact that Toby had invested £500 of hers in his own name, and suspicion on that account arose in her mind. This circumstance is admitted by Toby, though he disclaims all improper motives. We think that the fact itself, especially if attended with such [39] representations as were capable of being made respecting it, whether with good cause or not, might reasonably make a strong impression on the mind of the Testatrix unfavourable to Toby, and so account for this reduction, and his removal from the executorship.

The legacy to charity, of £500, is not to be found in this Will.

By these alterations a very considerable increase is made in the residue left undisposed of by the Will of 1835. The whole of that residue, amounting to not less than £9000, is given to Godrich, who, only five months before, took but £2000, and that, the first legacy ever bequeathed to him by the Testatrix. It must be admitted, we think, that such a disposition of the property by a Will executed in Godrich's own house, is well calculated to raise grave suspicions; but though we recognize this

position as unquestionably true, we are not prepared to say, looking at all the circumstances relating to Pryce Jones and Toby, and the absence of strong demands upon the Testatrix by near relations, that the contents of this Will are so opposed to all probability, as to raise any very powerful argument against its being the act of the deceased. We must make great allowance for the variation of intention so common in old persons, and for the reasonable increase of Godrich's influence.

The last branch on this part of the case is, the charge preferred against Godrich, of having exercised control over the deceased, and obtained the execution of the Will by fraud and undue influence.

With respect to the allegation of control, we are of opinion that there is no evidence of any coercion. It is disproved.

[40] To invalidate a Will on the ground of fraud and undue influence, it must be shown that they were practised with respect to the Will itself, or so contemporaneously with the Will, or connected with it, as by almost necessary presumption to effect it. Other frauds committed against a Testator are only evidence to raise strong suspicion against any act done under the superintendence or by the interference of those committing them.

There are acts done by Godrich with reference to the Testatrix, which every Court of Justice would view with suspicion, and some are deserving of the severest disapprobation. No sooner had the deceased began to reside under Godrich's roof than these acts commence. The transfer of the house in November 1835, in consideration of maintaining the Testatrix for a given period of time, described in the deed as an absolute purchase for £980, with a receipt indorsed thereon for the purchase-money, and attested by Mr. Chambers, who (if the transaction were of the nature described by Mr. Godrich) was, as he swears, in utter ignorance thereof, and was, therefore, made a witness to a nominal and fictitious payment of the purchase-money: Mr. Chambers swears that he believed the price to be a fair one, and to be paid, when, in fact, the payment of the price, if he speaks truly, was a mere delusion practised upon him by Godrich. Godrich, in opposition to his own witness, Chambers, swears that the consideration was inserted under his (Chambers') advice: but when Godrich answered the first allegation, he gave no such explanation.

The next transaction is the agreement of the 5th of September 1838, twenty days before the death of the deceased, when, in consideration of the transfer of [41] £1200 11s. Consols, Godrich covenants to maintain the deceased till her death, and furnish medical attendance. Upon such an agreement, at such a time, and under such circumstances it is hardly necessary to observe that it was a mere specious cover to obtain possession of the property.

Of the same date is the power of attorney to transfer this stock, and the power to transfer the £448 Long Annuities, and the donation of the £800 Exchequer Bills, immediately follows.

These are all acts by which Godrich was directly benefitted, and by which, before the death of the deceased, he obtained the control over nearly all her property.

Even the acts done in the management of the other property have all a similar tendency; the benefit of Godrich. The policy of insurance on the life of Player, is in his name.

The effect of all these acts we will consider hereafter.

We do not conceive it necessary particularly to notice other circumstances set forth in this case, to prove that Godrich had acquired and exercised undue influence over the deceased: care and attention to her wants and wishes, even to her whims and fancies; flattery and obsequiousness, however degrading, will not constitute such an undue influence as can affect the acts of a capable Testatrix.

Before we leave this branch of the case, it is right to notice the evidence as to the recognition of this Will. Mr. Howard deposes that, as near as he can recollect, about a twelvemonth after the deceased had quitted Rose Cottage, he was in the room with the deceased when young Alfred Godrich was present, and after some observation about his making a noise, she [42] said, "What a fine boy he is: I have adopted him in my Will: I have left him £2000." She also went on to say she had left his father sole Executor.

Assuming that this evidence is fully to be relied on, it is of great importance, for

the Testatrix, in this conversation, shows memory and capacity, and identifies and recognises the instrument in question.

The evidence of Miss Terry, to nearly the same effect, also deserves attention. Deposing on the same article, Miss Terry says that the deceased, about a twelve-month before her death, speaking of Mr. Godrich, who had been much tired with attending a patient at night, said, "that it was a pity he tired himself in that way, when he knew it was not necessary, for she had provided for him, saying—'I have left Alfred £2000, and his father the residue or the greater part of my property.'"—a declaration strongly confirmatory of this instrument being the real Will of the deceased.

We must now turn our attention to the first Codicil executed by the Testatrix: that Codicil bears date the 13th of December 1836: it revokes the legacy of £500, given to Toby, jun., and bequeaths it to Charles Jones, of Welchpool.

With respect to the contents of this Codicil, there does not appear to be any improbability of this according with the mind of the Testatrix, for it was not unlikely that her regard for Toby, already greatly diminished by her quarrel with him, should, in consequence of the estrangement, have been wholly extinguished; nor is the transfer of the legacy to Mr. Charles Jones improbable. Further, Godrich had no interest under this Codicil, and it is free from all suspicion on that account.

It is true that the evidence in support of it, is but [43] scanty; but if the Will can stand, their Lordships think that this Codicil must also be entitled to probate.

The last testamentary act is the Codicil of September 1838: it reduces the legacy of £500 given to Charles Jones by the first Codicil, to £300, stating that the Testatrix had given him £200 some short time before. It is admitted that the gift had taken place, and it appears that the deceased had made some directions as to her intention to make some such Codicil. The probability is, therefore, in favour of it; but this will not be sufficient, unless we are satisfied that the Codicil was the act of a capable and willing Testatrix.

Mr. Lane is the drawer of this Codicil; he, without communication with the deceased, receives instructions for it from Godrich, who would be benefitted by it; and still without communication, prepares a fair copy for execution, and takes it to the deceased on the 5th of September. Lane says, being alone with the Testatrix, he read it over to her; he has no recollection of any remark she may have made after the reading over, but before the reading over she had been anxious to impress on his mind, that she had let Jones have the £200 through Godrich's interference.

Mr. Flook, who was a stranger to the deceased, gives a somewhat different account of the transaction. He says that the substance of the Codicil was stated to her, and that she acquiesced; he adds also that Godrich was present; and, at some part of the transaction, Cooper. Such differences are not of great importance in ordinary cases, but in this they require attention, for we must determine whether, all the circumstances considered, the evidence will be sufficient.

Cooper, whom Lane says knows nothing of this Codicil, was present; she never heard of it till the [44] execution, on the 5th of September. In fact, there is no evidence whatever to any of the transactions of this day, excepting that of Lane and Flook. This renders it the more necessary to examine completely into all the circumstances, and particularly to consider, whether we can give full credence to their testimony.

We must now revert to the contemporary acts of that day (September 5th), to the agreement for the transfer of the £1200 Consols, and the power of attorney to transfer the same, and to the power of attorney to transfer the £448 Long Annuities. All these were acts in which Lane was concerned,—instruments which he prepared and caused the Testatrix to execute, and by which her interest was sacrificed and Godrich's promoted. If it be true, as stated by Godrich's answer, that the power of attorney, as to the £448 Long Annuities, was to save probate and legacy duty, it must have been done in contemplation of the speedy decease of the Testatrix; then what becomes of the agreement to transfer the Consols for maintenance; twelve hundred pounds, as it turns out, for twenty days? or can it be averred by Lane, that this agreement too was a scheme to save probate and legacy duty? Even this retreat is closed, for Lane has represented this agreement as a real *bona fide* agreement, for the purposes mentioned in it.

When we see the solicitor who declares himself employed on behalf of the deceased, inducing her to do acts of this description, our first doubt is, whether the deceased understood what she did: whether she was not a mere instrument in the hands of those about her, and if so as to these acts, whether it was not the same as to this Codicil.

The conduct of both the witnesses in giving their [45] account of the proceedings of this day has tended greatly to shake our confidence in their statements.

Lane examined in chief says:—"There was then some other business transacted, but I am the solicitor of Mr. Godrich, I am not at liberty to mention it. After it was over, Mr. Flook and myself came away."

On the 12th Interrogatory he says:—"I was with the deceased only about ten minutes on that occasion. I did transact some other business with her at that time. It was after, and not before, the execution of the Codicil."

Lane proceeds to state that, after the examination had proceeded so far, he consulted a civilian as to what he should answer and what not, and what documents he should produce or refuse. He declines to produce the instructions for, or the draft of, the agreement of the 5th of September; but on the 13th and 14th Interrogatory he sets forth some of the facts relating to that agreement, and the power of attorney connected with it.

In answer to the 18th Interrogatory, Lane deposes, that his last "transaction of business with the deceased was on the 5th of September, when the second Codicil and power of attorney were executed, but which of the two preceded the other I forget: they were done before each other, and one a little before the other. If the Codicil was the last, then the persons present were Mr. Godrich, Mr. Flook, Sarah Cooper, and me. If that was the first, Mr. Flook may have gone out of the room, leaving only Mr. Godrich and me. I can't say how this was—I quite forget." On the subsequent examination he says: "There is another attendance on Mr. Godrich; it relates to Mrs. Loyd, but not to her Will or Codicil." This entry he will not show.

This evidence gives rise to several observations:—[46] 1st. That Mr. Lane kept back the other transactions of September 5th, except the Codicil; but he does disclose the fact of there being other transactions. His plea for silence is professional confidence. That such a plea could, under the circumstances, be sustained, we do not admit; it might justify silence, but not misrepresentation. How does Mr. Lane deal with this? Upon examination he has disclosed the agreement and power of attorney to sell the Consols, but he represents this as the last transaction; clearly negating all others, especially the power of attorney for the transfer of the £448 Long Annuities: describing Flook as probably not present, who must have been an attesting witness to the last power, and who, as he must recollect, was a witness to the first power. How could he doubt?

The plain truth is, that Lane felt that these were transactions which could not bear the light, and he was not only silent as to them, but represented the case as if no such facts had occurred.

How does Flook represent these occurrences? He says, "We signed on a small table which stood beside the deceased. I then immediately left the room, and went into the parlour for about five or ten minutes more. I left Mr. Lane and Mr. Godrich in her room." Again—"I did not see Mr. Godrich again, but Mr. Lane came down alone, and we went away from the house together."—"I was with the deceased only five minutes." Further on—"I am aware I was with her but a short time, but I believed her to know what she was about, and I witnessed her act accordingly" (not acts).

On the 4th Interrogatory he repeats this, and again on the 28th. In the whole of the former part of his evidence he has excluded the notion of any other act being done.

[47] Here again then, there is not only silence as to what did occur, for he attested the powers of attorney, but a representation inconsistent with the truth. It would really be no unfair conclusion that these witnesses had so deposed by preconcert; but be that as it may, we do not think this evidence can be safely relied on, nor forget that in five minutes Flook could be no very adequate judge of capacity, and that of a stranger.

We have now discussed the most material facts of this case; and with respect to the Will, we are of opinion, that the testamentary capacity of the deceased at the time of making it is established, and that no delusion existed which could affect its validity; and we think, though many of the acts done by Godrich with respect to the property deserve severe reprobation, yet that none of them are so connected with the Will, as to justify us in deciding that its execution was procured by means which the law holds to be fraudulent. We, therefore, affirm the Decree of the Court below pronouncing for the Will, and the same reasons induce us to hold the first Codicil valid.

With regard to the second Codicil, the Judge below decided in its favour, when he was in ignorance of the execution of the power for the transfer of the Long Annuities, a fact which first appeared in this Court (*a*). [48] Considering that this Codicil was executed when the deceased was at the verge of the conclusion of a life unusually protracted; that the evidence to capacity is weak, and comes from witnesses whose credit cannot be wholly relied upon; that this instrument is contemporaneous with acts the most reprehensible, and completely and perfectly concealed so long as concealment was possible; we are of opinion that the whole *res gesta* of that day, September 5th, are so tainted, that this Codicil cannot stand: we, therefore, reverse the Decree pronouncing for it.

As to costs, we think that this case pre-eminently called for investigation; it was not till a Bill in Chancery had been filed, and the case had come up here, that all the facts were known; so that the inquiry as to the second Codicil, with all its proper circumstances, could only be conducted in the Appellate Court. Mr. Pryce Jones, in carrying on this suit, had to defend the interests of all interested under the Will of 1834, especially that of Mrs. Jones of Merthyr, so unaccountably taken away. We think this litigation was fully justified, and are of opinion that all the costs of the Appellant in this Court, and in the Court below, should be paid out of the estate.

[Mews' Dig. tit. EVIDENCE, VI. EXAMINATION OF WITNESSES, *s. Privilege*, a. ii.; tit. WILL, I. TESTAMENTARY CAPACITY, *g. Soundness of Mind*. On point (i.) as to testamentary capacity (5 Moo. P.C. 20), see *Banks v. Goodfellow*, 1870, L.R. 5 Q.B. 549; and note to *Harwood v. Baker*, 1840, 3 Moo. P.C. 282; (ii.) as to effect on *onus probandi* of fact of testatrix residing with beneficiary (5 Moo. P.C. 20), see *Cockcraft v. Rawles*, 1845, 4 N. of C. 237 (on subject of undue influence generally, see note to *Barry v. Butlin*, 1838, 2 Moo. P.C. 492); (iii.) as to attorney's privilege (5 Moo. P.C. 46), cf. *Bursill v. Tanner*, 1885, 16 Q.B.D. 1; *Ramsbotham v. Senior*, 1869, L.R. 8 Eq. 575; *Burton v. Darnley, Ltd.*, L.R. 8, Eq. 576 *n*; *Ex parte Campbell*, 1870, L.R. 5 Ch. 703; *Heath v. Crealock*, 1873, L.R. 15 Eq. 257; (iv.) *noviter ad notitiam perventa* (5 Moo. P.C. 47), commented on in *Anon.* 1855, 9 Moo. P.C. 434; and see *The Newport*, 1857, 11 Moo. P.C. 155; *The Laura*, 1865, 3 Moo. P.C. (N.S.) 181; (iv.) as to costs out of estate (5 Moo. P.C. 48), see *Boughton v. Knight*, 1873, 3 P. and D. 77-80.]

(a) The fact of this transaction having come to the knowledge of the official assignee of the Appellant, assigned to prosecute the appeal, subsequent to the Decree of the Prerogative Court, he prayed leave to bring in an allegation pleading facts and circumstances relating thereto, affirming by affidavit that the facts pleaded were, *Noviter ad notitiam perventa*, and essential to the issue of the cause. The Judicial Committee* (8th February 1844), after hearing advocates on both sides, gave leave to bring in the allegation on the party (Appellant) giving security for costs in the sum of £100. The Respondent put in an answer admitting the facts stated relative to the exercise of the power of attorney for the sale of the Long Annuities, on a day subsequent to the 5th of September 1838, but traversing the other facts alleged. No evidence was produced on either side.

For the admission of new matter in a Court of Appeal, see Oughton, tit. 318, pl. 1; *Price v. Clark*, 3 Hagg. 265; *Fletcher v. Le Breton*, 3 Hagg. 365.

* Present: Lord Brougham, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

[49]

ON PETITION FROM GUERNSEY.*

In re THE BAILIFF AND JURATS OF THE ROYAL COURT OF GUERNSEY
[Dec. 10, 11, 16, 18, and 20, 1844].

The advice of the Bailiff and Jurats of the Royal Court in the Island of Guernsey, is not necessary, for the purpose of authorizing the Governor, or Lieutenant-Governor, to exercise the power of deportation of aliens domiciled in the Island.

The Bailiff and Jurats are individually entitled to take part, and speak, in all conferences with the Governor, or Lieutenant-Governor, of the Island; but the Governor, or Lieutenant-Governor, has the sole authority to appoint the time and place for such conference.

A writ of pardon, under Her Majesty's sign manual, addressed to the Lieutenant-Governor, and the keeper of the gaol, to discharge out of custody a person undergoing imprisonment, does not require to be verified and registered by the Royal Court, before it is executed.

The refusal of the gaoler to discharge a prisoner, on the production of a writ of pardon under the sign manual, will not warrant the Lieutenant-Governor in enforcing obedience to the writ, by the threat of military or other force.

This case arose out of two Petitions presented by the Bailiff and Jurats of the Royal Court of Guernsey, complaining of certain acts of the Lieutenant-Governor of the Island (Major-General William Napier), as being inconsistent with the rights and privileges of the Royal Court, and contrary to, and incompatible with, the constitution of the Island; and praying that Her Majesty would be pleased to make such declaration, or order, as might prevent their recurrence, and secure the future observance of the rights and privileges of the Royal Court, and the maintenance of the usages and constitution of the Island. The substance of the first Petition, which was presented on the 20th of November 1843, was as follows:—

[50] That two several matters of difference between his Excellency the Lieutenant-Governor and Commander-in-Chief of Guernsey, and the Petitioners, had arisen out of the expulsion from the Island, by his Excellency, of a man named Isidore Le Comte, a subject of his Majesty the King of the French. That these matters were: first, as to the right of the Petitioners, the Jurats, to speak in the conference held between the Lieutenant-Governor, Bailiff, and Jurats, according to the constitution of the Island; and, secondly, as to the authority of the Lieutenant-Governor in expelling aliens from the Island irrespectively of the jurisdiction of the Royal Court. That Le Comte was domiciled in Guernsey, and, as the Petitioners believed, was neither suspected of any offence against the State, nor had in any way brought himself under the designation of "a dangerous person," in analogy with the Acts of Parliament passed for the regulation of aliens. That the constable of the town parish, Albert Carey, Esq., by whose instrumentality the Lieutenant-Governor had acted, having inserted a letter in the papers, which seemed to intimate that he had acted upon his own authority in expelling Le Comte, the case was thereby brought directly under the notice of the Royal Court: and the constable, being an officer more particularly under their control, he was called on by them to account for having, as it appeared, imprisoned that individual, and sent him away, without either producing him before them, or even making to them a report of what had been done; when the constable justified himself as having acted under the order of the Lieutenant-Governor, submitting to the Court that he was responsible to his Excellency alone, and that, without his permission, he was bound to withhold from them [51] any further information. That the charge against Le Comte, by the constable, at the Guernsey gaol, in which the imprisonment took place, was not entered till about a month after the imprisonment, the constable having declined

* Present: The Lord President [Lord Wharncliffe], the Lord Chancellor [Lord Lyndhurst], Sir James Graham, Bart., Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Assessor.—The Solicitor-General (Sir F. Thesiger).

to state how the gaoler was to make the entry, both when he imprisoned, and when he released Le Comte. That the charge, then dictated by the constable to the gaoler, was "annoying the constable in the execution of his duty." That the Court felt it incumbent on them, to endeavour to satisfy themselves with regard to the exercise of such authority, by the Lieutenant-Governor, in expelling Le Comte without trial; and, as the most respectful course towards the Lieutenant-Governor, resolved to seek a conference with his Excellency, at which they might enter together into explanation on the subject, and come to a right understanding for the future; a course sanctioned by law and ancient usage, which had been at various times resorted to with most beneficial results. That the Lieutenant Governor was pleased to accede to the Court's request, and fixed the time and place for holding such conference, viz., Monday, the 9th October, at his residence, Havilland Hall. That conformably to that appointment, the Court waited on his Excellency, being prepared to enter on a conference in the manner which had always been usual on similar occasions. But the Lieutenant-Governor, to their surprise, treated the interview as an affair of ceremony and state. That on the Bailiff adverting to the subject of the interview, the Lieutenant-Governor interrupted him by saying, that he had acceded to granting a conference in the case of Le Comte, sent out of the Island by his authority, but that, before [52] proceeding, he would state in what manner only he was willing to hold such conference:—that, as Her Majesty's representative, the highest authority in the Island, he would communicate with the Court through the Bailiff alone, as the organ of that body, and would not allow the Jurats individually to take part in it. He therefore desired the Bailiff to say if he was then fully prepared to deliver the sentiments of the Court. That the Bailiff, on his replying that he could not, in this manner, express with certainty the sentiments of the Jurats, who, in fact, had not, as yet, the means of coming to any decision, was told by his Excellency that they had better return to their Court-house, and after they had considered the matter, and were better prepared, another interview might take place. That it was then proposed by the Bailiff, that the Court, with his Excellency's permission, should retire for a few minutes, into another room to consult in private; that having thereupon withdrawn, they unanimously agreed they could not accede to the Lieutenant-Governor's terms, which they considered unconstitutional, and contrary to the spirit and intent, as well as to the letter, of the law. That the Bailiff, in communicating their resolution to his Excellency, observed that, in accordance with the Orders in Council in force on the subject, the object of a conference was, by friendly communication, to bring about a right understanding, and that, in requiring that the Bailiff alone should be at liberty to speak, they must consider his Excellency to refuse the conference. That the Lieutenant-Governor, repeating he would enter into no conference except as he had stated, declared the interview at an end, and the Court with-[53]-drew. That by an Order in Council of the 6th March, 1568, it is directed "That all controversies and mislikings, that shall at any time hereafter chance between the Captain, Bailiff, and Jurats, shall be forthwith advisedly considered, at some time and place to be appointed by the Captain, where, by mutual conference, they shall quietly appease and reform all controversies and mislikings; so as, each of them being aiding and assisting to the others, they may not only avoid the inconveniences and dangers that were like to follow of the contrary, but be also the better able to attend their charge, and to see to the good observation of such good constitutions as shall be by them established, as well as for the good government and defence of the Isle, as for the continuing of the inhabitants of the same in good order and obedience; and in case any such disorder should fortune to fall out as may not be compounded and redressed amongst themselves there, within the space of forty days, that it shall then be lawful for any that will do the same, to repair over hither for reformation thereof, by means of the Lords and others of the Privy Council here, without any let or restraint." That, according to the practice which had been since followed, whenever an interview was appointed between the Lieutenant-Governor and the Bailiff and Jurats, the party proposing the meeting attended at the place named by the other party; a proof, as decisive as could be adduced, of the terms of equality upon which the meetings of the parties were at all times to take place. That the oath of the Lieutenant-Governor, which is administered to his Excellency by the Bailiff and Jurats, on his

admission into office, was as follows:—"That you will keep and preserve the castles and [54] fortresses, at present here committed to your custody and keeping, to the use and service of our said Lady the Queen, or her heirs, the Kings or Queens of Great Britain; and keep and maintain, in like manner, the commons and inhabitants of this Isle in their true allegiance and fidelity to Her said Majesty; that you will also preserve and support the said inhabitants of this Island in their rights, liberties, privileges, and ancient customs, and will likewise maintain the ordinances of the Court; and if, peradventure, you should act or do contrary to the said privileges, ancient customs, and ordinances, that you will, at all times, upon conference with the Bailiff and Jurats, being duly informed by them, reform and redress as may be found meet and reasonable." That by the usage which has hitherto invariably prevailed, in conferences between the Lieutenant-Governor, Bailiff and Jurats, the Jurats have always been admitted to speak and to take part individually. That the Petitioners, considering their right of speaking at all such conferences of the utmost moment, in a constitutional point of view, could not allow such a doubt to be brought upon it, without at once taking measures to keep and retain it, in all its integrity, and so to transmit it to their successors. That with respect to the other point, as to the authority of the Lieutenant-Governor, over aliens, and the relative jurisdiction of his Excellency and of the Royal Court, the Petitioners proceeded to show, as well the law of the Island, as the practice theretofore observed. That, in ancient times, a rent was exacted from strangers, born out of His Majesty's dominions, dwelling in the Island, particularly in reference to marriages between inhabitants and strangers; and this rent was counted as part of [55] the Crown revenues; and was set forth and defined accordingly, in the extent of the rents, services and homages due to His Majesty King James the First, as Duke of Normandy, in the Island of Guernsey, drawn up by Sir Robert Gardiner, Knight, and James Hussey, Doctor of Laws, and one of the Masters in Chancery, who acted under a Royal Commission, dated 25th July 1607, and confirmed by an Order in Council of the 30th June 1608, made upon the answers of the aforesaid Royal Commissioners. That, supposing the Lieutenant-Governor, under any interpretation of the law ancient or modern, was at liberty, at this day, to withhold his permission to an alien taking up his abode in the Island, or to expel from it, at any moment, an alien, being a dangerous person, the Petitioners humbly submitted to Her Majesty whether, as well according to the constitution under which they live, as by analogy with the regulations of the Acts of Parliament successively passed in respect of aliens, the extraordinary power of his Excellency did or should extend to interrupt the common course of justice, in the case of an alien who, by permission of the Lieutenant-Governor, expressed or implied, had become domiciled in the Island, and was not a dangerous person; taking the individual out of that protection of the Royal Court, and depriving him of that trial, which is the right of every inhabitant. That the jurisdiction of the Bailiff and Jurats extends over all causes, both criminal and civil, arising in the Island, except in the cases of treason, of counterfeiting money, and of offering personal violence to the Bailiff and Jurats, or any of them, whilst they are in the exercise of their offices; the punishment whereof is reserved to the Sovereign. That from early times, definitions of the powers of the Lieutenant-Governor, [56] with reference also to those of the Court, have been given by the authority of the Privy Council: in the Regulations by Royal Commissioners in 1554; by the Order in Council of 1568; by the answers of the Lords of the Council to the propositions or requests exhibited to their Lordships by the Deputies of the Isle of Guernsey on behalf of the inhabitants, given on the 11th of June 1605, and the 25th of July 1607, already referred to; and the Order in Council of 30th of June 1608, also before referred to, which the Petitioners in part set forth—that these authorities alone, the Petitioners submitted, showed that it was only upon extraordinary occasions, as of war or hostility, or for the suppressing or surprising of robbers or pirates, or for the avoiding of some imminent danger otherwise like to ensue unto the Island; or upon matter of higher nature than a private offence, and concerning the State, that the Lieutenant-Governor was to exercise his martial jurisdiction, or to interrupt the common course of justice. That numerous ordinances had been from time to time made by the Royal Court of the Island, for the disposal and regulation of aliens and strangers, and generally upon

some crisis of war, or scarcity, or other exigency of the moment; such ordinances having frequently been made by the Court, on the immediate application and representation of the Lieutenant-Governor himself, as appears on the face of them. That the Petitioners, far from seeking to limit the rightful authority, prerogative, and power of the Lieutenant-Governor, were desirous that the largest and most liberal interpretation should be given to the same, and they were ready and anxious to maintain his Excellency therein, to the utmost of their ability. That, by the Acts of Parliament successively passed [57] for the regulation of aliens, more and more facility and encouragement had been from time to time given to such aliens taking up and continuing their abode in England. That the Petitioners conceived they were bound, by their oath of office, (believing the Lieutenant-Governor to have taken an erroneous view of his authority,) to inform him thereof accordingly. In soliciting an interview with his Excellency, they felt they were following the spirit and intent of the Order in Council in that behalf; and had they succeeded in obtaining the usual conference, they might have been spared the necessity of that their humble representation to Her Majesty. And they prayed that Her Majesty would be graciously pleased, by Her order to be made in that matter, to declare that, in the conferences to be thereafter held by his Excellency the Lieutenant-Governor, and the Bailiff and Jurats of the Royal Court of Guernsey, all and each of the said parties should use and enjoy the privilege and advantage of taking part and speaking in such conferences, as they had hitherto used and enjoyed the same. And that Her Majesty would also be graciously pleased, by Her order, to declare that in case any alien domiciled in Guernsey, not being "a dangerous person," should be charged with any ordinary matter, such as was not of higher nature than a private offence, and as did not concern the State, such alien should be dealt with according to the common course of law in the Island, and should not be liable to be expelled therefrom without trial.

The second Petition, which respected the conduct of the Lieutenant-Governor in executing Her Majesty's writ of pardon to one Thomas Fossey, and the necessity of the due verification and registry thereof, previous to execution, was presented by the Bailiff and Jurats of the [58] Island on the 30th March 1844. It set forth that his Excellency, upon receiving Her Majesty's most gracious warrant of pardon in favour of Thomas Fossey, a prisoner in the public gaol of the Island, (the said warrant being addressed to "His Excellency the Lieutenant-Governor, the keeper of the gaol, and all whom it may concern,") did, in the execution thereof, commit, on the 15th of February last, further acts, which were not only violations of the constitution of the Island, but, inasmuch as he actually sent for soldiers to force the gaol, went to the length of substituting military force in lieu of the arm of the law: that, far from acknowledging the irregularity of his proceedings, his Excellency, on the 7th of March, instructed Her Majesty's law-officers to prosecute Stephen Barbet, the porter and turnkey of the gaol, for alleged disrespect and disobedience to Her Majesty's said warrant of pardon, in having hesitated to liberate the said convict on the application of his Excellency and the exhibition of the warrant;—whereupon the Petitioners, having heard evidence and arrived at a full knowledge of the case, unanimously dismissed the complaint against the said turnkey. That the law and constitution of the Channel Islands requires that all charters, orders, writs, warrants, patents, and commissions, touching the judicial and civil Government, which emanate from the Crown and issue in the Island, be verified and registered by the Royal Court previously to being acted upon. The law as regards writs of pardons being contained at the 468th page of the Commentary of Terrien on the Customs of Normandy, and reading thus:—"Comme à notre Sire le Roi appartient donner pardons, remissions, et rappaeur de baon, aussi à ses Juges en appartient la vérification et entérinement." [59] That the chapter containing this passage was expressly declared to be the law of the Island by the "*Approbation des Loix*," confirmed by an Order in Council of the 27th October 1583, duly registered on the records of the Court, and was therefore statute law in Guernsey; consequently, previous to execution, even writs of pardon required to be verified and registered. That Her Majesty's Royal authority had been divided between two high Ministerial officers appointed by patent from the Crown, and alike representing Her Majesty each in his own department: namely, the Lieutenant-Governor, who is also Commander-

in-Chief, and the Bailiff or Président of the Court and States, their several authorities and powers being perfectly distinct and separate; at the same time they are expressly enjoined by law to afford each other all due countenance and support in the government of the island. That to the Lieutenant-Governor alone is confided the political and military executive, as explained in his oath of office. That he is the guardian and keeper of the Island, and as such is charged to defend it from foreign aggressions, and every subject of annoyance coming from without; and within, he is to maintain the inhabitants in their allegiance to Her Majesty. That in his own department he stands alone; and his power, within the limits of his own proper functions, is paramount and absolute. That the Bailiff, as the civil representative of the Crown, is entrusted with the management of all the judicial and administrative functions of government. That to him is committed the immediate direction and control of the whole body politic; and, in his capacity of Her Majesty's chief minister of Justice in the Island, he is placed at the head of the civil and ju-[60]-dicial executive: but he is provided with a Council, in the twelve Jurats of the Royal Court, without whom he can neither act nor decide in any matter of law; and the right of electing the Jurats, as well as the Sheriff and Constables, the judicial and civil executive officers of the Island, is a privilege that belongs to the inhabitants, who are thus made to provide the whole of the power by which, when necessary, they are coerced.

The Petition then proceeded to set forth the nature and origin of the authority executed by the Bailiff and Jurats, as declared by the Charter of King John, the Inquest of Edward the Third, and the Order in Council of June 1670; and proceeded to state that on the investigation of the complaint before alluded to, brought by the Lieutenant-Governor against the turnkey of the public gaol, it came to the certain knowledge of the Petitioners, by the evidence then adduced, that Major-General Napier did not only execute, contrary to law, a warrant of pardon, without the previous verification and registry thereof, but that he did, moreover, actually issue orders for the soldiery to come and force the gaol, and that under the influence of such order, the prisoner was released, the civil power being thus, by the act of his Excellency, supplanted by military force. And the Petitioners prayed that Her Majesty would be graciously pleased to instruct and direct his Excellency to regulate his future acts in the government of the Island, conformably to the laws, customs, and chartered rights of the inhabitants. And that Her Majesty would also be graciously pleased to declare, in accordance with the Order in Council of the 30th of June 1608, that it was not fit or convenient that the Lieutenant-Governor should exercise any martial jurisdiction contrary to the usual course of justice, except it be in time of war or hostility, or for the suppressing or avoiding of some imminent danger otherwise like to ensue unto the Island; and to declare Her Majesty's gracious purpose not in any way to suffer the common course of justice to be superseded by military force.

These Petitions were referred by Her Majesty to a Committee of Her most Honourable Privy Council, who directed a case to be prepared stating the facts, the grounds on which the Royal Court objected to the proceedings of the Lieutenant-Governor, and the laws, usages, and customs of the Island, which were invaded or affected by those proceedings.

The case, as prepared by the Petitioners, set forth the laws and constitution of the Channel Islands, as found in the *Coutume de Normandie*, the Constitutions of King John, the "*Approbation des Lois*," and other authorities to be found in the histories of Guernsey by Berry, Duncan, and Falle, and the treatises of Warburton and Le Merchant, together with abstracts from the Orders in Council respecting the affairs of Guernsey and Jersey, and extracts from the Acts of the Royal Court of Guernsey: they produced also, extracts from the Patent Rolls, Close Rolls, and French Rolls, and Council papers, relating to Guernsey and Jersey, from the reign of King John to that of his late Majesty King George the Third.

The Lieutenant-Governor also put in a statement in answer to the above Petition, accompanied by extracts from the works above cited, and the Ordinances of the Royal Court.

The Petitioners insisted and submitted, that by the law and practice of the Island of Guernsey—

[62] I. Residents having acquired a domicile in Guernsey were not subject to be deported, but in such manner as the Captain, with the advice of the Bailiff and Jurats, should order and appoint.

II. That the Bailiff and Jurats of the Royal Court were individually entitled to take part, and speak, in all conferences with the Lieutenant-Governor.

III. That the above writ of pardon ought to have been verified, and registered by the Royal Court, before it was executed; and

IV. That the Lieutenant-Governor was not warranted, in enforcing obedience to the said writ, by a threat of military force.

Mr. Burge, Q.C., Mr. S. Wortley, Q.C., and Mr. De Sausmarez, for the Petitioners; and Mr. Roebuck, Q.C., and Mr. Waddington, for the Lieutenant-Governor.

The following cases and authorities were referred to [for the arguments see 6 St. Tr. (N.S.) 170; and Gurney's Shorthand Notes]:—

Tupper v. The Treasurer of the Hospital of St. Peter Port (3 Knapp's P.C. Cases, 406). *Donegani v. Donegani* (Ib. 63). *In re Adam* (1 Moore's P.C. Cases, 460). *The Mayor of Lyons v. The East India Company* (Ib. 175). *Cameron v. Kyte* (3 Knapp's P.C. Cases, 332). *The King v. Beaton* (1 W. Black. 479). *Calvin's Case* (7 Coke Rep. 1). *Blankard v. Galdy* (Salk. 411). *Christian v. Corren* (2 P. Will. 74). *Campbell v. Hall* (20 How. State Trials, 239). Comyn's Dig. tit. Grant. G. 7. 2 Rolles Abr. 195 E. Bacon's Abr. tit. Pardon. Chalmers' Opinions, 108. 4 Inst. 286. Sir W. Hale's [63] History of the Common Law, vol. 2, p. 40. Selden's Mare Clausum, Ch. xix. 333, 341, Eng. Ed. 1652. Rymer's Foedera, vi. 178. Stoke's History of the Colonies, 150. Jersey Code, 1771. Placita De Quo Warranto Parlamento, Temp. Ed. II., as to Guernsey and Jersey, 822. Parliamentary Roll, vol. i., A.D. 1278. Falle's Hist. of Jersey. Duncan's Hist. of Guernsey. Berry's Hist of Jersey. Le Marchant, Remarques et Animadversions sur l'approbation des lois et coutumier de Normandie. Warburton's History of the Laws and Customs of the Island of Guernsey. Terrien's Com. on the Coutume de Normandie, Ch. 7, Bk. 12, p. 468. Merlin's Repertoire, voce, Enteriement. 1 Denisart, 681. Ferriere Dic. de Droit, tit. Lettres de Grace. Constitution of King John. Falle's Jersey, 329. Charter of 11th Feb., 20 of Car. II. Les Approbation des Lois, 1583. Precepte d'assize, 5 Ed. III. Warb. App. 115. Regulations made by the Royal Commissioners in 1554 and 1816, and Report of Commissioners, 1607. Ordonances of the Royal Court, 7th April 1611, and 26th January 1684.

No Judgment was delivered in the case, but the Report of their Lordships, bearing date the 20th of December 1844, which was confirmed by Her Majesty, was as follows:—

"The Lords of the Committee, in obedience to your Majesty's said orders of reference, did, on the 10th, 11th, 16th, 18th, and this day, take the said Petitions into consideration, and heard Counsel as well in support thereof as in objection thereto; and understanding that it is your Majesty's pleasure that their Lordships should merely advise your Majesty upon certain questions arising out of the said Petitions, as regards the law and usages of Guernsey, their Lordships agree humbly to report their opinion to your Majesty upon the following questions, submitted in the cases of the Petitioners in this matter. In respect of the first question—'Residents having acquired such domicile in Guernsey as thereinbefore stated, are not subject to be deported, but in such manner as the Captain, with the advice of the Bailiff and Jurats, shall order and appoint in this respect.'—their Lordships are of opinion that the advice of the Bailiff and Jurats is not necessary for the purpose of authorizing the Captain to exercise the power mentioned in said question. That under the term Captain, their Lordships consider that the Governor, and in his absence, or in case there should be no Governor, the Lieutenant-Governor, or the person exercising the powers of Governor or Lieutenant-Governor for the time being, are included. In respect of the second question—'That the Bailiff and Jurats of the Royal Court are individually entitled to take part, and speak, in all conferences with his Excellency the Lieutenant-Governor,'—their Lordships are of opinion that the Lieutenant-Governor has the sole authority of appointing the time and place for such conference, and that the Bailiff and Jurats of the Royal Court are individually entitled to take part, and speak, in all conferences with his Excellency the Lieutenant-Governor. In respect of the third question—'That the aforesaid writ of

pardon ought to have been verified and registered by the Royal Court before it was executed,'—their Lordships are of opinion that the writ of pardon in the Petitions mentioned did not require to have been verified and registered by the Royal Court before it [65] was executed. In respect of the fourth question,—‘That the Lieutenant-Governor was not warranted in enforcing obedience to the said pardon by a threat of military force,’ their Lordships are of opinion that it was the duty of the Portier immediately to have discharged the prisoner, on the production to him of the pardon under the sign manual; but the Portier, not being a servant of the Lieutenant-Governor, for the purpose of the custody of the prisoner, their Lordships are of opinion that the Lieutenant-Governor was not warranted in enforcing obedience to the writ of pardon, by the threat of military or other force.”

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 13. *Jersey and Guernsey*, b. S.C., with annotation, in 6 St. Tr. (N.S.) 159; and see Printed Cases for petitions, cases, and statements in reply. As to the laws of Jersey and Guernsey, generally, see notes to *In the Matter of the States of Jersey*, 1853, 8 St. Tr. (N.S.) 286; S.C. 9 Moo. P.C. 185; 1862, 15 Moo. P.C. 195; and cf. *In re Belson*, 1850, 7 Moo. P.C. 114; *In re Jersey Jurats*, 1866, L.R. 1 P.C. 94, 4 Moo. P.C. (N.S.) 456; *Lacloche v. Lacloche*, 1870, L.R. 3 P.C. 125, 6 Moo. P.C. (N.S.) 383; L.R. 4 P.C. 325, 9 Moo. P.C. (N.S.) 87. Reports (i.) of 1846 on the Criminal Laws of the Channel Islands; and (ii.) 1859, on the Civil Laws of Jersey. In *In re Daniel*, 1891 (6 St. Tr. N.S. 159), the Privy Council held that in Jersey a warrant of pardon did not need to be registered before being put into execution. As to deportation of aliens, see note to *Donegani v. Donegani*, 1834-35, 3 Knapp 93.]

IN RE ROBINSON'S PATENT * [February 3, 1845].

The user of an invention in England prior to the date of Letters Patent granted for Scotland, will invalidate the Scotch Patent.

The Judicial Committee of the Privy Council, under the 5 and 6 Will. IV., c. 83, sec. 2, refused to confirm a Scotch Patent, the invention being used in England before the date of the Scotch Patent.

This was an application, under the 5th and 6th Will. IV., c. 83, sec. 2, for the confirmation of Letters Patent for Scotland, bearing date the 22nd of March 1833, granted to John Robinson, for an invention called a “Nipping Lever for causing the rotation of wheels, shafts and cylinders under certain circumstances.” The Petitioner was the assignee of the Patentee.

The Petition stated that since the date of the Letters Patent for Scotland, the Petitioner had discovered that [66] some other persons had used the invention unknown to the Petitioner, before the date of the Letters Patent for Scotland, and that he was advised that the prior use of the invention in England would, in the event of law proceedings, be considered a sufficient user for the purpose of invalidating the Letters Patent for Scotland, and inasmuch as it was unknown to the Petitioner that such prior use of the invention in England would in Scotland be considered as any user at all, or any user within the meaning of the condition, in that respect, in the Letters Patent for Scotland contained, and that John Robinson, before he applied for the Letters Patent for Scotland, was informed and believed that the law was universally supposed by Counsel in Westminster Hall, to be that no prior use in England would invalidate a Scotch Patent granted for the invention, subsequent to such prior use in England, but that the Petitioner was advised, that the decision in the case of *Brown v. Annandale* (reported 8 Clk. and Fin. 437; and 1 Webster's Patent Cases, 433: and see *Roebuck v. Stirling*, 5 Brown's Sup. to Morrison's Collection of Decisions in the Court of Session, 522; and 8 Clk. and Fin. 447, note), in the House of Lords, on the 25th of February 1842, and after the granting of the Letters Patent for Scotland, was in fact a decision, against the

* Present: Lord Langdale, Lord Campbell, The Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

validity of all Patents, which had been applied for, and granted for inventions, which had been previously put in practice in England, and therefore against the validity of the Letters Patent for Scotland, which had been assigned to the Petitioner; and he prayed that Her Majesty would confirm the Letters Patent for Scotland, so granted to John Robinson.

[67] Mr. Retch for the Petitioner.—This application is made in consequence of the decision in the House of Lords in *Brown v. Annandale*, which will render this Patent invalid, unless it can be brought within the provisions of the 5th and 6th Wm. IV., c. 83, sec. 2 (*a*).—[Lord Campbell: You put it as if this was an English patent, and that the invention had [68] been practised without the knowledge of the Patentee before the patent was granted. You must show that although it is a Scotch patent, and the invention had been used in England, it comes within the terms of the Act].—The Act was passed to provide for such a case. In the Baron Heurteloup's Patent (1 Webster, Pat. Cases, 553), the invention had been published in a book in France, before the grant of Letters Patent in England, and their Lordships confirmed the Patent.

The Solicitor-General (Sir Frederick Thesiger), for the Crown.

Lord Campbell.—We cannot make laws. We have no power to act, unless under the second section of the Act of Parliament, which was meant to meet a totally different case from the present.

[Mews' Dig. tit. PATENT; C. LETTERS PATENT; 5. *Scotch and Foreign*; F. CONFIRMATION, etc. I. *Confirmation*. See now s. 16 of the Patents Act, 1883 (46 and 47 Vict., c. 57), 5 and 6 Will. IV., c. 83, was repealed by the Patents Act, 1883, but petitions may still be presented for the confirmation of patents granted under the Patent Law Amendment Act, 1852 (15 and 16 Vict. c. 83). See s. 113 of the Act of 1883; *In re Brandon's Patent*, 1884, 1 R.P.C. 154; 9 A.C. 589; and cf. *In re Jablochkoff's Patent* (1891), A.C. 294, 8 R.P.C. 281. Confirmation may also be obtained by special act.]

(*a*) This section enacts, "That if in any suit or action it shall be proved, or specially found by a verdict of a jury, that any person who shall have obtained Letters Patent for any invention, or supposed invention, was not the first inventor thereof, or of some part thereof, by reason of some other person or persons having invented or used the same, or some part thereof, before the date of such Letters Patent, or if such Patentee or his assigns shall discover that some other person had, unknown to such Patentee, invented or used the same or some part thereof, before the date of such Letters Patent, or if such Patentee or his assigns shall discover that some other had, unknown to such Patentee, invented or used the same, or some part thereof, before the date of such Letters Patent, it shall and may be lawful for such Patentee or his assigns to petition His Majesty in Council, to confirm the said Letters Patent, or to grant new Letters Patent, the matter of which Petition shall be heard before the Judicial Committee of the Privy Council; and such Committee, upon examining the said matter, and being satisfied that such Patentee believed himself to be the first and original inventor, and being satisfied that such invention, or part thereof, had not been publicly and generally used before the date of such first Letters Patent, may report to His Majesty their opinion that the prayer of such petition ought to be complied with, whereupon His Majesty may, if he think fit, grant such prayer; and the said Letters Patent shall be available in law or equity, to give to such Petitioner the sole right of using, making and vending such invention as against all persons whatsoever, any law, usage or custom to the contrary notwithstanding: provided that any person opposing such petition shall be entitled to be heard before the said Judicial Committee: provided also that any person, party to any former suit, or action, touching such first Letters Patent, shall be entitled to have notice of such petition before presenting the same."

[69] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF SAINT LUCIA.

ANNET JEAN BEAUCÉ, *Appellant*; WILLIAM MUTER,—*Respondent**
[Dec. 10, 1844; Jan. 17, 1845].

A. obtained a judgment in the Court of the Seneschal in the island of Saint Lucia in 1827, on a mortgage claim against the estate of B. After B.'s death, his heirs sold the estate to C. In 1830 the Judgment against the estate was registered against B., and his succession, but not against C., who was then the owner of the estate. A. afterwards, by an act of session, transferred to D. a part of the mortgage claim. In an action "*Declaration d'Hypothèque*," brought by D., as the transferee of part of the mortgage claim against E., then in possession, it was held by the Judicial Committee of the Privy Council, affirming the Judgment of the Court below:

- 1st. That the mortgage claim constituted, by the law of the Island, a general hypothec, and created a real right upon the estate, and those who derived their title from B.'s heirs were subject to such hypothec [5 Moo. P.C. 79].
- 2nd. That in such circumstances the registration of the Judgment of 1827, against B. and his succession, was a sufficient compliance with the Order in Council of 1829 [5 Moo. P.C. 80].

Domicile must be *de facto*, not *de jure*. Therefore the fact of a party resident in France, but represented by an attorney in the Island, will not create a constructive domicile, so as to entitle a party to set up as a discharge to a mortgage, a plea of prescription of ten years *entre présents* [5 Moo. P.C. 79, 80].

This suit was instituted for the purpose of enforcing against the Appellant, as owner of a plantation or estate called Anse Canot, in the Island of Saint Lucia, payment of part of a sum of money, recovered by other parties against the former owner of the estate, by a Judgment of the Court of Seneschal, bearing date the 8th of May 1827, which was subsequently confirmed by a Decree of the Royal Court of Saint Lucia, on the 15th of November 1838. By the pro-[70]-ceedings in such suit, which was an action styled, under the French law, "*Declaration d'Hypothèque*," the Respondent, the then Plaintiff, called the Appellant, the then Defendant, into Court, as the proprietor of the Anse Canot estate, to recover from him payment of a proportion (to the amount of £906 0s. 2d. for principal, interest, and costs) of a mortgaged claim held by the Demoiselles de Croiseuil, who were resident in Fontainebleau, in France, against that property, and which part or proportion of the mortgage claim had been transferred and assigned over to the Respondent, by an act dated the 28th of July 1837, and registered in Saint Lucia.

The mortgage claim of the Demoiselles de Croiseuil, thus partially assigned to the Respondent, arose by virtue of a Judgment of the Court of Seneschal, at Saint Lucia, rendered in their favour against the heirs of one Auguste Hosten, deceased, on the 8th of May 1827, whereby the heirs of Hosten were condemned to pay the Demoiselles de Croiseuil 78,125 livres.

On the 1st of April 1829, the heirs of Hosten sold the estate of Anse Canot, to Auguste Philippe, who purchased it as well for himself as on account of the Dame Rose Gramir, the wife of Jacques de Ruand. On the 26th and 30th of May 1837, Philippe sold his half of the estate to Jacques de Ruand; and on the 18th of April following, Ruand and his wife sold the estate to the Appellant.

By an Order in Council, of the 15th of January 1829, it was ordered, amongst other things, "that all persons who, at the time of the promulgation of such Order within the Island, should have a claim to have any mortgage, lien, charge, or incumbrance, upon any immoveable property or slaves situate or being in [71] the Island, should, in manner thereafter mentioned, enrol an abstract thereof at the

* Present: Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

office of the Registrar of the Royal Court of the Island, within eighteen calendar months next after the promulgation within the Island, of such Order: and that from and after the expiration of the said term of eighteen months, no mortgage, lien, charge, or incumbrance, which, at the promulgation of such Order in the Island, should be subsisting or in force upon or against any immoveable property or slaves situate or being in the Island, should have force, effect, or any virtue in the law (except as against persons being actually or virtually parties to the same, or the heirs and executors of such persons), until the same should be first registered in manner aforesaid. Provided always, that at any time after the expiration of the said term of eighteen months it should and might be lawful for any person who, at such promulgation as aforesaid of such Order, should have or claim to have any such mortgage, lien, charge, or incumbrance, to register the same: and the same, when so registered, should be valid and effectual in the law, not only against the parties to the same, their heirs and executors, but also against all other persons who, subsequently to such registration, should acquire any title to a mortgage, lien, charge, or incumbrance, upon any such immoveable property or slaves."

In pursuance of this Order, the mortgage of the Demoiselles de Croiseuil was enrolled and recorded in the Island on the 2nd of July 1830 against Hosten and his succession.

On the 7th of December 1841, the Respondent commenced his proceedings against the Appellant, by a petition in the Royal Court of the Island, on which an Order was, on the 15th of November 1841, made for [72] summoning the Appellant; and the petition prayed, that the Respondent might be permitted to cause to be cited, at one of the next ordinary sittings of the Royal Court of the Island, at the expiration of the delays allowed by the Ordinance, the Appellant, then absent from the Colony, but represented therein by Mr. Charles Beaucé, his nephew, to hear and be present at the Order given that the sugar plantation called Anse Canot, as well as the buildings thereon constructed, the cattle, etc., and generally all the appurtenances and dependencies, —(the whole having belonged to Mr. Jean Baptiste Henri Hosten, the Dame Antoinette Azelia Hosten, wife of Mr. Jacques Philippe Verdery, and the Dame Françoise Charlotte Eulalie Caroline Beraud, wife of Jean Baptiste Henri Hosten, and acquired by Jean Annet Beaucé from Mr. and the Dame de Ruand, (on the 8th of February 1838),—should be and remain affected and mortgaged to the payment of the causes or purposes of the Judgment of the 8th of May 1827, confirmed by the Decree of the Royal Court of the Island of the 15th of November 1838: and in consequence, that the Appellant might hear himself condemned to pay to the Respondent in real and effective money—1st, the sum of 22,363 livres 4 sous and 1 denier, being the amount of the portion transferred to the Respondent in the principal condemnations pronounced by the Judgment therein before set forth, of the 8th of May 1827; 2nd, that of 14,622 livres 10 sous and 4 deniers, the amount of the portion of interest due to the said Respondent on the claim in question, to the 4th of April 1838, the said interest being liquidated by a Decree of the 15th of November 1838; 3rd, that of 3354 livres 9 sous 7 deniers, the amount of interest on the aforesaid sum [73] of 22,363 livres 4 sous and 1 denier, computed from the 4th of April 1838, to the 4th of April 1841 (three years); 4th, that of 772 livres 2 sous and 5 deniers, being the amount of the portion transferred (5-12ths) on the expenses of obtaining the Judgment; the whole of these sums being united making the total one of 41,112 livres 6 sous and 5 deniers in money of the Colony, or £822 4s. 11½d. sterling; to the interest on the first sum of 22,363 livres 4 sous and 1 denier, to be computed from the 4th of April 1841, the day to which they had been calculated.

In defence to this action the Appellant pleaded that the Judgment of the 8th of May 1827, was not available against third parties holding the estate, except in cases where the latter had purchased from the heirs of Hosten themselves posterior to the registry of 1830, and also a prescription of ten years.

The Royal Court of the Island of Saint Lucia gave Judgment on the 19th of July 1842, and thereby declared, that the estate Anse Canot, and the buildings erected thereon, cattle, etc., and generally all its appurtenances, should be and remain affected and hypothecated for the payment of the amount of the Judgment of the 8th day of May 1827, homologated by an *arrêt* of the Royal Court of the said Island on the 15th of November 1838, and in consequence condemn the Appellant

to pay to the Respondent in real and effective money the said total sum of 48,112 livres 6 sous 5 deniers, or £822 4s. 11½d. sterling, the amount of the same various sums claimed by the said Respondent against this Appellant as aforesaid, together with interest on the said sum of 22,363 livres 4 sous 1 denier, or £447 5s. 3½d. sterling, from the 4th day of April 1841, up to the date to which it had been commuted, unless the Appellant should prefer to abandon the [74] said Anse Canot estate, and its appurtenances, in order that the whole might be sold as therein mentioned, and the Respondent be paid the amount of his claim from the proceeds of the sale, and the surplus, if any, be paid to whomsoever it might concern; and the Court condemned the Appellant to pay the costs of the then present process.

The reasons given by the Royal Court for this Judgment, were as follows:—

“The mortgage in question was a general hypothec, and struck, therefore, against all properties being anterior to the date of 1st of April 1829.

“This mortgage claim we hold, therefore, to be regularly enregistered against the former proprietors of the Anse Canot estate, who, in selling that property to De Ruand, could not sell it otherwise than subject to this general mortgage, from which Ruand's mere sale to the Defendant could in no manner release it.

“But the Defendant pleads prescription, which, indeed, is tacitly admitting that the claim has not been extinguished by any payment, or settlement of account; and indeed, if such were the case, the proper mode of proceeding would be, for the proprietor of the Anse Canot estate, to call the Dames de Croiseuil, or their representatives, into Court, to have the mortgage claim in question erased (*radie*) from the Registry Action, on Declaration d' Hypothèque.

“Now the Article CXIV. of the ‘Coûtume de Paris,’ which regulates this colony in the matter of prescription, is thus entitled, and runs as follows:—‘*Quand aucun a possédé, et joui par lui et ses prédecesseurs, desquels il a le droit et cause d'héritage ou rente, a juste titre et de bonne foi, pour dix ans entre présens et vingt ans entre absens, âgés et non privilégiés, franchement et paisiblement, sans inquiétation d'aucune rente [75] ou hypothèque; tel possesseur du dit héritage ou rente, a acquis prescription contre toutes rentes ou hypothèques prétendues sur le dit héritage ou rente.*’

“Now the requisites of prescription are, 1st, ‘*juste titre.*’ That is not disputed to the Defendant, in so far. 2ndly, ‘*de bonne foi,*’ ten years’ *entre présens*, and twenty years’ *entre absens âgés et non privilégiés.* Now the Defendant having been for several years Attorney in this Island, for the heirs of Augustine Hosten, must be presumed not to have been ignorant of this claim, and therefore it cannot be held, that in making the purchase of the Anse Canot estate, he was altogether ‘*de bonne foi,*’ if he meant to impugn it.

“But even on the supposition of good faith, it is admitted that the staid Dames de Croiseuil have, for more than ten years previously, resided in France, and at least one of them was, it is admitted on both sides, until very lately, a minor residing in France; whether with or without a mandatory here she is clearly ‘*entre absens:*’ and the age puts the matter beyond a doubt.

“For this reason we hold, that the mortgage claim in question has not prescribed as against the estate.”

From this Judgment the present Appeal was brought.

Mr. Burge, Q.C., and Mr. Simpson, for the Appellant.—The effect of the registration of the 2nd of July 1830 depends upon the Order in Council of the 15th of January 1829, and the Ordinances of the Governor of the Island of Saint Lucia, of the 3rd of July 1829, by which the Order in Council was promulgated and carried into effect (see *Inglis v. De Bernard*, 3 Moore's P.C. Cases, 431, where the Order in Council and the Ordinances are set out). By the Order, it is ordered that the registering of an instrument shall give effect to any lien, mortgage, or charge, thereby established, on all immoveable property of the debtor, present or future, except such lien, etc., be declared in the instrument to attach to some specific property only. The registration, therefore, of the 8th of May 1827 did not affect the Appellant, nor give the Respondent any right to enforce the same against the Anse Canot estate. Even if the registration had been effectual, so as to preserve the charge against the original parties against whom the Judgment was obtained, yet it could only be so upon the ground that those parties continued owners of the estate.

They alienated the property before the registration, and therefore such registration was not effectual for preserving the charge against the Appellant. The Appellant was a purchaser for a valuable consideration not affected with notice of the claim which the Respondent is seeking to enforce. It is true that a purchaser of property subject to a Judgment becomes by the French law a debtor, and is bound to pay the original debt (*Coûtume de Paris*, Art. 101; *Basnage Traite des Hypothèques*, cap. xi., *et seq.*), but the sum so recovered against the former owner of the property is not a charge by the law of the Island until the Judgment is enrolled. Here the enrolment was not made until after the former owners had sold the property to parties under whom the Appellant derives his title: the registration, therefore, was not effectual.—[Mr. Baron Parke.—Is not the Order in Council limited to future judgments?]—No. It has a retrospective effect. Assuming that creditors can follow [77] real property in the hands of third parties, which we submit cannot be done (2 *Persil Regime Hypothecaire*, cap. vi. pt. ii., tit. 176-7-9 *et seq.*), yet another defect exists in the registration; it does not contain the name of the then debtor, Philippe.

Secondly. Assuming the Judgment to have become effectual, when registered against the estate, and the Respondent's claim to be well founded, the estate has been discharged by prescription. The time of the prescription began to run when the debtors Hosten sold the estate in 1829. Now from that time till the proceedings in 1841, a period of more than ten years, the estate was enjoyed by Philippe and those who purchased from him. By the 113th article of the *Coûtume de Paris*, which is the law in force in Saint Lucia, if any one has enjoyed or been in possession of an estate by legal title, and *bona fide*, either by himself, or by his predecessors in their right and as their assignee openly and without disturbance for ten years, between parties present, and twenty years between parties absent, he obtains a right by prescription: and by the 114th article of the *Coûtume*, any one who has been in possession of an estate by legal title, and *bona fide*, for ten years between parties present, and twenty years between parties absent, without molestation, for any rent or mortgage, such possessor acquires a right by prescription against all rents or mortgages claimed against the estate. Now, if it is urged that the Demoiselles de Croiseuil were absent from the Island ever since the proceedings began, and that, therefore, the time of prescription is twenty and not ten years, we submit that they were present, and acting, by having a constituted Attorney in the Island to represent them (8 *Pothier*, tit. de la Prescription, pt. i. ch. v. pl. 130-132, *et seq.* 141; 8 *Pothier*, chap. i. pt. i. pl. 6, chap. ii. pt. i. pl. 36).

[78] Mr. J. Parker, Q.C., and Mr. Musgrave, for the Respondent.—This Judgment of the 8th of May 1827, by the law of the Island, became a general hypothec, lien, or charge, on all the property of the succession of Hosten. The hypothec follows the estate (3 *Burge's Com. on Col. Law*, 194); and the Appellant having purchased the estate, it became liable to the hypothec charge, of which the Respondent became the cessionary by the transfer of a proportion thereof to him by the Demoiselles de Croiseuil. An action, *declaration d'hypothec*, is not a personal, but a real action. The Appellant's first objection is, that the registration is informal, inasmuch as Philippe is not named, and against whom the Judgment ought to have been entered up. This was not necessary either under the old law before the promulgation of the Order in Council (*Coûtume de Paris*, Art. 114, 115), or under the present law. The third article of the Ordinance prescribes that all antecedent mortgages should be registered, but it does not prescribe that all antecedent purchase deeds should be registered. This Ordinance only gives priority from registration. *Inglis v. De Barnard* (3 *Moore's P.C. Cases*, 425). It was impossible to have registered against Philippe, for the Demoiselles de Croiseuil had no knowledge of the transfer to him by Hostens' heirs. The Judgment was duly enrolled and registered pursuant to the Ordinance, and that was all the law required to be done.

The second point is, that the estate is discharged by prescription. It is clear that the Appellant cannot rely upon this title. The Demoiselles de Croiseuil were absent from the Island, being resident in France, and, [79] therefore, the prescription of ten years provided for in the *Coûtume de Paris* does not apply. Domicile must be *de facto* and not *de jure*, for it is the actual domicile, and not merely a domicile by construction, which subjects a party to the prescription of ten years (8 *Pothier*, tit. de la Prescription, pt. i. c. ii. Art. 107; 3 *Burge's Com. on Col. Law*, 45).

The Right Hon. T. Pemberton Leigh.—This is an appeal from a Judgment of the Royal Court of Saint Lucia. The subject of the appeal is a plantation or estate called Anse Canot, which is subject to a Judgment of the Court of Seneschal of the 8th of May 1827, in favour of the Demoiselles de Croiseuil. It is admitted that this Judgment bound the estate, during the time the Hostens were owners of the estate, and that it still binds the estate, unless it has been discharged, either by the want of compliance with the requisites of the Order in Council of the year 1829, or that it has been barred by prescription. With regard to the first question, the Order in Council requires the name of the present debtor, and the date and nature of the title or original judgment act, or abstract of the mortgage, lien, or charge, and if any abstract shall omit the name of the creditor, or the name of the actual debtor, or the nature or date of the title from which the lien or mortgage arises, it shall be void. Now it is admitted on all hands, that the estate of the Hostens was liable to the Judgment of the Demoiselles de Croiseuil, and that any one who subsequently acquired a title to the estate, was liable to this claim. We, therefore, think that the registration against Hosten and his succession was sufficient, and that it was [80] not necessary to register it against Philippe, who acquired his title from the Hostens.

Then the question is, whether the prescription has been in such a manner as to bar this claim, whether there has been a possession by the Appellant, and those under whom he derives his title, so as to satisfy *en bon foi* prescribed in the *Coûtume de Paris*. There has been no actual residence of the Demoiselles de Croiseuil in Saint Lucia, for a period of ten years from the year 1829, and the fact of their being represented there by Attorney, is not sufficient to operate as a constructive domicile (3 Burge's Com. on Col Law, 43): therefore, we think the prescription of ten years will not apply.

For these reasons, we are clearly of opinion that the Judgment is right, and that the appeal must be dismissed, with costs.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 22. *West Indies*; tit. NOTICE, 5. *By Negligence and Non-inquiry*.

[81] ON APPEAL FROM THE COURT OF APPEAL OF THE ISLAND OF THE MAURITIUS.

HENRY SHIRE,—*Appellant*: CATHERINE SHIRE,—*Respondent* * [Feb. 12 and June 13, 1845].

The Charter of Justice of the Island of the Mauritius does not provide for Appeals in matrimonial suits, yet upon Petition for that purpose the Judicial Committee recommended the allowance of an Appeal against a decree for the restitution of conjugal rights.

Semble. If an Appeal is incompetent, the Respondent should move on Petition to dismiss the same on such ground, and not wait till the hearing, to object to its competency.

This was an Appeal from a Decree of the Court of Appeal of the Island of the Mauritius, bearing date the 30th of April 1842, in a suit brought by the Respondent for the restitution of conjugal rights, by which it was declared, that she was the only lawful wife of the Appellant, and restitution of conjugal rights decreed her, with alimony and costs.

The Appellant obtained leave from the Court below to Appeal.

Upon the opening of the case (Feb. 12 †), a preliminary objection was taken by

* Present: The Lord President [Lord Wharnccliffe], Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington.

† Present: The Lord President [Lord Wharnccliffe], Lord Brougham, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

the Respondent's Counsel, to the competency of the Appeal, as a suit for the restitution of conjugal rights was not comprehended within the causes in which an Appeal was given by the Charter of Justice of the Mauritius (see Extract of Charter, 4 Moore's P.C. Cases, 374).

[82] Mr. B. S. Follett, for the Respondent, in support of the objection, referred to *D'Orliac v. D'Orliac* (4 Moore's P.C. Cases, 374).

Mr. Charles Buller, for the Appellant, insisted that the case was distinguishable from *D'Orliac v. D'Orliac*, as involving pecuniary rights, viz., the liability to maintain the wife and children, if any, of the marriage.

Lord Brougham.—Every marriage involves the liabilities insisted on by the Appellant; the *status* of the issue of the marriage: and that is a right, which may be said to be beyond pecuniary value. The point was very carefully considered in *D'Orliac v. D'Orliac* [4 Moo. P.C. 374], and though there was no charter right to appeal in matrimonial causes, we recommended the Crown to grant leave to appeal, on a special application for that purpose. It would have been more convenient in this case, if the Respondent had moved to dismiss the Appeal, as was done in *D'Orliac v. D'Orliac*, and not waited till now, to object to the right of appeal. Their Lordships will recommend the allowance of an Appeal: the case to stand over for the Appellant to present a petition for such purpose, as in *D'Orliac v. D'Orliac*.

A petition was accordingly presented, and the Appeal allowed, which came on to be heard on the 13th of June. The question between the parties, and raised by the Appeal, was one of fact only, depending on the evidence adduced between the parties.

Their Lordships, after hearing Counsel for the Appellant, and without calling upon the Respondent, dismissed the Appeal, with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*, 6. *Practice*, o. *Other Matters*. On point (i.) as to appeals from Mauritius in matrimonial suits, see *D'Orliac v. D'Orliac*, 1844, 4 Moo. P.C. 374; (ii.) as to special leave in civil cases generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

[83] ON APPEAL FROM THE EXECUTIVE COUNCIL OF THE PROVINCE OF CANADA.

JOHN COUNTER.—*Appellant*; JOHN MACPHERSON and Others.—*Respondents* *
[Feb. 12, 1845].

Agreement for a lease for five years, from the 1st of April 1840, the landlord undertaking to erect, by that time, a new warehouse, on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on the 1st of April, but no objection was made by the intended lessees, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire. In such circumstances,—Held, upon a Bill filed by the landlord, for specific performance of the agreement, and for the Defendants to rebuild the premises, and to accept a Lease; that it was a condition precedent that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity, and the Bill dismissed.

This suit was instituted by the Appellant, for specific performance of an agreement, entered into between him and the present Respondents, for a lease, to be

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

granted by him to the Respondents, for five years, from the 1st of April 1840, of a wharf and warehouses in the town of Kingston, which, after the 1st of April 1840, but before the Appellant had performed the agreement on his part, were destroyed by accidental fire. By the agreement the Appellant was under an obligation to erect, according to a plan agreed upon, a new warehouse upon part of the ground to be demised, and to put the old stores or warehouses into repair; and the amount of the rent was to be deter-[84]-mined with reference to the amount of the Appellant's expenditure in erecting the new warehouse. One of the principal grounds of the resistance, on the part of the Respondents, to a specific performance of the agreement, insisted on by the Appellant, was, that at the time of the fire, the Appellant had not completed the building and repairs, which, according to the alleged agreement, he had agreed to execute; and was not, therefore, in a condition to call upon the Respondents to accept a lease, or to execute a counterpart, containing the usual covenants to repair, and for payment of rent.

The Appellant, on the 27th of July 1840, filed his Bill in the Court of Chancery, for the then province of Upper Canada, thereby stating, that he did, in the month of August 1839, enter into a treaty with the Respondents, John Macpherson and Samuel Crane, on behalf of themselves, and of the Respondent, Alexander Ferguson, to demise and lease the same to the Respondent, for the term of five years, from the 1st of April 1840, upon the terms, and subject to the rent, thereafter mentioned.

That several letters and communications passed between the Appellant and the Respondents, on the subject of the intended lease, by means whereof the terms of the agreement became reduced into writing.

That on the 19th of August 1839, the Appellant wrote and addressed to Macpherson and Crane the following letter:

Kingston, August 19th, 1839.

"Dear Sirs,—I am willing to let you my premises on the wharf, consisting of the following, viz.: The storehouse you now occupy, the one occupied by R. Jackson, and that now occupied by myself, together [85] with a store which I intend to build, as large as the span of the roof will admit, one story high; for the space of five years from the 1st of April; next at the annual rent of £200, Halifax currency. The premises, at the expiration of the term, to be returned in as good order as they will be on the 1st of April next, reasonable wear and tear only excepted. As it will be necessary to contract for the lumber to build the store immediately, I shall require your answer to-day.—I am, gentlemen, yours truly, John Counter."

That the Respondents wrote and addressed to the Appellant the following letter, in reply to the above:

" Kingston, August 19th, 1839.

"Dear Sir,—We have to acknowledge receipt of your two letters of this date, one enclosing transfers from Edward Noble, and Rose and Cameron, for two shares of Ottawa and Rideau stock, which shall appear in your name in the Company's books; the other offering to let your present forwarding premises, with the addition of a warehouse which you are to build before the 1st of April next, along the front of the present range of stores, about 100 feet \times 50, for the term of five years from that date, for the yearly rent of £200, currency, which offer we accept, with the understanding that you retire from your present forwarding agency in our favour, at the close of this season, and that no business of the kind is to be done on the premises but by us.—We are, dear Sir, your very obedient servants, Macpherson and Crane."

"It is a matter of course that all the wharf is to be ours, and that we shall have the privilege of subletting. Favour us with your answer.—M. and C."

That in reply to this, the Appellant wrote and addressed to the Respondents a letter, as follows:—

[86]

" Kingston, August 20th, 1839.

"Dear Sirs,—In reply to yours, I would give you to understand, that all the wharf is included in my proposition, with the exception of what will be landed for the bakery, and my private house. I shall also feel it my duty to support the Company, and to give it all my present business and interest; therefore the lease can be prepared to suit your convenience.—I am, your most obedient, etc., John Counter."

That upon the date and signature of the said last-mentioned letter, certain proposals were made and passed between the Appellant and the Respondents, touching improvements to be made on the premises, and it was ultimately agreed that the annual rent of the premises should be increased to £250, and that the Appellant should lay out and expend the sum of £600 in such improvements, and that the Respondents should, in the event of the costs of such improvements exceeding the said sum of £600, pay to the Appellant, as or by way of additional rent thereon, over and above the annual rent of £250, a sum equal to 12 per cent. upon such additional cost of the said improvement above the said £600.

That on the 1st of January 1840, the Appellant wrote and addressed to the Respondents the following letter:—

“ Kingston, January 1st, 1840.

“ Gentlemen,—The improved plan shown your Mr. Macpherson this morning I want your approval or disapproval of, on the following conditions, viz., I will furnish the sum of £600 in the improvement, should it require more to be paid by you at the expiration of five years from the 1st of April next; the sum so advanced to be repaid without interest; the advance not [87] to exceed the amount of the contract of said improvement or building. If you approve of this proposition, the annual rent to be £250, payable quarterly; or I will complete the said improvements at 12 per cent. on the contract, viz., the present understanding £200 per annum, should the contract be, say £800, that would be an addition of £96, making the annual rent £296 less 12 per cent. on £125, which was to have been expended, leaving the sum of £281, more or less, according to the amount of said contract. It is now, therefore, for you to take your choice of the above propositions. A lease will be drawn, showing the understanding before entered into. The stores all to be put in order, and given up to you as your own, and to be returned at the end of said lease, allowing for fair wear and tear.—I am, gentlemen, your obedient servant, John Counter.”

That the Respondents wrote the following letter in reply:—

“ Kingston, 2nd January 1840.

“ Dear Sir,—In reply to your letter of yesterday, we beg to remark that we do not consider the allowance enough which you propose to make for the improvement which was first spoken of, viz., 12 per cent on £125; it would not be possible to put the present wharfs in proper condition, and build a warehouse of 50 feet by 100, for that sum; but if you will say we are to pay 12 per cent per annum on what the cost of the contemplated improvement may be over £100, we shall agree to it, and wish it distinctly understood that any loss or damage, which may be caused by the insufficiency of the wharfs and stores, is to be sustained by you.—Your obedient servants, Macpherson and Crane.”

[88] That in reply, the Appellant wrote the following letter:—

“ Kingston, 2nd January, 1840.

“ Gentlemen,—In reply to yours of this day, I have only to say that you must have misunderstood my intention, for the shed on Calder's Wharf, occupied by Hooker and Henderson, was referred to as a pattern. I perceive by looking at my letters of 19th and 20th of August last, that a one-story store is mentioned as large as the span of the roof will admit, and not a warehouse, as spoken of by you to-day. At the very time, an order was given for the stuff, made out by a carpenter, and I am prepared to prove that the sum of £100 was then estimated for the building of such a shed or store. However, I am very willing, rather than be made such a buffoon of, to have what was to be done valued; and what the cost of building, according to the present plan, is above such valuation, to take 12 per cent., and do it. I wish you fully to understand that I shall do nothing until a proper arrangement is made, for I really cannot understand the treatment I have received.—I am, etc., John Counter.”

That the Respondents wrote in reply the following letter:—

Kingston, 3rd January 1840.

“ Dear Sir,—In acknowledging your letter of the 2nd, we have to assure you

that you quite mistake us, if you suppose that we want any thing unreasonable of you. We are perfectly aware that a warehouse, to be made suitable for storing wheat, must cost more than it otherwise would; we therefore will have no objection to increase the yearly rent £50, and which surely must pay you handsomely on the plan you last proposed, [89] and agreeably to which we wish you to build.—Your most obedient servants, Macpherson and Crane.”

That in reply, the Appellant wrote and addressed to them a letter as follows:—

“ Kingston, January 3rd, 1840.

“ Gentlemen,—In reply to yours of this morning, I would wish you to understand that I have made up my mind not to spend more than £600 in the building of the contemplated warehouse; and should it cost more than that sum, and the funds are provided by me, the rent must advance above £250 in proportion at the rate of 12 per cent. on the amount of the said contract, or you must provide the amount above £600, and be repaid at the expiration of said lease without interest: in this case the rent to be £250. These are the only terms I can agree to. Your reply, if we build, must necessarily be immediate.—I am, gentlemen, etc., John Counter.”

That the Respondents wrote and addressed to the Appellant the following reply:—

Kingston, 3rd January 1840.

“ Dear Sir,—We hereby agree to pay at the rate of 12 per cent. per annum for the cost over £600 of the improvement about to be made on your forwarding premises occupied by us in addition to the £250, as per our letter of this morning.—Your most obedient servants, Macpherson and Crane.”

That the Respondents entered upon the possession of the premises.

That part of the premises were, in the month of April 1840, destroyed by fire, and other parts thereof were materially damaged and injured thereby.

And the Appellant, by the Bill, charged that the several letters constituted a good, valid, and binding [90] agreement between the Appellant and the Respondents, which ought to be performed. That under the terms of the agreement, he laid out and expended a considerable sum of money, over and above the sum of £600, in the building and improvements in the letters mentioned; and he expressly charged that he ought to be allowed a rent in respect of such additional outlay upon the terms in the several letters of the 3rd day of January. And he further charged that the warehouse was erected and fit for occupation on the 1st of April; and that the Respondents had actually taken possession of the warehouse for many days before the same was burnt down or destroyed, and had actually caused the inside thereof to be boarded up or lined for the reception of wheat in bulk, and had erected, or were erecting machinery to convey wheat in bulk to the upper stories, whereby the Appellant was prevented from completing the warehouse.

And the Appellant prayed that the agreement might be specifically performed and carried into execution, and that the Respondents might be decreed to accept and take a lease of the aforesaid premises from the Appellant, and to execute to the Appellant a counterpart thereof upon the terms of the aforesaid agreement, the Appellant being ready and willing, and thereby offering to execute such lease, and in all other respects to perform his part of the agreement, and that an account might be taken by and under the direction and decree of the Court, of all sum and sums of money paid, laid out, and expended for or on account of the said improvements, and that in the lease the rent of the premises might be fixed and determined at the sum of £250, and together with an addition thereto at the rate of 12 per cent. per annum, upon such sum of [91] money as should appear to have been expended upon the improvements over and above the sum of £600, and that the Respondents might be decreed to repair and rebuild the premises, and to enter into all usual and necessary covenants, and to keep and leave the same in good and sufficient repair.

The Respondents severally appeared, and put in their answers, whereby they denied that they had ever taken possession of any part of the premises under the agreement, the terms of which they admitted, but insisted that they were not liable, under the circumstances, to rebuild the stores or to accept a lease.

The Appellant replied, and the Respondents having rejoined, the cause was at issue, and witnesses having been examined on both sides, the same came on to be heard before his Honour the Vice-Chancellor of the province of Canada, on the 9th day of December 1841, when his Honour did by his Decree declare that the agreement contained in the letters set forth in the Bill ought to be carried into execution, save and except the putting in order of the stores therein mentioned, before the commencement of the lease thereby agreed to be executed, which was waived by the Defendants, and did decree the same accordingly. And it was ordered, that it be referred to the Master of the Court to inquire and state to the Court what amount was expended by the Plaintiff on the new building in the pleadings mentioned, beyond the sum of £600. And it was further ordered, that a lease should be executed by the Appellant to the Respondents, of the premises in question in the cause, for the term of five years from the 1st of April 1840, at the yearly rent of £250, and £12 per cent. per annum on such sum as the Master should find to have been expended by the Plaintiff on such new building as aforesaid beyond the sum of £600; such lease to contain a covenant on the part of the Defendants, for the payment of the rent during the term, and to restore the premises at the expiration thereof, in the same plight and condition as the same were at the commencement of the lease; and such other provisions as should be conformable to the agreement, save as aforesaid: and the said Respondents were to execute a counterpart of the lease; and they were thereby enjoined from showing in any action at law that such lease was not delivered on the day of the date thereof. And it was further ordered, that the lease should be settled by the Master in case the parties should differ about the same; and that the Respondents should pay unto the Appellant or his solicitor the costs of the suit, to be taxed by the Master.

The Respondents, on the 28th of February 1842, appealed from this Decree to his Excellency the Governor-General of the province of Canada in Council.

The Appeal came on to be heard at the city of Toronto, before the Chief Justice, together with two members of the Executive Council, and the Puisne Judges of the Court of Queen's Bench, as composing the Court of Appeal, on the 21st of November 1842, and the 20th of February 1843, when the Court of Appeal ordered and adjudged that the Decree made in the cause in the Court below should be reversed, and that the bill of complaint be dismissed with costs.

The Appellant appealed from this Order and Decree to Her Majesty in Council.

Mr. Bethell, Q.C., and Mr. Shebbeare, for the Appellant.—[93] The Appellant is entitled to a decree for specific performance of the agreement. The contract for a lease of the premises was completed by the last letter of the Respondents, of the 3rd of January 1840. That letter concluded a contract which is capable of being performed, notwithstanding any event which has since happened, and the Appellant is entitled to the benefit of such contract. A party who enters into a binding contract for the purchase of an estate becomes in equity the owner of it, and is entitled to any profit, and is subject to any loss, which may afterwards occur to it. Though the time by which the new building was to be erected and the old one repaired had passed, yet the Respondents, by retaining possession of the premises, waived any objection on that score, and the contract was still subsisting (*Sugden's Vend. and Pur.* 253; 7 Edit. Inst. Lib. iii. tit. xxiv. s. 3). In *Paine v. Meller* (6 Ves. 349), the contract was for the sale of houses: from a defect of the title it could not be completed on the day agreed upon, and the treaty proceeded upon a proposal to waive the objections on certain terms; in the mean time, and before the contract was completed, the houses were burnt down. The Court held that the purchaser was bound by the contract. So a Court of Equity will decree specific performance of a contract for the sale of a life annuity, though the annuitant be dead at the time of the decree. *Kenney v. Wexham* (6 Mad. 355). Or although the party die before any payment of the annuity. *Mortimer v. Capper* (1 Bro. C.C. 156). The case was decided by the Court below upon some rule of the common law, which was inconsistent with the principles of Courts of Equity, namely, that it [94] was a condition precedent that the premises should be put in repair before the Defendants could be called upon to accept a lease. *Mundy v. Jolliffe* (5 Myl. and Cr. 167), *Levy v. Pendergrass* (2 Beavan, 415), are authorities against this doctrine. Moreover, the Court below proceeded upon the assumption that the agreement not having been

signed before the destruction of the building by fire, the occurrence of that event put an end to it. This is erroneous, for the agreement constituted a valid contract in equity. We admit that the Appellant had not completed the alterations he contracted to perform, and that the obligation rested with him so to do, but he is entitled to have the buildings restored by the Respondents to the condition they were in when the fire broke out. There are two modes by which substantial justice may be done; first, by decreeing the lease to be dated as on the 1st of April 1840, containing, on the part of the Appellant, covenants to repair and complete the building, and, on the part of the Respondents, to keep them in repair and restore them at the end of the term; in such case there would be a subsisting lease, upon which an action might lie against the Appellant, for non-performance of his engagement to build and put in repair; or secondly, the Respondents may be considered as taking the premises as they stood before the fire, and as undertaking to restore them to the same condition, and the Appellant then can covenant to complete them when restored. The form of such lease could be settled by the Master in case the parties differ about the precise terms.

Mr. Kindersley, Q.C., Mr. Turner, Q.C., and Mr. E. J. Lloyd, for the Respondents.

[95] Although the letters may constitute a valid agreement in equity, yet the contract is not of such a nature that, under the circumstances, a Court of Equity could interfere to compel specific performance. The parties ought to be left to their legal rights. The non-completion of the contract may be the subject of an action at law for damages. The Appellant was under an obligation to repair the old buildings, and to erect and completely finish a new building, before he could require the Respondents to accept a lease or to execute a counterpart thereof; and at the time when the buildings were destroyed by fire, the Appellant had not complied with the exigency of this obligation. He is not in a condition, therefore, to enforce specific performance in equity. A Court of Equity will not make a decree that it cannot enforce, or in which substantial justice cannot be done. Here it is utterly impossible to place the parties in the same situation in which they ought to stand. No materials are before the Court to enable it to frame the covenants. By the condition precedent, the Appellant undertook to put the premises into repair; that cannot be done now, because of the fire; therefore, no covenant to that effect could be introduced. A party seeking to enforce a contract must perform his part of the contract; he cannot do so here, nor does the Appellant offer, by his Bill, to complete the repairs. This distinguishes the present case from *Paine v. Meller* [6 Ves. 349], and the other cases cited by the Appellant.—[The Right Hon. T. Pemberton Leigh.—Would the landlord be bound to execute a lease in order that the lessee might recover at law?—In *Wilkinson v. Torkington* (2 Y. and Coll. 726), a bill was filed for specific performance [96] of an agreement to grant a lease, and for an account of arrears of rent on the footing of the agreement: the term for which the lease was granted expired before the hearing, and, in such circumstances, the Court refused the specific performance. The agreement is executory: an act must be done by the Appellant before any conversion of property can take place. The nature of the agreement is, that a building is to be erected, and if the cost should not exceed £600, then the rent is to be £250 per annum; if it exceeds that sum, an additional rent of 12 per cent. is to be calculated on the excess. The rent is to vary according to the outlay. How is it to be ascertained? A general covenant to lay out a certain sum in buildings of a certain value cannot be executed. *Mosely v. Virgin* (3 Ves. jun. 184). No mutuality exists. If the Court cannot enforce the positive part of the contract, it will not restrain the negative. *Kemble v. Kean* (6 Sim. 333). The remedy must be mutual. *Flight v. Bolland* (4 Russ. 298). If the Court dismisses the Bill, the Appellant is not precluded from bringing his action at law for damages.

Mr. Bethell, in reply.—No action for a breach of agreement can lie; unless the agreement is decreed specifically, no breach of it can be assigned.

The Right Hon. T. Pemberton Leigh (1st March 1845).—In this case a Bill was filed by the Appellant in the Court of Chancery in Canada, seeking the specific performance of an agreement entered into by the Re-[97]spondents. The Vice-Chancellor made a Decree in favour of the Plaintiff: from this decision the Defendant appealed to the Governor-General in Council, who reversed the decision of the Vice-

Chancellor, and dismissed the Plaintiff's Bill, with costs. From this Order the present Appeal is brought.

The terms of the agreement between the parties are to be collected from a correspondence which began in the month of August 1839, and terminated on the 3rd of January 1840. That these letters constitute a valid agreement is not disputed by the Respondents, although it has been contended on their behalf, at the Bar, that the contract is one with respect to which a Court of Equity ought not to interfere, and that the parties should be left to their legal rights and remedies.

The case appears to be this. The Appellant was the owner of a wharf and three stores at Kingston in Upper Canada; upon part of the property the Appellant carried on what is called a forwarding business; one of the stores was in the occupation of a Mr. Jackson, and another in the possession of the Respondents, under a sub-contract with a public company (who had taken a lease from the Appellant), and whose interest would expire on the 1st of April 1840. In this state of circumstances, the Respondents entered into a negotiation for a lease of the whole of the premises for a term of five years, from the 1st of April 1840. After much discussion, it was finally agreed between the Appellant and Respondents, that the Appellant should put in order the existing stores, and should build a new store or warehouse, according to a plan referred to in the correspondence, but not proved in the cause; that these works should be completed by the 1st of April 1840, and that the Respondents should then take a [98] lease for the period of five years from that day, at a rent of £250 per annum, if the sum expended by the Appellant in the erection of the new building should not exceed £600; and if the sum so expended should exceed £600, then at an additional rent calculated at the rate of 12 per cent. upon the excess. Possession of the whole of the property was to be delivered to the Respondents on the 1st of April 1840, and they were to engage to restore the premises at the end of the term in as good a condition as that in which they were, when possession was taken. It appears also that the Appellant was to relinquish his forwarding business in favour of the Respondents.

In pursuance of this arrangement, the building of the new warehouse was commenced; but when the 1st of April arrived, it is admitted on all hands that the warehouse was far from being completed; and the evidence shows, in our opinion, that the necessary repairs to the old buildings had not been done, and as to part of those buildings, had not been commenced. No complaint however, or at all events no objection, to the completion of the contract, was made on that ground by the Respondents; and if time was the essence of the contract, we have no doubt that all right of objection on that score was waived by them. They continued in possession of that part of the premises which they previously held, and which, but for the contract, they should have given up on the 1st of April, and the works in progress were continued with their approbation.

In this state of things, on the 1st of April 1840, the rights of the parties stood thus:—the Appellant was bound by his contract to perform his agreement, by putting the old stores in order, and completing the new [99] building within a reasonable time, and upon this being done, the Respondents were bound to accept a lease according to their agreement. But they could not be required to accept a lease until the works were done, nor could the rent, until that time, be ascertained. If the Appellant refused to perform the works, or neglected to do so within a reasonable time after notice, the Respondents would be at liberty to put an end to the agreement. The obligation on the Respondents to accept the lease was conditional on the Appellant's putting the premises into the state in which he had contracted to demise them to the Respondents. The waiver of the Respondents extended not to the works being done, but only to the time within which they were to be completed.

After the 1st of April the Appellant accordingly continued the works which had been begun, and commenced repairs upon the old buildings; but while the works were in progress an accident occurred which has given rise to the present litigation. On the 18th of April 1840, a fire broke out upon the premises, which destroyed, or materially injured, all the stores. The Appellant insisted, that the Respondents, at their own expense, should rebuild and restore what had been destroyed or injured, and accept a lease on the terms of their agreement. This the Respondents refused to do; and on the 27th of July 1840 the present Bill was filed.

It is material to attend to the allegations of the Bill, and the relief sought by it, in order to understand the real nature of the question, and the only question, which it raised.

After stating the correspondence and some other matters, with respect to which there is no dispute between the parties, it alleged that "the Respondents, in [100] the month of April 1840, entered into possession of the premises, and continued in possession up to the time of filing the Bill." It then stated that, in the same month of April, part of the premises were destroyed by fire, and other parts materially injured thereby, and that the Appellant had applied to the Respondents specifically to perform their agreement, and to accept a lease upon the terms of such agreement, "and to rebuild and repair the said premises accordingly," which they refused to do.

After some charges, not material to the present purpose, the Bill charged "that the said warehouse was erected and fit for occupation on the 1st day of April, or within a few days thereafter, and that the Respondents had actually taken possession of the said warehouse, for many days before the same was burned down and destroyed, and had actually caused the inside thereof to be boarded up or lined, for the reception of wheat in bulk, and had erected, or were erecting, machinery to convey wheat in bulk to the upper stories, whereby the Appellant was prevented from completing the said warehouse:" and the Bill charged, "that the Respondents received goods as custom-house warehousemen after the 1st of April 1840, and deposited the same in the said warehouse, and also deposited therein a considerable quantity of flour, and not less than 1000, 3000, or 2000 barrels, and accepted, took and retained the possession of the key of the said warehouse."

These allegations, though not perhaps in all respects quite consistent with each other, appear to amount to this; that, previously to the fire, the Appellant had substantially performed his agreement by erecting and making fit for occupation the new warehouse, and the [101] Bill, accordingly, contained no suggestion of anything remaining to be done in that respect by him.

The prayer of the Bill was, "that the said agreement might be specially performed and carried into execution, and that the said Respondents might be decreed to accept a lease of the said premises from the said Appellant, and to execute to the said Appellant a counterpart thereof, upon the terms of the aforesaid agreement, the said Appellant being ready and willing, and thereby offering, to execute such lease, and in all other respects to perform his part of the said agreement; and that an account might be taken by and under the direction and decree of the Court, of all sum and sums of money, paid, laid out, and expended for or on account of the said improvements, and that in the said lease, the rent of the said premises might be fixed and determined at the said sum of £250, and together with an addition thereto, at the rate of £12 per cent. per annum, upon such sum of money as should appear to have been expended upon the said improvements over and above the said sum of £600: and that the said Respondents might be decreed to repair and rebuild the said premises, and to enter into all usual and necessary covenants, and to keep and leave the same in good and sufficient repair, and for general relief."

The Respondents denied that they had ever taken possession of any part of the property under the agreement, and they insisted that they were not bound under the circumstances, either to rebuild the stores or warehouse, or to accept any lease with that obligation.

Upon a record so framed, the substantial question between the parties was this; which of them was to suffer by the fire which had taken place; and, unless [102] the Appellant was justified in requiring the restoration of the premises by the Respondents at their own expense, he was not entitled to any relief upon his Bill.

With respect to the only question of fact in dispute, viz., the condition of the building when the fire took place, and the acceptance of possession by the Respondents, the parties went into evidence, the result of which appears to us to be as follows:—

We think that after the 1st of April the possession remained very much the same as it had done before.

The Respondents continued in the occupation of that portion of which they were previously in possession, although their old title to such possession had ceased. The Appellant remained in possession of that part which he held, and a part seems to

have been unoccupied. The old buildings had not been repaired, and the new warehouse was so far from being completed and fit for occupation, that, at the time of the fire, it had neither doors nor windows, the floor of the second story was not laid, and that of the first was not complete.

On the other hand, it appears that the delay had arisen in part from some alterations in the plan which had been suggested by the Respondents, to which the Appellant had assented, provided they were done at the expense of the Respondents; of the unfinished building (as far as any possession could be had of it), both the Appellant and the Respondents seem to have had the use, by placing under the shelter of the roof such goods as they found it convenient to deposit there.

Upon this state of the record, the Vice-Chancellor pronounced the following Decree: That the agreement contained in the letters set forth in the Bill, and bearing date the 19th of August 1839, and the 1st, 2nd, and 3rd of January 1840, ought to be carried into execution, save and except the putting in order of the stores therein mentioned, before the commencement of the lease thereby agreed to be executed, which was waived by the Defendants, and did decree the same accordingly. And it was ordered, that it be referred to the Master of the said Court to inquire and state to the Court what amount was expended by the Plaintiff on the new buildings, in the pleadings mentioned, beyond the sum of £600; and it was further ordered, that a lease should be executed by the Appellant to the Respondents, of the premises in question in the said cause mentioned, for the term of five years, from the 1st day of April in the year of our Lord 1840, at the yearly rent of £250, and £12 per centum per annum on such sum as the said Master should find to be expended by the Plaintiff, on such new building as aforesaid, beyond the sum of £600, such lease to contain a covenant on the part of the Defendants for the payment of the said rent during the said term, and to restore the said premises at the expiration thereof, in the same plight and condition as the same were at the commencement of the lease, and such other provisions as should be conformable to the said agreement, save as aforesaid; and the said Respondents were to execute a counterpart of the said lease, and they were thereby enjoined from showing in any action at law that such lease was not delivered on the day of the date thereof; and it was further ordered, that the said lease should be settled by the Master, in case the parties should differ about the same, and that the Respondent should pay unto the Appellant or his solicitor, the costs of the said suit, to be taxed by the said Master.

[104] An Appeal was brought by the present Respondents against this decision to the Governor-General in Council, who, on the 20th of February 1843, reversed the Decree, and dismissed the Bill, with costs. The propriety of this last order we have now to consider.

The case was argued on both sides before us with great ingenuity and ability. On the part of the Appellant, it was contended, that he was entitled to have the buildings restored by the Respondents to the condition in which they were when the fire broke out, but as upon the evidence it was impossible to argue that the Appellant had completed the work which he had contracted to perform, it was admitted, that after the Respondents had restored the buildings to their imperfect state, the obligation of completing them would rest with the Appellant.

The Appellant's claim was rested upon the principle, that a party who entered into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit, and subject to any loss, which may afterwards occur to it; and it was said that in this case, although the period at which the works were to be done had passed before they were completed, yet that the Respondents having waived any objection on that score, the contract was still subsisting, and the principle was to be applied. The case of *Paine v. Meller* (6 Ves. 349) was particularly relied on. In that case the Defendant had contracted for the purchase of a house: the house was destroyed after the period had passed within which the title was to be made out and the contract completed, but further time to make out the title had been allowed by the purchaser, who had accepted it before the fire took place, and under these circumstances the [105] purchaser was held bound to pay his purchase-money.

The more familiar cases of the purchase of a life annuity, and the annuity

dropping before the assignment : and the purchase of estates held upon a life, and the life dropping, were also referred to. *Mortimer v. Capper* (1 Bro. 156), and *Kenney v. Weaham* (6 Mad. 355). We have carefully examined these cases, and several subsequent authorities on the same subject, the last of which is *Vesey v. Elwood* (3 Drury and Warren, 76) (also reported, 2 Con. and Law, 47).

Of the general doctrine so stated we apprehend that there is no doubt ; but the question is, whether that principle or any doctrine to be found in any of the authorities maintained the Appellant's claim in this case. In ordinary cases of absolute and unconditional contracts, the risk is the risk of the purchaser, because that which is the subject of the risk is in equity considered to be the property of the purchaser. But treating the contract to take a lease as a contract to purchase, the warehouse was never to be in that sense purchased by the lessees until it was completed by the lessor ; and until that had been done, therefore, it was not the property of the lessees. They had never contracted to take an unfinished warehouse : they had never engaged to do any repairs, or to accept or restore any unfinished or dilapidated buildings ; and although after the 1st of April 1840, the contract was still binding in equity, provided the Appellant performed it on his part, yet until he had so performed it, no obligation attached on the lessees. They could not object that the lessor had not performed his engagement within the time limited, but they had a right [106] to require that he should perform it before they were called upon to accept a lease. They were to receive a complete building at the commencement of the term, and to restore a complete building at the end of it, and to pay a rent calculated upon the amount of the expenditure. The accident of the fire interrupted and delayed the completion of the work, but it could not relieve the Appellant from his obligation to complete it.

It was said, that this case was decided by the Judges of Appeal, upon some rules acted upon by Courts of Common Law ; but inconsistent with the principles of Courts of Equity. We are not aware that, upon the main question in this case, there could be any difference between the decision of a Court of Law and of a Court of Equity. The question is, was it, or not, incumbent on the Appellant to repair the old buildings, and complete the new, before he could require the Respondents to accept a lease according to their agreement ? If he was so bound, there is, in our opinion, nothing in the circumstances of this case which could relieve him from that obligation ; the fire could have no such effect, nor would the circumstance, that the delay in the completion of the building was in part attributable to the Appellant's compliance with the suggestions of the Respondents. The contract in equity was subsisting, although by the omission of the Appellant to complete his part of it by the time stipulated, it might have become void at law, and if the Appellant had been willing to restore the buildings, the obligation of the Respondents to accept a lease might have been differently determined in Law and in Equity ; but the construction of the contract, or the liability of the Appellant within some time to [107] perform what he had engaged to do, before he called upon the Respondents to accept a lease, was not at all altered.

Had our opinion upon the main question been different from that which we have formed, it would have been necessary to consider several points of great importance which have been discussed at the Bar ; and in particular, whether, as has been contended on the one hand, the Court ought so to modify the Decree, as to do substantial justice between the parties, or whether, as has been insisted on the other hand, having regard to some of the terms of this contract, the alleged want of mutuality of remedy, and the difficulty (or as it has been called impossibility) of placing the parties by any Decree in the situation in which they ought, by the contract, to stand, the Appellant should have been left to any legal remedy which he might have.

The view which we take of the rights of the parties, makes it unnecessary for us to enter into any discussion of these questions, further than as an examination of the relief which it has been proposed to ask appears to us to elucidate the principle upon which our decision is founded.

It was said that there were two modes in which substantial justice might be done : one was by decreeing a lease to be executed, dated on the 1st of April 1840, containing covenants by the Appellant to repair and complete the buildings, and

by the Respondents to keep in repair, and restore them at the end of the term; and it was said that there would then be a subsisting lease, and an action might be maintained against the Appellant for the non-performance of his engagement to build and repair.

[108] But, in the first place, the Respondents never entered into any such engagement; they never agreed to accept the Appellant's covenant to do the work after the commencement of the term; and if they had, the obligation on the Appellant to complete the building, notwithstanding the fire, would have remained precisely the same.

Another mode suggested was this; that the lease should be dated as on the day of the fire, and that the Respondents should be considered as taking the premises as they stood before the accident on that day, and should undertake, by some covenant, an obligation to restore them to that condition, and that the Appellant, on the other hand, should covenant to complete them when restored. Now it is obvious that this is to impose upon the parties a contract, which they never entered into, either by expression or implication; and although, where a binding contract is subsisting, the completion of which, in its exact terms, becomes impossible through accident, without any default of the party seeking relief, a Court of Equity will struggle with points of form, it cannot, for that purpose, alter the substance of the agreement, or impose upon either party obligations totally different from those which, by the agreement, he had contracted.

In this case, there is no reason why the Court, upon any principle of moral justice, should at all desire to interfere; both parties are equally innocent, and the only question is, upon which of them the loss arising from an inevitable accident is to fall. The claim to relief has accordingly been very fairly rested in argument by the Appellant, upon the general principle, [109] that the buildings, when the fire took place, were, in equity, the property, and, therefore, standing at the risk, of the Respondents.

For the reasons assigned, we are of opinion, that this principle is not applicable to the case; and that the decision appealed from is right, and must be affirmed.

With respect to the costs, as there have been conflicting decisions below, the case was very naturally brought here by Appeal. But we think that, upon the main question, the Respondents have, from the beginning, been right, and that some material allegations of the Bill, which must have been within the knowledge of the Appellant, are directly contradicted by the evidence; we do not think, therefore, that there is any reason for excepting this case from the ordinary rule; and we think that the Appeal must be dismissed with costs.

[Mews' Dig. tit. LANDLORD AND TENANT, M. COVENANTS, 3. *To repair*, a. iii. *Conditional or Absolute Covenants*. As to specific performance, cf. *Hughes v. Jones*, 1861, 3 De G. F. and J. 307; *Taylor v. Caldwell*, 1863, 3 B. and S. 826; *Lysaght v. Edwards*, 1876, 2 Ch.D. 507. The existence of divergences of opinion in the Court below (5 Moo. P.C. 109) is taken account of in considering applications for special leave, *Robinson v. Canadian and Pacific Railway* (1892). A.C. 481, at p. 485.]

[110] ON APPEAL FROM THE COURT OF APPEALS FOR LOWER CANADA, IN THE PROVINCE OF CANADA.

JOHN TOBIN and ANDREW MURISON.—*Appellants*: ALEXANDER
MURISON.—*Respondent** [June 17, 1845].

Though allowance is to be made for the technical difference of the proceedings

* Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

in the Courts of Canada and those of England, yet where trial by jury prevails, a special verdict ought to be the finding of facts, by the Jury, from which the Court is to pronounce its judgment on the law, and the verdict ought not to leave facts to the Court to draw an inference; such as, whether negligence has or not been established; negligence being a question of fact and not of law [5 Moo. P.C. 125].

The negligence of a Bailee in disobeying the instruction of a Bailor, given more than a year prior to the cause of action, and not specifically declared upon; Held not sufficient, though proved in the cause, to entitle the Plaintiff to recover damages thereon. A *venire de novo* awarded, with liberty to amend the pleadings [5 Moo. P.C. 128, 129].

This was an Appeal from a Judgment by the Court of Appeals for Lower Canada, pronounced at Quebec, on the 20th day of January 1843, on an Appeal from a Judgment of the Court of King's Bench for the district of Montreal in Lower Canada; given on the 2nd of June 1842. The Judgment of the Court of King's Bench for the district of Montreal was in favour of the then Plaintiff (the Respondent) for the sum of £1481 14s. 8d. currency, together with interest on that sum, from the 21th day of September [111] 1841; and that Judgment was affirmed by the Court of Appeals for Lower Canada with costs.

The action was commenced in the Court of King's Bench at Montreal, on the 11th of February 1840, by the Respondent, who then, and for several years before, was a merchant at Halifax, Nova Scotia, against the Appellants, who, during the same period, were partners and commission merchants at Montreal and Quebec, and in the habit of receiving consignments from the Respondent, as his agent, for sale upon commission: and the action was brought to recover as well the value of a quantity of sugar, which the Appellants, having so received from the Respondent, had never accounted for, and which had been destroyed in their warehouse by an inundation, as a sum of money due to him, from them, on the balance of their general commercial dealings for a number of years before.

The Declaration was on promises, and contained four counts:—First, for not accounting within a reasonable time for, and paying the proceeds of, the sale of divers goods, wares, and merchandizes consigned by the Respondent to the Appellants to be sold on commission. Second, for not accounting on request for such consignments. Third, for not taking due and proper care of such goods, wares, and merchandizes, as those in the first and second counts mentioned, whereby the same were damaged and lost. Fourth, for money lent, money paid, and money had and received.

To this declaration, the Appellants pleaded:—First, and more especially to the first, second, and third counts, that they had accounted for and paid over the proceeds of all goods, wares, and merchandizes con-[112]-signed to, or received by, them, to be sold for the Respondent, except thirty-three hogsheads of sugar, as to which, they said, that while the same were deposited in certain safe warehouses in Montreal, and while the Appellants were exercising all reasonable care and diligence, in and about the safe keeping thereof, until they should be able to sell and dispose of the same, by reason of the sudden rising and overflowing of the waters of the river St. Lawrence, the said thirty-three hogsheads of sugar, then being in the said warehouses, were wetted, and by the act of God and inevitable casualty, without any fault, negligence, omission, or want of care of the Appellants, were totally lost and destroyed. Secondly; the Appellants pleaded, and more especially to the first, second, and third counts, that they had accounted for, and paid the proceeds of, all goods, wares, and merchandizes, which the Respondent, at the times in the said counts specified, had consigned to them, or they had received, to be sold for him. Thirdly; the Appellant pleaded, and more especially to the fourth count, that the allegations therein were not true, and that the Appellants were not so indebted in manner and form, as the Respondent had complained against them. Fourthly; that they were not indebted in manner and form as the Respondent had complained against them. Fifthly; that they were not guilty in manner and form as the Respondent had complained against them.

The Respondent replied: To the first plea of the Appellants, and more especially to the first, second, and third counts, that the Appellants had not accounted for and paid over the proceeds of the goods, wares, and merchandizes which the Respondent had sent and con-[113]-signed to them as alleged in his said declaration; and as to the sugar mentioned and referred to in the said plea, that the same was not deposited in safe warehouses, as falsely alleged in and by the said plea, and that the same was by the Appellants, contrary to the express instructions by them before then received from the Respondent, placed and deposited in unsafe and improper warehouses, and there kept in violation of such instructions; and that while the said sugar was and remained in the said warehouses, contrary to the express instructions and orders of the Respondent, and in breach of such instructions and orders, it became wetted, submerged, and destroyed, by the overflowing of the waters of the river St. Lawrence at Montreal; and that the loss occurred in consequence of the breach of orders on the part of the Appellants as the Respondent's agents, who then acted for hire and reward for their services as such, and by their negligence, and violation of the positive instructions of the Respondent; that the sugar so lost and damaged by the breach of orders, negligence, violation of instructions, and improper conduct of the Appellants, was at the time worth a sum of £1000 currency; by means whereof they the Appellants became by law liable and responsible to the Respondent for the damage and loss so sustained. To the second plea, and more especially to the first, second, and third counts, the Respondent replied, that the Appellants had not accounted for or paid the proceeds of the goods, wares, and merchandizes sent and consigned to them, by him, as in the said plea alleged. To the third plea, and more especially to the fourth count, the Respondent replied, that the allegations therein were true, and that the Appellants were indebted to him in manner and form [114] as he had complained against them. To the fourth plea, the Respondent replied, that the Appellants were indebted to him in manner and form as he had complained against them. To the fifth, the Respondent replied, that the Appellants were guilty in manner and form as he had complained against them.

Upon these pleas and replication, both parties put themselves upon the country, and issues were thereupon joined.

On the 20th day of February 1841, a rule of the Court of King's Bench was made, at the instance of the Respondent, permitting him to examine the Appellants on oath, upon interrogatories, *sur faits et articles*, relative to the issues in the cause; and on the 19th day of June 1841, a similar rule was made for the like examination, upon additional interrogatories. Together with the latter interrogatories, the Respondent also filed certain exhibits, and, among others, a copy of a letter from the Appellants to the Respondent, dated Montreal, 30th April 1836; and a copy of his reply to them, dated Halifax, 18th May 1836. In pursuance of these rules, the Appellant was twice examined upon oath; and by his answers to those interrogatories the following admissions were made.

That the Respondent, at the time of the action brought, and for several years before, was a merchant at Halifax, in Nova Scotia, and during the same period the Appellants were commission merchants and co-partners, doing business at Montreal and Quebec, under the firm of Tobin and Murison. That during the same period the Appellants were the agents of the Respondent, and he had consigned to them as such commission merchants, and they had received [115] from him, divers goods, wares, and merchandize, to be sold by them, for him, and the proceeds to be accounted for, according to the usage and custom observed in such cases.

That in the course of such transactions, and in addition to others of a like nature (upon which there was a general balance due from the Appellants to the Respondent of £640 8s. currency), the Respondent had, on the 27th of October, in the year 1837, by the brig *Elizabeth*, consigned to the Appellants, for sale, a cargo of sugar, consisting of eighty hogsheads, which the Appellants stored in the basement story of a certain warehouse in their possession, situate on the Point á Calliere, in Montreal.

That of these eighty hogsheads of sugar, the Appellants sold, and accounted to the Respondent, for forty-seven hogsheads, deducting from the proceeds their commission of five per cent., besides charges for storage and various other expenses;

but the remaining thirty-three hogsheads were destroyed in the same basement story of the warehouse by an inundation of the river St. Lawrence.

That before this consignment of the eighty hogsheads of sugar, namely, in the year 1836, a similar inundation of the same river, at the same place, had occurred, by which the same warehouse was greatly endangered by ice and water, and had narrowly escaped being entirely destroyed. On which occasion the Appellants addressed to the Respondent a letter, dated Montreal, April 30th, 1836, which contained the following passage:—

“On Tuesday last, about two o'clock, our store and our neighbour, John Torrance and Co., escaped being levelled to the ground: had it pushed one foot, or [116] indeed half a foot, we were done for. The large beautiful cutstone store just above, had the front knocked in, besides the distillery and small buildings adjoining upset and covered with tons of ice. One family, supposed to be just at dinner, buried; the time occupied could not have been over five minutes. The distillery, fortunately for Mr. Handyside, he removed out of this time last year. A stone wall and covered as a shed, 160 feet long, belonging to the property on which our store is, has been carried away, and the roof lodged against our office window, depriving us of light and access to the road, which is, thank God, all the injury we received, excepting the bank of ice, without exaggeration, thirty feet high, lodged within ten feet of our door; £500 to £1000 will be required to remove this ice.”

That to this letter of the Appellants, the Respondent sent an answer, dated Halifax, 18th May 1836, which contained the following paragraph:—“T. and M.'s letter of the 30th ult., by last post, was duly received. I find I have narrowly escaped suffering a very serious loss, in a way which I never could have anticipated. Let no property of mine remain in so dangerous a situation in future.”

On the 24th of September the trial came on before a Special Jury: when it being agreed between the parties, that the Respondent's damage, by the loss on the thirty-three hogsheads of sugar, should be taken at £753 currency, and his damages for the balance due to him on other transactions at £728 14s. 8d. currency, the Jury found a special verdict accordingly for £1481 14s. 8d. currency, with a case reserved for the opinion of the Court of King's Bench, as to the liability of the Appellants, to pay the sum of £753 [117] (part of the above sum of £1481 14s. 8d.), the value of the thirty-three hogsheads of sugar.

The special verdict and case reserved, were in the following terms, viz. :—

“That the said Defendants, on or about the 27th day of October, in the year 1837, received from the said Plaintiff, on consignment, a quantity of eighty hogsheads of sugar, to be disposed of, on account of the said Plaintiff, the sugar being of the value of £1510 8s. 9d. current money of this province.

“That while the said sugar was in their possession in a certain store situate on the Point à Calliere, in the city of Montreal, which store had been used for purposes of storage for a number of years, a quantity of thirty-three hogsheads was destroyed by an unusual rise of the waters of the river St. Lawrence, while the said thirty-three hogsheads were stored in the basement story of the store.

“That the said waters did begin to rise on, or about, the 20th day of December 1837, and did continue rising until the 3rd day of January; at which period it had reached an unprecedented height, and which rise of waters was occasioned by the formation and shoving of the ice of the river St. Lawrence; and the said quantity of thirty-three hogsheads, during the rising of the said waters, were entirely lost to the said Plaintiff.

“That the average value of the said thirty-three hogsheads of sugar was 49s. 6d. for each hundred weight, and the weight of the thirty-three hogsheads was 362 cwt. 2 qrs. 2 lbs., and that the value of the said thirty-three hogsheads of sugar was £899 14s. 2d.

“That a certain paper filed in this cause, dated April 30th, 1836, was a letter written by the Defen-[118]-dants at Montreal to the Plaintiff at Halifax: and that the paper filed by the said Plaintiff as his exhibit, and bearing date the 18th day of May 1836, was a true copy of the answer thereto, written by the said Plaintiff to the said Defendants, and received by the said Defendants in due course of post.

"That the store, referred to in the said letter, written by the said Defendants to the said Plaintiff, and in the answer thereto written by the said Plaintiff to the said Defendants, is the same store in which the said thirty-three hogsheads of sugar were afterwards stored by the said Defendants, and where they were afterwards lost and destroyed.

"That the said quantity of thirty-three hogsheads is unaccounted for by the said Defendants.

"That in addition to the said quantity of thirty-three hogsheads of sugar, the general balance of accounts between the said Plaintiff and the said Defendants in their general commercial dealings, which had existed between them for a number of years before, leaves a balance due by the said Defendants to the said Plaintiff of £640 8s. currency, with interest thereon from the 6th day of June 1839, making the sum of £728 14s. 8d. interest up to this day.

"That as to the said sum of £728 14s. 8d. aforesaid, the said Defendants did undertake and promise, and are bound to account to the said Plaintiff in manner and form as complained by him, and they assess the damages of the said Plaintiff, on occasion of the not performing of the said promises, at the sum of £728 14s. 8d.

"That the total sum of money now due to the said Plaintiff by the said Defendants, payable to the said Plaintiff at Montreal, is £1481 14s. 8d., with interest [119] from this day; but as to the sum of £753 and interest aforesaid, the value of the said thirty-three hogsheads of sugar destroyed as aforesaid, the Jurors aforesaid are altogether ignorant, and therefore they pray the advice of the Court; and if upon the whole matter aforesaid it should seem to the said Court that the said Defendant, as to the said thirty-three hogsheads, did undertake and promise, and are bound to account, then the Jurors aforesaid, upon their oaths aforesaid, say that the said Defendants did undertake and promise, and are bound to account in manner and form as the said Plaintiff hath by said suit complained, and in that case assess the damages in respect of the said thirty-three hogsheads of sugar, on occasion of the said promise and undertaking and accountability, to be £753, with interest; but if upon the whole matter aforesaid it should seem to the Court that as to the said thirty-three hogsheads of sugar that the said Defendants did not undertake and promise, and are not bound to account in manner and form as complained, then the Jurors aforesaid, upon their oaths aforesaid, say that the said Defendants did not undertake and promise to account, and are not bound to account in manner and form as the said Plaintiff hath complained against them."

The case was heard on the 7th day of October 1841, in the Court of King's Bench, Montreal, on the special verdict; the only question then made was, whether the Appellants should pay the £753 for the loss on the thirty-three hogsheads of sugar, or whether the Respondent himself should sustain it; for in regard to the sum of £728 14s. 8d., the residue of £1481 14s. 8d., no question was raised, nor any doubt entertained.

[120] The Court of King's Bench, Montreal, gave their decision, upon the special case reserved, on the 2nd June 1842, and held that the Appellants were liable for the loss of the thirty-three hogsheads of sugar; and in consequence pronounced judgment in favour of the Respondent for the sum of £1481 14s. 8d. currency, "being the amount of damages assessed by the said special verdict, to wit, £728 14s. 8d., being the balance in favour of the said Plaintiff, of accounts between him and the said Defendants, on the 6th day of June 1839, including in the said sum, interest on the sum of £640 8s. from the said 6th day of June 1839, up to the 24th day of September 1841; and £753, being the price and value of thirty-three hogsheads of sugar, received by the said Defendants on account of the said Plaintiff, and destroyed when in the possession of the said Defendants, and unaccounted for by them to the said Plaintiff, with interest on the said sum of £1481 14s. 8d., from the said 24th day of September 1841, the date of the said verdict, until actual payment, and costs of suit."

Upon this Judgment, the Appellants brought a Writ of Error.

This writ recited that "Whereas in a statute made in our Provincial Parliament of Lower Canada, held at Quebec the 11th day of November, in the thirty-fourth year of the reign of his late Majesty George the Third, it was, amongst other things,

enacted, that wherever a Judgment appealed from should be founded on a verdict of a Jury, no other Appeal should be than an Appeal in Error, that the law only, and not the fact, may be drawn into question."

By this writ the proceedings in the cause were removed into the Court of Appeals at Quebec for Lower [121] Canada. In that Court the Appellants assigned errors as follows:—

"That no legal or sufficient Writ of *Venire Facias* for summoning a Jury, for the trial of the issues, raised between the parties, in the said cause was issued.

"That it did not appear by the record in the said cause, or by any legal or sufficient evidence, that a Writ of *Venire Facias* for summoning a Jury for the trial of the issues in the said cause was ever returned in the Court below, or that a Jury was ever sworn and empanelled for the trial of the said issues in the Court below, or that the trial of the said issues by a Jury was ever had in the Court below, or that a verdict of a Jury on the said issues was ever rendered in the Court below.

"That it does not appear by the record in the said cause, or by any legal or sufficient evidence, that the issues in the said cause joined by and between the said parties in the Court below, were ever tried by a Jury legally sworn and empanelled for that purpose.

"That no Jury was ever sworn or empanelled for the trial of the said issues in the said cause joined by and between the said parties in the Court below.

"That the Court below, in and by the said Judgment, hath awarded to the said Defendant in Error the sum of £1481 14s. 8d., current money of the Province of Canada, whereas the action of the said Defendant in Error ought, in and by the Judgment of the Court below, to have been dismissed with costs.

"That it appears by the record aforesaid, that the Judgment aforesaid was given for the said Defendant in Error, whereas, by the law of the land, Judgment ought to have been given for the said Plaintiffs in Error, and against the said Defendant in Error."

[122] The Joinder in Error by the Respondent was, that there was no error either in the record and proceedings, or in the rules, orders and judgments in the Court below, and more particularly in the Judgment rendered in the cause between the parties on the 2nd day of June 1842.

The Court of Appeals for Lower Canada gave Judgment, on the 20th January 1843, in favour of the Respondent, affirming the Judgment of the Court of King's Bench, Montreal, with costs.

Against that Judgment the present Appeal was brought; and the Appellants submitted that the Judgment was erroneous, for the following reasons:—

1st. Because by the finding of the Jury, in the aforesaid special verdict, it appeared that the thirty-three hogsheads of sugar were destroyed by an unusual rise of the waters of the river St. Lawrence, without any negligence on the part of the Appellants.

2nd. That the verdict did not show that the thirty-three hogsheads of sugar were stored in unsafe and improper buildings and warehouses, and there kept in violation of the instructions of the Plaintiff, as alleged by the Plaintiff in his replication to the first plea.

3rd. That the special verdict was not sufficient to warrant the judgment of the Court in favour of the Plaintiff.

The Respondent, on the contrary, contended that the Judgment ought to be affirmed, for the following reasons:—

1st. Because the Appellants, being, as commission merchants, agents for the Respondent, and his consignees for sale of sugar (an article liable to be destroyed by being wetted), deposited and kept the sugar in a warehouse which was, and which they knew to be, [123] exposed to inundation, whereby the sugar was destroyed.

2nd. Because the Appellants, who so deposited such an article in the basement story of a warehouse so exposed, did not, during the progress of an inundation, which began on the 20th of December and continued to rise till the 3rd of January following, remove the sugar from the warehouse or from the basement story.

3rd. Because, though that inundation appears to have been an unusual rise of water, and to an unprecedented height, it appears also that a similar event had there occurred the very year before, and to a height nearly as great.

4th. Because the Appellants, being justly alarmed at the former inundation, and having immediately sent advice thereof to the Respondent, as his agents, in the due course of business, the Respondent, on receiving such advice from them, had forthwith expressly instructed them that he considered the warehouse dangerous, and forbade any property of his to be kept there in future; which instructions of the Respondent were accepted by the Appellants before the sugar in question was either received by them or consigned by him.

Mr. Martin, Q.C., and Mr. Peacock, for the Appellants; and Mr. Bliss, and Mr. Robinson, for the Respondent.

They cited, and observed upon, *Coggs v. Bernard* (2 Ld. Ray. 909), [124] *Castle v. Hobbs* (4 Croke, Car. 22), *Witham v. Lewis* (2 Wil. 48, S.C. 6 Bro. P.C. 327), *Roscorla v. Thomas* (2 Gale and Dav. 508), *Goodall's Case* (5 Coke's Rep. 95), *Sanders v. Vanzeller* (4 Q.B. Rep. 260), *Story on Bailments*, 8.

Lord Brougham (June 21, 1845).—This case comes before us from the Court of intermediate Appeal and Error in Canada; and it seeks to have a Judgment reversed, there given upon an Appeal and Writ of Error, from the Court of King's Bench, in an action brought by the Respondent against the Appellants as bailees of sugars delivered to them by the Respondent, and destroyed by a flood of the river St. Lawrence. The ground of the action is the Appellant's negligence in keeping the sugars. And, first, we may consider the form of the pleadings, by which the claim of damages was stated, and resisted.

The declaration contained three counts, specially charging the Appellants, severally, with not duly keeping, not accounting for, and by their negligence occasioning the damage to the goods; the common counts, except those for goods sold and delivered, and on an account stated, were added; one, of course, being for money had and received to the use of the Plaintiff, and one for money lent and advanced by him. A plea, amounting to the general issue, was pleaded; and the replication, after traversing the matter of the plea, appears to make an addition to the matter of the declaration, for it avers that the Appellants (Defendants below) kept the sugars in a warehouse, or store, contrary to the Respondent's (Plaintiff's) instructions, and charges a violation of these instructions. It also uses language like that of a demurrer; nevertheless, it concludes to the country on the whole matter, and, therefore, we cannot doubt that, especially after a verdict, no objection can be taken as to the departure which Appellants (Defendants) might have demurred to, even if there were new matter pleaded by the replication. But, on the whole, and as the strict rules of pleading cannot, in this case, be enforced, we must consider this additional statement respecting the violation of instructions, as only a further specification of the charge of negligence in the declaration. That charge forms, in truth, the whole ground of the action, and the not following instructions may be justly considered as one circumstance, and a material circumstance, tending to show negligence in the case of the Plaintiff's goods. Nothing, therefore, arises on the pleadings; except this remark, very material to be kept in view, that there is no breach of contract charged; the action is not upon the contract; if it had been, then some damages must have been recoverable at all events, had the breach of the contract been proved, after proving, which is not even alleged, certainly not affirmed, in the special verdict, that the sugars had been accepted on the footing of the instructions, or in some other way that the Defendants (Appellants) had made themselves parties to these instructions, as to a contract.

Our attention is next required to the Judgment, which proceeds upon a special verdict. Now, upon this verdict some observations arise. There is no reason to hold, that the niceties of our pleadings are applicable to a proceeding in the North American colonies, which are under the French, and not the [126] English, law. Those rules may neither govern the pleadings, nor the verdict, nor the judgment; in short, we may assume that no part of the record is subject to them. Nevertheless, without descending to the particulars of our system, some things must of necessity belong to whatever proceeding involves the trial by jury. The matter of law, and the matter of fact, must be kept separate; without the severance of the two neigh-

bouring provinces, of Judge and Jury, the trial by Jury cannot, in any intelligible or consistent sense, be said to exist. So the nature of a special verdict, which flows immediately from that severance, that distinction of law and fact, of the two functions of Judge and Jury, must be the same wherever there is trial by jury. A special verdict must be a finding of the facts by the Jury, from which the Court is to pronounce its judgment on the law. The Jury should not leave the fact to the Court, or, stating the evidence, leave its result in point of fact to the Court; yet, in the present instance, the action being for negligence, the special verdict finds facts, and leaves the Court to say whether negligence has, or not, been proved. Negligence is a question of fact, not of law, and should have been disposed of by the Jury.

But the objection to this Judgment proceeding on this verdict lies deeper, and is more fatal. If the whole matter had been, that the Court and the Jury together had drawn an inference, which the facts appeared clearly to support, and if the inference was applicable to the claims, or suit, of the Plaintiff, we might have found no great difficulty in supporting the Judgment, although the functions of the Court, and of the Jury, had not been kept conveniently distinct, and either had encroached on those of the other. But [127] it does not appear at all clear, but the contrary, that there were either averments or findings in the Plaintiff's favour, sufficient to support his contention, and justify the sentence which he has obtained below. He has not alleged that the sugars were accepted by the Defendants on the footing of the Plaintiff's instructions, or that the compliance with these instructions was a condition upon which the bailment was made. He has not shaped his case in this form at all. He has only alleged negligence in keeping the sugars, and given among the proofs of this, nay, as the only proof, that a direction, as it were a notice, or a warning, had, a year and a half before the bailment, been given by the Plaintiff. The letter of May, containing many other matters, refers to a flood that the Defendants had described, in a letter of the preceding month of April, to which this of May was an answer, and says, that he desires no goods of his should remain in so dangerous a situation for the future, that is, by being stored in the river warehouse. Those who maintain that the neglect of this direction makes the Defendant answerable in damages for the loss sustained, also maintain, nor can they escape from the necessity of maintaining, that whatever might have caused the loss—lightning, earthquake, fire, or hurricane—which should have swept away half the stores in Montreal, the Defendants would equally have been answerable. I say they cannot escape from this, because there is no proof nor indeed any averment, certainly no finding, that the warehouse was unsafe, or was unsuited to keeping goods, or was in any way an unusual place for their custody. On the contrary, it is a fact in the cause, and so found, that the place was one usually so employed, and that the flood was one of unusual occurrence. The neglect, [128] therefore, consists in the disobeying or not observing the directions. It must follow, if that alone is sufficient to support the counts and the Judgment, that this nonfeasance or neglect was of itself sufficient to cast on the Defendants the responsibility for what happened.

It is not at all impossible, that further proof might have been afforded to show, on the one hand, how far the party was negligent, or, on the other, how far the custody was necessarily such as they gave to the goods. Very possibly, there was no other stowage for them; and, had he not put them there, he must have re-shipped them to the bailor. Very possibly, between the date of the letter, and of the bailment, other dealings between the parties had taken place, either by the Defendants storing the Plaintiff's goods in the forbidden warehouse, or by their carefully avoiding this course. Of all these things we are left uninformed. The result is, that we are required to cast upon Defendants the loss of the goods, because, eighteen months before, they had been told not to place them where they did place them. This deviation is not of itself sufficient to make them amenable. It is not of itself sufficient to constitute the negligence which is the ground of Plaintiff's claim, and the gist of the action. It is a circumstance, even a material one, but not sufficient to dispose of the case. The position never can be maintained, that all departure from a bailor's instructions is such neglect as gives him a right to cast the loss of his goods on the bailee. It never can be maintained that every such departure is such neglect as will give a right to recover damages. The loss must be

more immediately connected with the departure from the instructions; the holding them so liable must extend to the case of their having stored [129] the goods in the very best and safest warehouse in the town. Now, they might make themselves liable to loss even in this case, but only if they accepted the goods upon the condition; and this, in the present case, is neither proved by the evidence, nor averred by the pleadings, nor found by the verdict.

A sum of £728 11s. 10d. is found by the Judgment to be due from the Defendants, independent of the damages, assessed at £753. Though there is no count, for an account stated, in the declaration, and though this sum is stated in the Judgment to be for a balance of account, we think it may justly be given, as there are money counts; and this may be referred to a balance remaining unpaid, as the sums in one or other of these counts. The Judgment below, therefore, must stand for that sum, and *quoad* the damages assigned, a *venire de novo* is to be awarded, reversing, *pro tanto*, the Judgment below, but with leave to both parties to amend pleadings as they may be advised, and without prejudice to any question, except so far as adjuges a *venire de novo*.

[S.C. 9 Jur. 907. As to (i.) burden of proof, cf. *Hammack v. White*, 1862, 11 C.B. (N.S.) 588; *Cox v. Burrridge*, 1863, 13 C.B. (N.S.) 430; *Welfare v. London and Brighton Railway Co.*, 1869, L.R. 4 Q.B. 693; Story on *Bailments*, 9th ed. s. 410; (ii.) liberty to amend pleadings (5 Moo. P.C. 129), see *Ditcher v. Denison*, 1857, 11 Moo. P.C. 346.]

[130] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT CALCUTTA.

ANNE CASEMENT,—*Appellant*: JOHN WILLIAMSON FULTON and Wife,—*Respondents* * [June 17, 18, and 19, 1845].

The 7th section of the Indian Will Act, No. 25, of 1838, enacts "that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

A Testator signed his Will, in the presence of a witness, who subscribed it in his presence; and some time afterwards, upon the arrival of another witness, the Testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the Will. The second witness then subscribed the Will, and the first witness, in his and the Testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at Calcutta), that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the Testator, and jointly subscribe it in his presence.

Whether the rules of the Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of Appeal, apply to an Ecclesiastical cause in the Supreme Court at Calcutta, so as to deprive a party of the Charter right to appeal within six months from the decree, etc. *Quare?* [5 Moo. P.C. 142].

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

This was an Appeal from a sentence of the Supreme Court of Judicature at Calcutta, on the Eccle-[131]-siastical side, which rejected an allegation propounding an instrument, bearing date the 14th of April 1844, as the Will of Sir William Casement, the deceased in the cause, late a Major-General in the service of the East India Company.

The allegation was filed by the Appellant, as the widow of the deceased, and his executrix, named in the instrument in question, propounding it for proof, in solemn form of law.

The Respondents were the next of kin of the deceased.

The allegation pleaded in substance, that the deceased, while resident at Cassipore, in the suburbs of Calcutta, was, on the 14th of April 1844, attacked by cholera (whereof he afterwards died), and being sensible of the dangerous character of his malady, expressed to Lieutenant-Colonel Francis Spencer Hawkins, his intention to leave the whole of his property to his wife, and requested him to lose no time in getting a Will prepared for him to execute, to carry out that intention, and nominating the Appellant Executrix, and Mr. Browne Roberts and Colonel Hawkins Executors, of such Will. That, pursuant to this request, Colonel Hawkins had a Will prepared at Calcutta, and on his return with the same to Cassipore, he found Mr. Nicholson, one of the medical attendants, in attendance upon the Testator, and immediately, in his presence, produced the Will in question to the Testator, who, after reading it over attentively, signed his name at the foot or end of the Will as he lay on his couch, and Mr. Nicholson, in whose sight and presence it had been signed, then took the Will and subscribed his name to it, at a table in the adjoining room, which stood in sight of the Testator's couch, there being no [132] other convenience for writing in the same room: and Colonel Hawkins and Mr. Nicholson then awaited the return of Mr. Garden from Calcutta, in order to complete the execution of the Will. That upon Mr. Garden's arrival at the Testator's, about two hours afterwards, Colonel Hawkins, who, with Mr. Nicholson, had continued in attendance upon the Testator, produced the Will, and requested him to attest the Testator's signature to it: Mr. Garden, however, required that the signature should be first acknowledged by the Testator in his presence, and the three went up to the couch where the Testator was still lying, when the Testator acknowledged his signature to the Will, and the same to be his Will, in the presence of Mr. Nicholson and Mr. Garden, present at the same time; after which, Mr. Garden subscribed precisely in the same manner, and under the same circumstances, as Mr. Nicholson had done: and Mr. Nicholson at the same time, having already signed and subscribed the Will, thought it unnecessary to subscribe the same again, but acknowledged his subscription, then already at the foot of the Will, both in Mr. Garden's presence, and in that of the Testator. The allegation further pleaded that the Testator was a British subject, and, at the time of his death, was domiciled at Fort William—that he left goods within the province of Bengal, and within the jurisdiction of the Court.

A caveat against granting probate of the alleged Will having been entered on the part of the Respondents, they filed an exceptive allegation to the admission of the above allegation or condidit, protesting against the same for its nullity, its inapplicability, its indefinitiveness, its obscurity, and its insufficiency.

The admissibility of the allegation was argued before [133] Sir Lawrence Peel, Chief Justice, Sir John Peter Grant, and Sir Henry Wilmot Seton, on the 1st of June 1844, and the Court took time to consider its judgment until the 8th of July following, on which day Sir Lawrence Peel delivered the unanimous judgment of the Court, admitting the exceptive allegation, and rejecting the allegation propounding the Will, and decreeing the costs of both parties to be paid out of the estate.

On the 13th of August, the Proctor of the Appellant dissented from the sentence of the 8th July, and protested of the nullity of the same, and of a grievance, and of appealing from the same within the time allowed by the Charter (*a*). On the 12th of December, the Appellant filed her Petition for leave to appeal from the rejection of the allegation.

(*a*) This part of the Charter is as follows:—"And we do hereby also reserve to

This Petition was opposed on behalf of the Respondents, and the matter argued before Sir Lawrence Peel, who gave judgment, allowing the appeal.

The Appeal now came on for hearing, when the Respondents' counsel took a preliminary objection to its competency; contending that, by the true construction [134] of the Charter of Justice, which gave the Supreme Court ecclesiastical jurisdiction in Bengal, and directed that the Court should be governed by the same rules as the Ecclesiastical Courts in the Diocese of London, and the general principles and practice of the Ecclesiastical Courts which prevailed in India, at the time when the Appellant filed her Petition for leave to Appeal, namely, on the 12th of December 1844, her right of appeal was lost and pre-empted, no appeal having been asserted within six days. Voet (Pandeet. Lib. 49, Tit. 4; *Alciatus de Appellatione*, s. 9 and 29), *Greg v. Greg* (2 Add. 276), *Schultes v. Hodgson* (1 Add. 105), *Lloyd v. Poole* (3 Hagg. Ecc. Rep. 477), *The Ship Clifton* (3 Knapp, P.C. Cases, 375). That the latter part of the Charter giving six months' time to appeal from all original judgments, decrees, or decretal or other rules or orders of the Court, did not take away the general Ecclesiastical law, which required that an appeal must be asserted within six days, and that, therefore, the Supreme Court could not legally grant leave to appeal after that time.

Their Lordships did not call upon the Appellant's counsel in support of the right to appeal, and reserved their opinion upon the objection until they gave judgment in the cause.

Sir Thomas Wilde, Mr. F. Kelly, Q.C., Dr. Addams, and Mr. Kirwan, for the Appellant; and Mr. Turner, Q.C., Dr. Harding, and Mr. Malins, for the Respondents.

The question was, whether the requisites of the 7th section of the Indian Will Act, No. 25 of 1838 (a), [135] had been sufficiently complied with, the Will being signed by the Testator in the presence of only one witness, though acknowledged by him in the presence of two witnesses present at the same time, one of whom, having previously signed in the presence of the Testator, acknowledged his signature in the presence of the other witness, and both witnesses subscribed the Will in the presence of the Testator.

It was argued, that the acknowledgment of the first witness to his previous subscription was equivalent to re-subscription. That an important distinction existed between the 9th section of the English Will Act, 1 Vict., c. 26, and the 7th section of the Indian Will Act [No. 25 of 1838], inasmuch as the former Act required that the witnesses should attest and subscribe, whereas, in the latter, the word attest is omitted, and the witness only required to subscribe. *Moore v. King* (3 Curt.

ourselves, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble Petition of any person or persons aggrieved by a judgment, decree, or decretal or other order or rule of the said Supreme Court of Judicature at Fort William, in Bengal, to refuse or admit his, her, or their appeal therefrom, upon such terms and under such limitations, restrictions and regulations, as we or they shall think fit, and to reform, correct or vary such judgment, decree or orders, as to us or them shall seem meet. Provided always that no appeal shall be allowed by the said Supreme Court of Judicature at Fort William, in Bengal, unless the Petition for that purpose shall be preferred within six months from the day of pronouncing the judgment, decree or decretal order complained of, and unless the value of the matter in dispute shall exceed the sum of 1000 pagodas." [See now letters patent of 28th Dec. 1865, establishing the High Court of Calcutta, Art. 39 (Stat. R. and O. Rev. iv., 93); Code of Civ. Proc. (Act xiv. of 1882), ss. 595 *et seq.*; Act vii. of 1888].

(a) This section is a copy of the 9th section of the English Will Act, 1 Vict., chap. 26, with the omission of the words, "shall attest." It is as follows:—

"And it is hereby enacted, that no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

243). *In the goods of Byrd* (3 Curt. 117). *In the goods of Olding* (2 Curt. 865). *Cooper v. Bockett* (4 Moore's P.C. Cases, 419). *Holt v. Genge* (4 Moore's P.C. Cases, 265). *Hudson v. Parker* (1 Rob. Ecc. Rep. 14). That the words in the English Act [1 Vict. c. 26], "attest and subscribe," in the 9th section, were borrowed from the Statute of Frauds, and should receive [136] the same construction. *Harrison v. Elwin* (3 Q.B. Rep. 117). That by the Statute of Frauds, the validity of a subsequent acknowledgment by subscribing witnesses, of their signatures, was recognised in *Risley v. Temple* (Skinner, 107). *Grayson v. Atkinson* (2 Ves. Sen. 454). *White v. The Trustees of the British Museum* (6 Bing. 310). *Gryle v. Gryle* (2 Atk. 177). *Peate v. Ougly* (Comyns' Rep. 196). *Ellis v. Smith* (1 Ves. Jun. 11). *Burdett v. Spilsbury* (6 Man. and Gr. 386). *Price v. Smith* (Willes Rep. 1). *Trimmer v. Jackson* (cited 4 Burn. Ecc. L. 102-182). Roberts, on Frauds, ch. 5, p. 304-308, and Sir E. Ryan's Charge, Simoul's Rules, 2 vol. App. 51, were also referred to.

Lord Brougham (July 25, 1845).—General Sir William Casement being stricken with cholera, made his last Will in writing, on the 16th of April 1844, in his house, near Calcutta, and signed it, in the presence of Simon Nicholson, his medical attendant, who also subscribed it in his presence, being in the next room, a few yards from the General, and in full view of him. Another witness, Alexander Garden, was brought, some hours after, to the apartment, and signed it, after hearing the General acknowledge his subscription, and Mr. Nicholson, his fellow witness, also acknowledged his subscription. Moreover, both the General and Mr. Nicholson were present when Mr. Garden subscribed. The question, and the only question arising from the *factum*, is, whether or not the subscription of the two witnesses was so made, as to comply with the statutory requisition, the signature of Nicholson being not made, but only acknowledged, in Garden's presence: and the determination of this [137] question must be governed of course by the construction put upon the statutory provision, which we may take to be that of the Indian Will Act [No. 25 of 1838], s. 7, copied from the English Act, 1 Vict., c. 26, s. 9, with the single omission of the words "attest and" after "shall," and before "subscribe." We are clearly of opinion, that this alteration can make no difference in the construction, and, therefore, we are to deal with the question, as if it had arisen upon the English Statute. The Court below held the execution not to be a sufficient compliance with the Act, and we have come, after a very full hearing of the case, and after deliberately considering the whole question, to the same conclusion, without any doubt or hesitation.

The Statute of Frauds (29 Car. II., c. 3, s. 5), requires the Will to be signed by the Testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been, that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things,—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act. But it is too late to raise any such objection; we may, nevertheless, observe, that the greatest Judges who have dealt with the subject have admitted the force of such considerations, and lamented the latitude given to the statutory provision by their predecessors, who first broke in upon its strictness. When Lord Hardwicke, in 1752, was first called upon to adopt this construction, he expressed that it had for a long while been [138] *verata questio*; but still he felt the weight of authority too great to adopt the course he manifestly inclined to. *Grayson v. Atkinson* (2 Ves. Sen. 454). Two years after, the point was more solemnly considered in *Ellis v. Smith* (1 Ves. Jun. 11), and adjudged by the same great lawyer, who then had the assistance of Sir J. Strange, M. R., Willes, C. J., and Parker, C. B. All these eminent men expressed their opinion, that had the question been open, and that they were called upon now to decide it for the first time, they should not have held acknowledgments sufficient. But they found, on examining the cases, that the case was not *res integra*. It had been held, that acknowledgment was equivalent to signing, by Lord Jefferys (Skinner, 227), by Trevor, C. J. (Com. 197), and by Lord King, in *Dormer v. Thurland* (2 P.W. 260); nor was there to be found any conflicting authority except the supposed *obiter dictum* of Lord Holt, in *Lee v. Libb* (Carth. 35-8), of

which Willes, C. J., said (1 Ves. Jun. 13), that "many things were ascribed to that great man, which, on examination, his Lordship had found never to have been said by him," and he adds, that "*obiter dicta*" were frequently "*nunquam dicta*." Their Lordships, therefore, all considered the matter as not "*res integra*" but "*res judicata*," and held that it was the safer and wiser course "*stare decisis*."

We are thus fully warranted in refusing to carry one step further, a construction which so great a weight of authority lamented, and showed to have been ill-advised in its inception, and we are left in no doubt how these eminent Judges would have dealt with the present attempt to extend the latitude already given. They never would have held, that a witness acknowledging his subscription in the presence of his fellow-witness [139] was equivalent to his signing in that fellow-witness's presence.

It is further to be observed, that the new Act expressly allows the acknowledgment of the Testator to be as good as the signature, adopting the construction put on the Statute of Frauds by judicial decision. But it says nothing of the witnesses acknowledging. This is a very strong argument in favour of rejecting the proposed extension; for surely, had the legislature meant to make acknowledgment equivalent to signing in both cases, the word acknowledge would have been repeated in connection with the attestation; which it is not.

Let us now see, then, if the other argument of the Appellants is better founded; that which denies the Statute to require a signature of both witnesses in each other's presence.

Here we must observe, that though the Act adopts the large construction, as regards acknowledgment, it imposes new requisitions, as to attestations. The Statute of Frauds did not require that the witnesses to the subscription of the Testator should be present at the same time. But the new Act does require this. The Testator shall sign in the presence of two or more witnesses, present at the same time; and no doubt this is a most wholesome addition, and one tending to secure the compliance with what was manifestly the intention of the legislature in the older Act; for, if one witness may be present one day, and another a different day, perhaps at an interval of years, how can we say that both attest the same fact, that important fact for which their presence is required—the capacity of the Testator? He might be sane one day and insane another; and thus his capacity would only be attested by a single witness, because his two different conditions would only have one witness each.

It is not, perhaps, so important that the witnesses should both sign in each other's presence; nevertheless, it is of importance, for it gives an additional security against fraud or mistake, the signature being an act—the acknowledgment only a word. But be the reason what it may, if the law has said that the witnesses must sign in each other's presence, we are bound; and there can be no reasonable doubt raised, that the words of the Act amount to this requisition—the Testator is to sign or acknowledge in the presence of the witnesses present at the same "time." He is not to sign or acknowledge before the witnesses present at different times. But here he has acknowledged before them, present at the same time. Then must the witnesses who subscribe be present at the same time! We think the words admit of no other construction, for it is "and such witnesses shall subscribe." Now this forms one sentence, with the preceding words, "present at the same time," and "such" must plainly be read,—such present witnesses, or such witnesses so being present at the same time. "Such" describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is their being present at the same time. Therefore, we cannot limit the meaning of the large word of reference, "such," to the mere names or persons of the witnesses: it must embrace what had just been said of their presence; it must mean "the witnesses, etc., present at the same time."

To be sure, a very short end would be made of this [141] controversy, were we to read the enactment as we are called upon to do in the argument, and, stopping short at the early part of the section, we were to suppose that "executed in manner hereinafter mentioned," refers only to the signing or acknowledging by the Testator, and not to the attestation of the witnesses. But so extraordinary a construction would also make a short end of the whole provision, and would dispense with the necessity of any witnesses at all, and of any subscription by witnesses, whether

in each other's presence or not; for the Statute very probably would be confined to the not executing by the Testator, and no further invalidity could possibly arise from any want of attestation. Nothing can be more hopeless than this argument. It is rested upon the supposed application of the word "execution" to the Testator's part alone; for they say that the Testator executes, the witnesses attest. But this is utterly untrue. The Testator does not execute; he makes and publishes. In truth, the word "execute" applies to a Deed, rather than to a Will, and occurs not at all in the 5th section of the Statute of Frauds. In the Statute of Wills, 32 Hen. VIII., and 34, 35 Hen. VIII., it occurs, but only as applied to other instruments than Wills; "other acts," as they are termed. It is certainly to be wished, that in framing Statutes, the same words should always be employed in the same sense, and that the introduction of new terms, in dealing with the same matter, should be avoided. Yet we cannot say that the word "execute" is used by the framers of this Act, in any other than a correct and technical sense. It is employed plainly to designate the whole operation, including both the signature or acknowledgment of the Testator, and the attestation of the sub-[142]-scribing witnesses, and it is not used at all to designate the Testator's part alone. The same use is made of the word in the great case already referred to, of *Ellis v. Smith*. Lord Hardwicke (1 Ves. Jun. 16) afterwards uses execution to mean the whole operation. The Master of the Rolls (*ib.* 14) uses it in the same sense. The Chief Justice and Chief Baron use it to designate the making and publishing. Nay, the learned persons who drew up the present Appellant's case, and who use this argument, have, in one page of their case, used the word in all its senses, both as designating the making and publishing by the Testator, and the whole act of making, publishing, and attesting. We, therefore, at once reject the argument, grounded upon this commentary on the word "executed."

Agreeing altogether, as we do, with the Court below, on the merits, we are relieved from the necessity of deciding the preliminary question, whether or not the proceedings of the Appellant pre-empt this Appeal. Had we differed with the Judgment below, we must have disposed of that question. It now becomes wholly unnecessary so to do. We only say that our present Judgment does not in any way touch it, and that we certainly give no opinion at variance with the law and practice of Doctors' Commons on this head. The question does not come before us.

The Judgment appealed from must be affirmed. The costs of all parties, both here and below, to come out of the estate.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, a.; tit. WILL, IV. EXECUTION, b. *Attestation*. S.C. 3 Moo. Ind. App. 395. On point (i.) as to acknowledgment of past signature, see *In the goods of Maddock*, 1874, 3 P. and D. 170; and cf. *Kevil v. Lynch*, 1874, I.R. 9 Eq. 249; (ii.) as to attesting witnesses, subscribing in each other's presence, see *Sullivan v. Sullivan*, 1879, 3 L.R. Ir. 299, and authorities collected there.]

[143] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

HENRY FAWCETT and Others.—*Appellants*: the JUSTICES of BOMBAY,—*Respondents* * [June 19 and 20, 1845].

By Stat. 33, Geo. III., c. 52, s. 158, (for, among other things, making better provisions for the good order and government of the towns of Calcutta, Madras and Bombay,) assessments are directed to be made on the owners or occupiers

* Present: Members of the Judicial Committee,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

of houses, buildings and grounds, "according to the true and real annual values thereof."

Upon a rate made in pursuance of this Statute, the Quarter Sessions at Bombay assessed the annual value of a cotton pressing factory, having fixed machinery, upon the gross receipts, after making an allowance of ten per cent. for tenants' profits. Held by the Judicial Committee, reversing the Order of Confirmation of the Sessions, by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 and 7 Wm. IV., c. 96) that the building might reasonably be expected to be let for, to a yearly tenant.

On appeal by the Appellants, against a rate, made on the 13th of February 1844, for cleansing, watching and repairing the streets in Bombay, under the Statute 33 Geo. III., c. 52, s. 158,* upon certain warehouses and [144] premises situate at Bombay, and known as the Apollo Cotton Screw and Presses, belonging to the Appellants. The rate was appealed against, to the Quarter Sessions of Bombay, and was by that Court confirmed, subject to the opinion of the Supreme Court of Judicature at Bombay, upon the following special case.

By articles of agreement made and entered into on the 16th of August 1837, certain European, Mahomedan, Hindoo and Parsee merchants of Bombay, to the number of thirty, interested in the cotton trade, [145] agreed to carry on in co-partnership together at Bombay, from the 1st day of May 1836, until the 30th day of April 1856, the business of storing, screwing, and packing cotton, in certain houses and premises known as the Apollo Cotton Screws, under the name, style and firm

* "That it shall and may be lawful to and for the Justices of the Peace within or for the Presidencies of Fort William, Fort Saint George, and Bombay, respectively, for the time being, or the major part of them, from time to time assembled at their General or Quarter Sessions, to appoint scavengers for cleansing the streets of the said towns or factories of Calcutta, Madras, and Bombay, respectively, and to nominate and appoint such persons as they shall think fit in that behalf, and also to order the watching and repairing of the streets therein, as they respectively shall judge necessary, and for the purpose of defraying the expenses thereof from time to time to make an equal assessment or assessments, on the owners or occupiers of houses, buildings, and grounds, in the said towns or factories respectively, according to the true and real annual values thereof, so that the whole of such assessment or assessments shall not exceed in any one year the proportion of one-twentieth part of the gross annual values thereof respectively, unless any higher rate of assessment shall in the judgment of the Governor-General in Council, or Governor in Council, of the said respective Presidencies, become essentially necessary for the cleansing, watching, or repairing thereof, in which case the said Governor-General in Council, or Governor in Council, shall, and may, on any such urgent occasion, by Order in Council, authorise a further assessment, not exceeding in any one year the half part of the amount of the ordinary annual assessment hereinbefore limited; and that it shall be thereupon lawful for the said justices to make a further assessment according to the tenor of such order, and not otherwise, or in any other manner; and that all and every such assessment or assessments shall, and may, from time to time, be levied and collected by such person or persons, and in such manner, as the said justices, by their order in session, shall direct and appoint in that behalf, and the money thereby raised shall be employed and disposed of, according to the orders and directions of the said justices in session respectively, for and towards the repairing, watching, and cleansing the said streets, and for no other purpose; and that the said assessments being allowed, under the hands and seals of such justices, or any two or more of them, shall and may be levied by warrant under their hands and seals, or the hands and seals of any two of them, by distress and sale of the goods and chattels of any person or persons not paying the same within eight days after demand, rendering the overplus (if any be) to the same person or persons, the necessary charges of making, keeping, and selling such distress or distresses being first deducted."

of the Cotton Press Company, and undertook to promote, by all possible lawful ways and means, the interest of the said co-partnership, and agreed, that should any member of the said co-partnership employ any other cotton screw or screws, than those belonging to the said Apollo Cotton Press Company, without previously assigning a satisfactory reason to the managing committee of the co-partnership, such member should not only forfeit his dividend or dividends for the year, but a fine of one thousand rupees for each share in the co-partnership, held by such member, should be levied.

Under the above agreement, which is in full force and operation, the Company are now in the occupation, as owners, of two large warehouses, situate respectively in Marine and Apollo streets within the Fort Walls of Bombay. In those warehouses, extensive and powerful machinery is erected and supported by strong masonry, and sunk in and affixed to the soil, by means of which cotton is compressed and packed into bales ready for shipment and exportation.

The purchase-money of the above buildings amounted to two lakhs of rupees; the cost of paying and erecting the machinery therein, amounted altogether to the sum of eight lakhs of rupees.

By the aid of cotton press machinery, a bale of cotton, standing from four to four and a half feet high, when brought to the warehouse, is reduced to two feet, and then packed and corded very strongly, ready for measurement and shipment.

[146] No impressed cotton is exported from Bombay.

There are four other cotton screws existing, and in operation in Bombay.

The motive power in all these screws is applied by men using capstan bars, as in a ship, but in the presses of the Company, although the motive power is the same, and applied in the same manner as in their own and the other screws, less human labour is required, owing to the peculiar nature of the machinery.

The average total number of bales of cotton, annually prepared for exportation, at the several presses and screws in Bombay, amounts to about four hundred and fifty thousand.

Of this number, one hundred thousand bales, or two-ninths, belong to the members of the Company individually, and are prepared at their presses; of the remaining bales, two hundred thousand at the least are also pressed at the Apollo presses.

A rupee and a half is charged, as well at the cotton presses and screws of the Company, as at the private screws, for compressing and packing a bale of cotton.

No other charge is made, or fee received by the Company or owners of the other screws.

	Rupees.
The gross receipts of the Company during the year immediately preceding the assessment were	450,000
The expenses of management, office, establishment, etc., keeping the property in repair, insurance, taxes payable to Government, including an allowance of ten per cent. on the gross receipts for tenants' profits, were	150,000
Leaving a net residue of Rupees	300,000

[147] The cotton presses or screws in the island of Bombay, have not, previously to the present rate, been assessed, as improving the value of the buildings in which they have been erected and worked.

The rate which has been imposed by the Justices, under the provisions of the 33rd Geo. III., c. 52, sec. 158, has been confirmed on two principles: First, That the true and real annual value of the warehouses and premises, on which the Company carry on their business, is to be estimated according to the rent at which the premises might reasonably be expected to let for a year, to a tenant enjoying all the profits and advantages which accrue to the Company, from the pressing of their own cotton under the terms of their partnership agreement: and that such rent must be assumed, for the purposes of the rate, to be the gross receipts of the Company, derived from pressing and packing cotton (whether belonging to the Members of the Company or not), or otherwise for the use of their warehouses, minus the actual expenditure incurred in the management and conduct of the busi-

ness, repairs to the machinery and building, insurance, taxes payable to Government, and other outgoings, and a reasonable allowance for tenants' profits.

Secondly, That in estimating, for the purposes of the rate, the true and real annual value of the premises, by the rent at which they might reasonably be supposed to let to a tenant from year to year, not entitled to the advantages enjoyed by the Company, under the terms of their partnership contract, the Justices must assume such rent to be the present gross receipts of the Company, less the disbursements, above mentioned, and reasonable allowance for tenants' [148] profits; for as the aggregate quantity of cotton annually exported from Bombay, must be divided amongst the five, and only cotton presses and screws, now existing, and in operation, the quantity prepared at one press or screw for exportation, cannot be diminished, without an increased resort to the others; and as the Justices could not assume, for the purposes of the assessment, a probable increase of employment in the other presses, so they cannot assume that there would be a decrease in the resort to the presses in question, if in the hands of a tenant. The Company, on the other hand, contend, that as the cotton presses in this island have never hitherto been assessed, as improving the value of the buildings in which they have been worked, they ought not now to be assessed on such improved value; but that even if they are liable to be assessed, on such improved value, that under the 15th section of the 33rd Geo. III., c. 52, the thing to be rated is the building, according to the true and real annual value thereof; that, therefore, the building, with the fixtures annexed, is the thing to be rated, and that its value is what it would let for, exclusively of the profits of the trade carried on therein, or that rent which the Company would be forced to pay, if the premises were not their own property; and that to rate the building upon the principle contended for by the Respondents, would be, not to rate the building, but to rate the industry and capital of the owners, and the quantity of labour and current expenditure which they laid out on the premises, and that inasmuch as it is impossible (otherwise than from the rate hereinbefore stated) to obtain evidence of what particular sum the buildings, with the machinery therein, would produce, if let at an annual rent, to persons [149] willing to carry on the same business therein, that the rent at which the buildings and machinery might reasonably be supposed to produce, would be a sum equal to the amount of six pounds per cent. on that sum which the erection of the building and machinery therein have actually cost the Proprietors.

Money invested in the erection of dwelling-houses, or warehouses, or buildings of any nature, in Bombay, does not produce, on the average, under any circumstances, more than six per cent. per annum, net profits.

The questions for the opinion of the Court are, whether the Company are rateable upon the principles on which the assessment has been made, or on either of those contended for by the Company, that is to say,—

First, Whether the machinery and presses have been properly taken into consideration, in estimating the assessible value of the premises, either as being part of the buildings and warehouses themselves, or as improving the annual value thereof, or whether the rate should not have been confined to the buildings alone.

Second, Whether, assuming the Court to adopt the affirmative of the first part of the above question, the rateable annual value of the premises is that at which they might be supposed to let to a tenant for a year, entitled to the advantages which the Company now enjoy under their partnership contract; and, if so, whether that rent has been properly estimated, by taking the gross receipts of the Company, minus the expenditure above mentioned.

Third, Assuming the Court to adopt the affirmative of the first, and the negative of the second question, the question then will be, whether the rent at which the premises might be supposed to let to a tenant for [150] a year, not entitled to the advantages now enjoyed by the Company under their partnership contract, should not be estimated by the gross receipts of the Company, less the deductions before mentioned, according to the second principles on which the rate was confirmed; or, whether it should be estimated by the amount, exclusive of the profits of the trade carried on therein, of that rent which the Company would be forced to pay if the premises were not their own property; whether the rateable annual value of the premises should be estimated by the gross receipts of the Company, less the

deductions before mentioned, on either of the principles on which the rate has proceeded.

Whether the amount, for which the premises in question are liable to be rated, is not that sum exclusive of the profits of the trade carried on therein, which the Company would be forced to pay for them if the premises were not their own property; and whether, for the purposes of this rate, that sum must not be assumed to be rupees sixty thousand, or six per cent. on that sum which the buildings and the machinery therein have cost the Company.

If the Court should adopt either of the principles on which the rate has been made, the rate is to be confirmed; should the Court be of opinion that the machinery has been improperly taken into consideration, in estimating the assessible value of the premises, the rate is to be reduced to rupees nine hundred.

And if the Court should be of opinion, that although the machinery has been properly included, the rent at which the whole would let to a tenant should be assumed at six per cent. interest, on the amount of capital laid out in the purchase and erection of the [151] buildings and machinery, then the rate is to be reduced to rupees three thousand.

On the 13th of September 1844, the Special Case was argued before the Judges of the Supreme Court, who thereupon ordered and adjudged, that the said rate should be confirmed, with costs.

The Appellants, having obtained leave of the Supreme Court, brought the present Appeal.

Mr. F. Kelly, Q.C., Mr. S. Wortley, Q.C., and Sir John Bayley, for the Appellants.—The Judgment of the Court cannot be maintained. The principle upon which the warehouses and premises have been rated and assessed, is not the true or correct principle. It proceeds upon the authority of *The Queen v. The London and South Western Railway Company* (1 Q.B. Rep. 558). *The Queen v. The Grand Junction Railway Company* (4 Q.B. Rep. 18). Neither of these cases apply. They relate to poor rates, and have arisen upon railways. The present is a highway rate, founded upon the Statute 33 Geo. III., c. 52. The 52nd section directs the rate to be made on houses, buildings, and grounds, according to the true and real annual value thereof; there is nothing which can include trade, profits, fixtures, or stock in trade, yet the rate imposed is a rate upon the profits, derived by the Appellants from the use and application of the machinery, employed by them within the warehouse and buildings. It is a rate upon the skill, industry, and personal exertions, used and employed by the Appellants, in the exercising and carrying on of the business and the profits of the Appellants, especially derived therefrom. The rate has been made [152] and assessed in the absence of any legal or sufficient proof of the rateable value, even if made on a correct principle. The proper allowances and deductions from the gross annual value of the premises have not been made, which are essential to ascertain the legal rateable value. The Court at Bombay made a deduction of ten per cent. on the gross receipts for tenants' profits, which is not a sufficient or proper allowance. In the cases of *The Queen v. The London and South Western Railway Company* [1 Q.B. 558], and *The Queen v. The Grand Junction Railway Company* [4 Q.B. 18], twenty per cent. was deducted. They have made no allowance for outlay of capital, or for a fund to restore. All they have done is to take for granted that the income and profits of the Appellants amounts to £30,000 a-year, and upon that they found the rate. The statute, 33 Geo. III., c. 52, s. 158, says, "annual value," and this must mean as between landlord or tenant, such as would be obtained by letting. This construction is fortified by section 1, chap. 96, of the 6th and 7th Will. IV., which declares it to be the net annual value, that is, the rent at which the same might reasonably be expected to let from year to year, free from the usual tenants' charges. There is, moreover, a fatal objection; it does not sufficiently appear from the case, upon what property the rate is imposed.

Their Lordships stopped the Appellants' Counsel, and called upon

Mr. Serjeant Channell, and Mr. O. Malley, for the Respondents, to support the order of Sessions.

It sufficiently appears from the case, what the principle was upon which the rating was made. It was [153] made expressly upon the premises called the Apollo Press, and this description is correct. A toll-keeper is rated for the amount the tolls

would procure. No difficulty can occur as to the identity of the property rated.—[Lord Brougham: Can you maintain that the value of the machinery is the value of the profits obtained by its working?]—The rate is ascertained at that sum which a tenant might give with this advantage.—[Lord Brougham: The case does not show that. It shows that the Court has measured the value by the profits made by the Appellants.]—The Sessions did the same in *The Queen v. The London and South Western Railway Company* (1 Q.B. Rep. 558). This is not a case in which a building is used for the mere purpose of carrying on a trade in it, but it is by the building and machinery (which is part of the freehold) that the trade is carried on and the profit made. It has been established in *Rex v. Hogg* (1 Term Rep. 721), *Rex v. Justices of St. Nicholas* (Cald. 262; S.C. cited 1 Term Rep. 723), *Rex v. Bradford* (4 M. and S. 317), *Rex v. Lord Granville* (9 B. and C. 188), *The Queen v. The Cambridge Gas Company* (8 Add. and El. 73), that in estimating the annual value of buildings, all engines and machinery fixed to the freehold are to be taken into consideration, as enhancing the value. And the proper criterion of value is the amount of rent which it may be supposed that a tenant would give for the premises, with a view to use them for the same purpose as that for which the Appellants employ them. *The King v. The Inhabitants of Lower Mitton* (9 B. and C. 810). Such tenant being assumed to be in the same circumstances, and possessed of the same advantages for so using them, [154] as the Appellants were: and this is the principle upon which the Courts have proceeded in *The Queen v. The London and South Western Railway Company* [1 Q.B. 558], and *The Queen v. The Grand Junction Railway Company* [1 Q.B. 18], and by which this case must be governed. The peculiar advantage the Appellants enjoy in the monopoly of trade, is a fair ground for rating them at the gross receipts.

Their Lordships, without calling upon the Appellants' Counsel to reply, delivered judgment, by

The Vice-Chancellor Knight Bruce.—The question is, whether the Appellants, who by the rate in dispute, made the 13th of February 1834, have been assessed upon no less an amount than 300,000 rupees, have by it, under the Statute 33 Geo. III., c. 52, sec. 158, been duly and equally assessed as owners or occupiers of houses, buildings, or ground, according to their true and real annual value. Unless they have been so assessed by the rate, the Appeal is well founded. It has been argued for the Appellants, that it does not sufficiently appear from the materials before their Lordships, what the rate is, or of what house or buildings, ground or grounds, the Appellants have been assessed as owners or occupiers. If there is any foundation for this argument, or any importance in the point, it is in the Appellants' favour. But their Lordships, not wishing to rest their decision upon it, declined giving any opinion upon the question. Assuming this objection to be out of the way—that is, assuming the rate to appear, and the Appellants to have been rated in respect only of rateable property, occupied by them, of a specified and properly ascertained nature—their Lordships think it manifest that the assessment, as far as the Appel-[155]-lants are concerned, was on a wrong principle. If it was legitimate, or proper, to introduce into the calculation of the true and real annual value of the property in question, or to refer, for the purpose of the calculation, to the elements or circumstances which the Justices and the Court of Quarter Sessions have introduced, or referred to, other and further elements, or circumstances, ought also to have been referred to, or introduced, which do not appear to have been so introduced, and which cannot be assumed to have been so introduced.

An examination of the case of *The Queen v. The Grand Junction Railway* (4 Q.B. Rep. 18), in comparison with the case which was before the Supreme Court in the present instance, will sufficiently explain their Lordships' meaning in this respect. But are even the principles on which the decision in the Court of Queen's Bench proceeded, applicable to such a case as the present? Their Lordships are not satisfied that they are. If of two manufacturers in the same street, carrying on precisely the same kind of business, by means of fixed machinery, one makes an annual profit of £2000 per annum, the other an annual profit of only £1000 per annum, that circumstance, if the respective buildings and machinery do not materially differ in size, description, extent, or quality, cannot render the one

liable to be assessed at a higher rate than the other. The greater or less degree of success with which a trade or manufacture is conducted, in a warehouse, or manufactory, or other building, having or not having fixed machinery, depends on many and various contingencies and circumstances, of a nature foreign to the mere capabilities of the warehouse, manufactory, or building, and cannot [156] form a just ingredient, in any calculation, of its true and real annual value.

The test or definition, afforded by section 1, of the Statute 6 and 7 Will. IV., c. 96, in these words—"The net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let, from year to year, free from all usual tenants' rates and taxes, and to the commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent,"—seems to their Lordships substantially a correct test or definition, to be applied under the Statute 33 Geo. III., c. 52. And they are satisfied that the application of the test or definition, to that which has been done in the present instance, is destructive of the rate. They are satisfied that no such principle was followed or kept in view. There must be judgment, therefore, for the Appellants, and the costs which they were ordered to pay below, if paid, must be refunded.

Their Lordships desire it particularly to be understood, that they do not mean to express or intimate any opinion against the rateability of fixed machinery, or any opinion, how this case might have stood, if the business which at the warehouses, and with the machinery in question, the Appellants carry on, could not be carried on at Bombay, by any other persons than themselves, or in any other warehouse or place there, than the warehouse in question, or by any machinery, except the very identical machinery used by them.

[S. 158 of 33 Geo. III., c. 52 was repealed by the S.L.R. 1887; S.C. 3 Moo. Ind. App. 408. As to test of rateable value, see *Reg. v. School Board for London*, 1886, 17 Q.B.D. 738; *London County Council v. Erith and West Ham* (1893), A.C. 562; *Farnham Flint, Gravel and Sand Co. v. Farnham Union* (1901), 1 K.B. 272.]

[157]

ON PETITION FROM JERSEY.

In re WHITFIELD * [June 20, 1845].

The Royal Court of Jersey having, on the remission of a *Doleance* and Petition, pronounced certain arrests and seizures made by the Attorney-General of the Island, for alleged frauds against the revenue laws of the Island, to have been illegal; the original Petitioner brought a Petition and remonstrance in the Royal Court of Jersey, against the Attorney-General, for damages thereby occasioned. The Attorney-General, upon being called upon to answer this remonstrance, summoned the Lieutenant-Governor, the Bailiff and Jurats, (who were the Commissioners of the *impôt* duties,) alleging that, as he had acted under their advice, they were proper parties to the suit, and they were joined with him as parties to the suit. The Bailiff and Jurats constituted the Royal Court. The Attorney-General then put in a plea, that the Court, thus constituted, was incompetent, as being interested in, and parties to, the suit, whereupon the Court declared itself incompetent to adjudicate in the cause. The Petitioner took no further steps for two years, when he presented a *Doleance* and Petition, to the Queen in Council, and obtained a summons for the Attorney-General to appear. The Attorney-General petitioned to dismiss such summons,—First, Because no leave to Appeal had

* Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, and the Right Hon. T. Pemberton Leigh.

been granted by the Court below; Secondly, Because the other parties to the suit ought to have been summoned; and Thirdly, Because if it was an Appeal, it had not been duly prosecuted within three months from the date of the Act of the Court. Held by the Judicial Committee that such objections were fatal, and the summons discharged.

This was a Petition presented by the Attorney-General of the Island of Jersey, praying the discharge of a summons served upon him to appear and answer the *Doleance* and Petition of George Whitfield.

Upon the hearing of the original Petition brought by Whitfield (reported, 2 Moore's P.C. Cases, 269, 273), it was ordered by the Judicial Committee, that the Petitioner's case should be remitted, and re-heard before the full Royal Court of Jersey; which was accordingly done, when that Court annulled the arrests and sequestrations issued against the Petitioner's [158] property, and discharged him from the actions and proceedings brought against him by the Attorney-General.

The Petitioner having sustained great damage by the above proceedings, thus declared illegal and void, presented, on the 10th of December 1842, his remonstrance to the Royal Court, in which, after setting forth the circumstances of the case, he prayed that Thomas Le Breton, the Attorney-General of Jersey, should be ordered to appear before the Court; and that in his presence, and after proof being given of the facts therein alleged, should be condemned (but without prejudice to his right against any other parties whom it might concern) to pay to the Petitioner the sum of £15,000 sterling, by way of damages, for the losses, expenses, and other injuries to which he had been exposed by the illegal measures adopted towards him.

The Attorney-General, upon being called upon to answer this remonstrance, summoned Sir Edward Gibbs, Knt., Lieutenant-Governor of the Island, Sir John De Veuille, Knt., Bailiff, and Charles Le Maistre, and eleven others, the Jurats of the Royal Court of Jersey, (the Lieutenant-Governor, the Bailiff and Jurats being the Administrators of the *Impôts* of the Island,) and also the said Sir John De Veuille, as President of the States of Jersey, and Francis Godfrey, Esquire, as Treasurer thereof, actioning them to guarantee him, and hold him harmless in the suit, on the allegation that he had acted throughout by their instructions. These parties were accordingly joined, as parties to the suit.

The Attorney-General then put in a plea, that the Court was incompetent to proceed, inasmuch as the persons composing that Court were personally in-[159]-terested, and parties to the cause. In consequence of this plea, Whitfield applied that the cause should be referred to the decision of Her Majesty in Council; whereupon the Royal Court, on the 20th of September 1843, by an *Acte* or Judgment, decided as follows:—"Considering that the cause is not one relating to the revenues of the *Impôt*—that it is instituted with a view to recover damages from the Defendant, without prejudice to his claim of guarantee on whom it might concern—and seeing that the Defendant has called in the Bailiff and Jurats, in their capacity of Administrators of *Impôts*, to afford him such guarantee and acquittal, and that they are thereby made parties to the cause, the Court has declared itself incompetent."

No step was taken by Whitfield, till the 6th of January 1845, when he presented a *Doleance* and Petition to Her Majesty in Council, praying that the same might be heard before Her Privy Council, and that the necessary summons might be issued to Thomas Le Breton, Esquire, in the said Island, and all other necessary and proper parties, to appear and answer his case, and that the said Thomas Le Breton, the Attorney-General, might be condemned to pay to him the sum of £15,000, by way of damages for losses, expenses, etc.

On the 7th of January 1845, a summons was issued from the Council Office, upon the Attorney-General of Jersey, to appear and answer the above *Doleance* and Petition within forty days.

The Attorney-General of Jersey having been duly served, on the 23rd of April 1845 presented a petition, in which he set forth that the summons was irregular, inasmuch as it was issued *ex parte*, no leave to appeal having been first granted; because it did not [160] call upon the other Defendants or parties to the suit, to appear, but only upon the petitioner, one of such parties; and because such sum-

mons was issued after the right of appeal, if any, had been lost by lapse of time; and he prayed that the summons might be set aside, with costs.

Mr. Busk, for the Petitioner, now moved to dismiss.

There are three objections: First, the Appeal was not entered within three months, nor prosecuted within a year. Secondly, Whitfield's Petition is described as a *Doleance* and Petition of Appeal; these two characters cannot be united. A Petition of Appeal is a prosecution of a suit between the parties to it; but a *Doleance* is a complaint against the Judge (Jersey Code of 1771, Art. 163). Thirdly, the only parties to the *Doleance* and Petition are Whitfield and the Attorney-General of Jersey, whereas, in the Court below, the suit was between other parties, who are not included in the Petition, or made parties to the Appeal.

Mr. Martin, Q.C., *contra*.

Lord Brougham.—Their Lordships cannot understand how this case can be referred to them. Whitfield calls upon us to give him £15,000 damages, his case being, that in consequence of the Royal Court at Jersey pronouncing itself incompetent he has no relief. We have no power to issue a mandamus to that Court, to do certain acts: that was decided, in the case of the Assignees of Manning (3 Moore's P.C. Cases, 154) (and see *In re Muir*, 3 Moore's P.C. Cases, 150). [161] Again, if this be a *Doleance*, there cannot be an Appeal also. Upon the whole, we think that the objections to the summons must be sustained, and that the summons being irregular, must be dismissed.

By an Order in Council, it was ordered that the summons, bearing date the 7th of January 1845, be rescinded.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, a. c. o. See notes to *In re Whitfield*, 1838, 2 Moo. P.C. 269, 273; and *In re Bailiff and Jurats of Royal Court of Guernsey*, 1844, 5 Moo. P.C. 65.]

ON APPEAL FROM THE ISLAND OF MALTA.

EMMANUELA CAMILLERI.—*Appellant*: EVANGELISTA FLERI.—*Respondent**
[June 20, 1845].

By the Order in Council, of the 18th of December 1834 [1824], for regulating Appeals from the Island of Malta, to the King in Council, an Appeal is allowed only where the sum, or matter, at issue, involves, directly or indirectly, any Civil rights amounting to, or of the value of £1000. But

Leave to Appeal was granted by the Judicial Committee, from the decrees of the Courts of the First and Second Instance of the Island, which directed the children to be removed from the guardianship of their mother.

This was a Petition for leave to Appeal from the Judgments of the Courts, of the First and Second Instance, of the Island of Malta, pronounced in the following circumstances. The Petitioner, Emmanuela Camilleri, in the year 1835, being a native of Malta, and of the Roman Catholic persuasion, intermarried with her first husband, Dr. Publio Fleri, who died in the year 1839, leaving her surviving, with two chil-[162]-dren. The Petitioner afterwards became converted to Protestantism, and in the year 1843, after publication of banns, she was married in the Protestant Cathedral Church of Gibraltar, to Michel Angelo Camilleri, who had formerly been a Roman Catholic priest, but had publicly, and before his marriage, abjured the Romish Church, and joined the communion of the Protestant Church of England.

After the marriage, the petitioner and the two children by the former marriage

* Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

returned to Malta. In the month of February 1844, proceedings were instituted in the Court of First Instance at Malta, by Evangelista Fleri, the mother of the Petitioner's first husband, with a view to deprive the Petitioner of the custody of the children of that marriage, and to place them under the guardianship of their grandmother, who founded her claim upon the assertion, that the Petitioner was not lawfully married at Gibraltar, but was living in a state of concubinage, and that she was therefore an improper person to have charge of her children.

On the 6th of February 1844, the Court of First Instance made a Decree, directing that the two children should, within four days, be delivered up by the Petitioner to Evangelista Fleri. The Petitioner appealed from this Decree, to the Royal Court of the Second Instance at Malta, which Court, on the 17th of June 1844, made its Decree, confirming the Decree of the Court of First Instance. The Petitioner then presented a Petition for leave to appeal from these Orders to Her Majesty in Council, which the Royal Court granted. A question was, however, raised whether, under the terms of the Order [163] in Council of the 18th of December 1831, providing for appeals to Her Majesty in Council (*a*), the Decree of the Royal Court of Second Instance formed a subject of an ordinary appeal to Her Majesty, as it did not involve property of the value of £1000 sterling, but merely affected a question of civil rights; in consequence of which the present Petition was presented. The Petition, after setting forth the above facts, prayed that, if the Decree of the Royal Court of the Second Instance did not form the object of an ordinary appeal, pursuant to the Order in Council of the 18th day of December 1834 [1824], that Her Majesty would [164] take the Petition into consideration, and make such Order as the exigency and peculiarity of the case required.

Mr. Edmund F. Moore, in support of the Petition—Referred to *D'Orliac v. D'Orliac* (4 Moore's P.C. Cases, 374); *Shire v. Shire* (*ante*, p. 81).

Lord Brougham.—This Petition comes within the principle laid down in the cases cited. Leave to appeal, therefore, will be granted, on giving the usual security (the Appeal was not prosecuted, in consequence of the death of the Appellant).

[Mews' Dig. tit. COLONY. III. APPEALS TO PRIVY COUNCIL. 3. *Leave to appeal*. See note to *Retemeyer v. Obermüller*, 1837, 2 Moo. P.C., at p. 125, as to appeal by special leave in civil cases. Appeals from Malta to the Privy Council are still regulated by the O. in C. of 18th Dec. 1824—not 1834, as stated in the text—(Stat. R. and O., 1899, p. 1688).]

(*a*) The material part of this Order in Council is as follows:—

"Whereas by the law at present in force in the Isle of Malta and its dependencies, no provision exists, for permitting and regulating Appeals from the Supreme Council of Justice in and for the said Island and its dependencies, and it is necessary to make provision for regulating such Appeals, it is therefore hereby ordered by His Majesty, by and with the advice of his Privy Council,—

"That any person being a party or parties concerned in any cause, suit or action depending, or which may hereafter be commenced or brought, in or before the Supreme Council of Justice in the said Island of Malta, may appeal to His Majesty, his heirs and successors, in his or their Privy Council, in such manner, within such time, and subject to such rules, regulations, and limitations as are hereinafter mentioned.

"In case any judgment, decree, order, or sentence, for or in respect of any sum or matter at issue, above the amount or value of £1000 sterling, or in case such judgment, decree, order, or sentence shall involve, directly or indirectly, any claim, demand, or question to or respecting property, or any civil rights amounting to, or of the value of, £1000 sterling; the person or persons feeling aggrieved by any such judgment, decree, order, or sentence, of the Supreme Council of Justice, may, within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Supreme Council of Justice, by Petition, for leave to appeal therefrom to His Majesty, his heirs, and successors, in his or their Privy Council" [Stat. R. and O., 1899, p. 1688].

[165] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE
AT BOMBAY.

FRAM-JEE COWAS-JEE,—*Appellant*; WILLIAM THOMPSON and HENRY
KEBBEL,—*Respondents* * [June 20 and 21, 1845].

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser.

This was an Appeal from a Judgment for the Respondents, given on the 25th of November 1844, in an action of trover, on the plea side of the Supreme Court of Judicature at Bombay, in which the Respon-[166]-dents were the Plaintiffs, and the Appellant was the Defendant.

The Respondents, during the time to which the transactions in question relate, were merchants of the City of London, carrying on business in co-partnership as lead and tin plate merchants, under the firm and style of William Thompson and Co. And the Appellant, during the same period, was a merchant and Parsee inhabitant of Bombay, and the sole owner of the ship *Buckinghamshire*.

The declaration was filed on the 23rd of June 1842, and alleged that the Respondents "were possessed as of their own property," of certain pigs of lead therein mentioned, and that the Appellant afterwards converted them to his own use.

The Appellant, confessing the conversion, pleaded to the declaration, one plea only, denying that the pigs of lead were the property of the Respondents in manner and form as they had alleged, and thereupon issue was joined.

Commissions for the examination of witnesses on behalf of the Appellant and Respondents were issued, and evidence taken in London, under them.

On the 25th day of June 1844, the action came on to be tried before the Supreme Court.

The case proved on behalf of the Respondents, was, that on the 12th of November 1841, while the ship *Buckinghamshire* was lying in the East India Docks in the Port of London, in charge of William Stockley, the ship's husband and manager, employed in that capacity on behalf of the Appellant, the Respondents employed their lighterman, to put on board the pigs of lead in question, in two parcels; and he [167] received from the Respondents, with the lead, two forms of receipt, therein set forth, written wholly by their clerk. That on the same day the pigs of lead were duly put on board the *Buckinghamshire* by the Respondents' lighterman, who handed in the forms of receipt for the mate's signature, and that he then duly signed them, and returned them to the lighterman, who, two or three days afterwards, returned them so signed to his employers, the Respondents, and that from that time, and during all the time of the transactions in question, those receipts for the lead were retained by, and had remained in the possession of, the Respondents. It was

* Present: Members of the Judicial Committee—Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, and the Right Hon. T. Pemberton Leigh. Privy Councillors: Assessors—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

also proved on behalf of the Respondents, that the firm of Messrs. Boggs, Taylor, and Co. (who were the real shippers of the lead) became insolvent, and stopped payment on the 18th of December 1841; that on the 20th and 29th of December 1841, whilst the *Buckinghamshire* still lay in the East India Docks, with the lead on board, possession of the lead was duly demanded on behalf of the Respondents, with an offer to pay all freight due upon it, and all other reasonable charges attending the re-delivering of it, which offer was refused on behalf of the Appellant, and that a certain bill of exchange for £1218 0s. 8d., which had been accepted by Messrs. Boggs, Taylor, and Co., on account of the lead in question, remained in the hands of the Respondents unpaid, having been dishonoured by Messrs. Boggs, Taylor, and Co. when it fell due.

The case of the Appellant was, that on the 30th of October 1841, the Respondents contracted to sell to Messrs. Boggs, Taylor, and Co. 100 tons of British pig lead, "free on board, at £20 per ton, 6 months' accept-[168]-ance," "or 2½ per cent. discount, for cash," at the option of Messrs. Boggs, Taylor, and Co., and that the lead in question was shipped in pursuance of that contract. That on the 2nd of November 1841, Messrs. Boggs, Taylor, and Co. addressed a letter to Messrs. Daniel Dickenson and Co., requesting them to insure the lead in question, and to accept two bills of exchange, drawn on them by Messrs. Boggs, Taylor, and Co. for £1500 each, dated respectively the 29th of October 1841, and the 1st of November 1841, payable respectively six months after date, on the faith of Messrs. Boggs, Taylor, and Co. placing in their hands the lead in question, or the bills of lading relating thereto, with other lead and with copper of the value of £2000, which bills of exchange were accepted by Messrs. Daniel Dickenson and Co., on the 2nd of November 1841, and long before the shipment of the lead by the Respondents, and were handed over by them to Messrs. Boggs, Taylor, and Co., and paid when due. That the policies of insurance were effected, and that Messrs. Boggs, Taylor, and Co. were debited by Messrs. Daniel Dickenson and Co. with costs of such insurance. That on the 16th of November 1841, the captain of the *Buckinghamshire*, without requiring the delivery to him of the receipts for the lead in question, before referred to, signed four bills of lading of the lead in question, dated the 15th of November 1841, prepared by Messrs. Boggs, Taylor, and Co., describing it as shipped by Messrs. Boggs, Taylor, and Co., and to be delivered to Messrs. B. and A. Hormajee, or to their assigns, which bills of lading were afterwards endorsed by Messrs. Boggs, Taylor, and Co., in blank, and delivered by them to Messrs. Daniel Dickenson and Co. [169] That on the 26th of November 1841, Messrs. Boggs, Taylor, and Co., declining to pay for the lead in cash, accepted the dishonoured bill of exchange for £1218 0s. 8d. before mentioned, which was dated the 12th of November 1841, being the date of the shipment, and was drawn on them by the Respondents, and was accepted by Messrs. Boggs, Taylor, and Co., on account of the lead in question, and made payable six months after date. The Appellant also proved that, according to the usage and custom of merchants in London, where goods are sold to be delivered free on board a ship, it is part of the seller's duty, under the contract, to ship them, but that in such cases the buyer, at whose risk they are from the time of shipment, is considered to be the shipper—that where goods are sold on a contract, to be delivered free on board, to be paid for by bill, and are shipped on board, and a bill given, pursuant to the terms of the contract, it is the seller's duty, on receipt of the bill, to deliver up the mate's receipt (if any), to the buyer, and that the seller's retention of the mate's receipt, after such bill given and received by the seller, would give the seller no claim against the ship-owner or the broker, or the goods, and maintained that the possession by the Respondents, of the receipts for the lead, did not affect their property in it.

The Court, after considering the evidence, found that the pigs of lead were the property of the Respondents, as they alleged in their declaration, and thereupon judgment was given for the Respondents, from which the Appellant appealed.

Mr. F. Kelly, Q.C., Mr. S. Wortley, Q.C., and Sir John Bayley, for the Appellants.—[170] In this case, your Lordships sit as a jury as well as judges; you have to find a verdict upon the facts contained in the evidence taken under the Commission.—[Lord Brougham: We try all the Court below tried; we are not a Court of Error.]—The question to be decided is this; whether there was a complete and perfect delivery when the lead was put on board. If so, the *transitus* was at an end.

If it was not, the legal possession was undoubtedly in the sellers, and they could stop the goods. We submit that the *transitus* was completed by the shipment of the goods.—[Lord Brougham: Mr. Justice Le Blanc, in *Busk v. Davis* (2 M. and S. 403), clearly lays it down that if anything remains to be done, between the buyer and seller, the goods may be stopped.]—By the terms of the contract between the sellers and the purchasers, the latter agreed to purchase the lead in question, and to pay for it by cash or bill, at their election, when delivered to them free on board a ship, to be named by them. The sellers accordingly delivered the lead, by their direction, free on board the ship *Buckinghamshire*, and having done so, delivered an invoice, stating that they had so done; and having been apprised of the purchasers' election to pay by bill, drew a bill upon them for the price of the lead, which bill was accepted by the purchasers and delivered to the sellers, and thereby the transaction of sale and delivery was completed. The shipment was a complete delivery to the purchaser within the terms of the contract, and the right to stop, *in transitu*, did not exist after such delivery. The circumstances of the lead being shipped on account of the purchasers, distinguishes the case from *Craven v. [171] Ryder* (6 Taunt. 433), *Ruck v. Hatfield* (5 B. and Ald. 632), and *Thompson v. Trail* (6 B. and C. 36). In these cases the goods were shipped on account of the sellers. The taking the ship's husband's receipts was never intended, and did not operate in law, to control the right of possession or property in the lead, and its retention was accidental, and was alike devoid of such intention. It gave them no better title to the lead, than if they had delivered the mate's receipts to the purchasers, on receiving their bill in payment, the receipts being retained by them under circumstances which had no reference to the title. The Supreme Court has wholly disregarded the legal effect of the evidence given on the part of the Defendant, and has assigned to the Plaintiffs possession of the mate's receipts, an effect unwarranted by law, and the usage and custom of merchants. The object of the retention, was a question of intention for the Court to decide upon the evidence, and such evidence proved conclusively, that the sellers did not, after they received payment for the lead by bill, retain possession of the mate's receipts with the intention of continuing or retaining any property in, or control over, the lead. In the absence of any notice from the sellers to the Defendant or his agents, not to make out and deliver to the purchasers, bills of lading, the Defendant was bound to make out, sign, and deliver bills of lading to, and at the request of, the purchasers, to the holders of the bill of lading.

Serjeant Channell, and Mr. Peacock, for the Respondents.—[172] The lead must not be considered to have reached its journey's end. The shipment was not a complete delivery of it by the sellers to the purchasers, and on their insolvency they were entitled to stop the lead *in transitu*. *Miles v. Gorton* (2 Cr. and Mee. 504). No case has been cited against the sellers' right to stop *in transitu*. The signing of the receipts by the ship's husband was an admission, that the lead continued to be the property, and subject to the order, of the sellers, and they retained their property in the lead, as long as they retained the receipts for it. The goods were sold under a contract to deliver them on board the ship to be named by the purchaser. In such a case, the seller retains his property in the goods, by taking a receipt for them, from the person in charge of the ship; and so long as he keeps this receipt in his own hands, the shipment is not a complete delivery to the buyer. *Craven v. Ryder* (6 Taunt. 433). *Abbott on Shipping* (6 Edit. 469). He still retains his right, if the receipt be refused him at the time of shipment, and the master afterwards sign and deliver a bill of lading to the purchaser who becomes insolvent, after the departure of the ship. *Ruck v. Hatfield* (5 B. and Ald. 632). Neither did the signing of the bill of lading to the purchaser affect the sellers' right to stop the goods. *Thompson v. Trail* (6 B. and C. 36). The receipts were the proper evidence of the sellers' property in the lead; the signing, therefore, by the captain of the vessel, of the bills of lading, for the lead, without requiring the delivery of the receipts for it, did not pass the sellers' property in the lead from them to [173] third persons. In *Craven v. Ryder*, Chief Justice Gibbs, in giving judgment, says, "the person in possession of the lighterman's receipt, is the person entitled to the bill of lading, which ought to be given only to the holder of the receipt." No distinction exists in that case from the present, except in the form of the receipt. The receipt has never been parted with by the seller.

Lord Brougham (July 25).—Messrs. Boggs, Taylor and Co. bought of Messrs. Thompson and Co., in the city of London, 100 tons of British pig lead “free on board,” at £20 per ton, to be paid for by acceptances, at six months, upon delivery on board, or in cash at $2\frac{1}{2}$ per cent. discount; at the option of the sellers. The lead was delivered on board, the receipts taken by the lighterman, from the mate of the vessel, which vessel was chosen and indicated by Boggs, Taylor and Co., the purchasers. The sellers elected to be paid by acceptances at six months, which they immediately received from the purchasers, and the latter having failed soon after, both after they accepted the bill and after the master of the vessel had signed bills of lading. The question arose at Bombay, in an action of trover, by the Appellants, the dispute being, whether these goods were *in transitu*, so as to give Thompson and Co. a right of stoppage, or had reached their journey’s end, and were completely vested in the purchasers, Boggs and Co., and their assignees, under the bill of lading.

It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London, “free on board,” the cost of shipping them falls on the seller, [174] but the buyer is considered as the shipper. The argument of the Respondent and of the Court below, we must presume (having no note of the reasons for the judgment under Appeal), is, that the mate’s receipt was never given up by Thompson and Co., to Boggs, Taylor and Co., and that, therefore, the sale was not completed, the delivery was imperfect, something remained to be done, and the transaction was not finished, nor the *transitus* determined.

We are clearly of opinion, that the non-delivery of the receipt can operate nothing whatever, and on this plain ground, that Thompson and Co. ought to have delivered it up; it was their clear and bounden duty so to do; and it would be preposterous that they should avail themselves of their own wrong against the other party, whom they had injured. What possible right could they have to retain the receipt, which belonged to Boggs, Taylor and Co., as much as any chattel in their possession? It is admitted by one of the firm, in a conversation sworn to by a witness, and not in the least contradicted by any other evidence, or by his cross examination, that if the receipt had been asked for, it would have been given up. This was a matter of course. Either a mere oversight, or a fraud, must have caused its being retained, after the acceptance was taken on the delivery of the goods—which acceptance was a payment in substance; for a payment in cash would have been made had the sellers preferred to lose the two and a half per cent discount; therefore, they never can be heard, to set up the possession of the receipts against the purchaser of the goods. They were bound to give them up, in good conscience, and would have been compelled so to [175] do, had a bill in equity been filed against them, and all actions, inconsistent with the equities of the purchasers, would have been staid—or trover might have been maintained for the receipts, at law: therefore, the argument fails entirely, which is founded on the possession of them.

Indeed, numberless reasons occur to show, that no such doctrine can have any foundation as the one on which the Judgment below proceeded. The lighterman may, and generally does, take one receipt for all the goods he delivers, specifying each parcel. Then how can the complete delivery of each person’s goods, and their property vesting finally in him, depend on the possession of a document which only one of them can by possibility hold? But the best answer to the position contended for, and the best removal of it from the case, is the obvious consideration, that the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the ship owner or his captain and mate; and no receipt being necessary, no non-delivery of it can affect the proceeding. Suppose the lighterman took no receipt, or, taking it, dropt it into the water, or otherwise lost it, shall it be said that the delivery of the goods is the less complete, when the stipulated price has been paid, or an equivalent for it taken in an acceptance according to the contract?

Does not the taking that acceptance, which was by the contract only to be given by the purchaser on the delivery of the goods, and to be given for each parcel as delivered, at once show that the delivery was completed, that nothing remained to be done, that the [176] goods had reached their journey’s end, and that they were no longer *in transitu* to be stopt?

The cases and authorities resorted to, prove really nothing in favour of the Judgment. *Craven v. Ryder* (6 Taunt. 433) differs materially from the present case, in having an order from the sellers to the captain, "to receive the goods for and on account of the Plaintiffs" (the sellers), and in the receipt expressly stating, that they were received for and on account of the sellers; and it was proved that this form had been recently adopted, for the express purpose of giving the shipper a command over the goods, until the receipt should be given up for the bill of lading. It is true, Gibbs, C. J., says he should have held the same opinion had the receipt been in the old form; yet he says the change is a circumstance to be considered. Nor can we argue that it is otherwise, than an important distinction between that case and this. Dallas, J., who tried the cause, said, the jury were clear that the Plaintiff never had parted with the possession; so that he considered the fact of continuing possession as having been left to them. Moreover, there was evidence in the present case that by the custom of the trade, when goods were sold "free on board," the buyer is considered as the shipper, though the seller is to carry them for him to the vessel; and we know not if any such evidence was given in *Craven v. Ryder* [6 Taun. 433]. If that Judgment be understood to hold this evidence immaterial, then we are unable to concur with it.

In *Ruck v. Hatfield* (5 B. and Ald. 632), a receipt was tendered to the mate, who had the command, stating that the goods were shipped on account of the Plaintiff (the seller), but he refused to sign it, and delivered bills [177] of lading; and Abbott, Chief Justice, held that the Defendant ought to have signed the receipt so tendered, which would have been an acknowledgment, that the goods were delivered on account of the Plaintiff.

In *Thompson v. Trail* (6 B. and C. 36), there was no mention of the goods being received on account of the Plaintiff; but though this is alleged to have been deemed immaterial, the case in Banc turned entirely on the question whether or not there was evidence of a conversion.

Reliance was placed on a passage in Abbott on the Law of Shipping, Part IV. c. 10 (p. 469, 6 Ed.), in which the cases of *Ruck v. Hatfield* [5 B. and Ald. 632] and *Craven v. Ryder* [6 Taun. 433] are cited. But in another passage, of more distinctness, Part IV. c. 4 (p. 301), the learned author says, that the master should take care not to sign a bill of lading before he has had the receipt returned, else he may make himself responsible to the shipper and the holder of the receipt. But he goes on to say, how he may make himself responsible and in what event, in case the shipper has a legal right to have the goods delivered to his own order.

The question in all the cases between buyer and seller, which is the case here, is, whether, or not, anything remained to be done as between these two parties. The importance of keeping that in view, and always attending to this, whether the question arises between these two parties or between one of them, the seller, and some third party, is well stated by Le Blanc, J., in *Busk v. Davis* (2 M. and S. 403), and *Whitehouse v. Frost* (12 East, 621). In the present case, it is quite clear, that nothing whatever remained to be done, between the buyer and seller, unless it be, that the former ought most certainly to have delivered up the mate's [178] receipt, which he wrongfully, or by oversight, kept possession of, without the shadow of a right to it; and whether it be wrong or error, he is not the party to take advantage of this.

The Judgment below must be reversed. The costs below, if any have been paid by the Defendant (Appellant), must be returned to him, and the Plaintiff (Respondent) must pay the costs of the suit below.

[Mews' Dig. tit. SALE OF GOODS: G. RIGHTS OF UNPAID VENDOR; 2. *Stoppage in Transitu*; e. ii. *Delivery to Carrier*; tit. SHIPPING A. XVI.; STOPPAGE IN TRANSITU; 6. *Transitus at an end*. S.C. 3 Moo.; Ind. App. 422. On point (i.) as to stoppage *in transitu*, considered in *Schotsmans v. Lancashire and Yorkshire Ry. Co.*, 1867, L.R. 2 Ch. 339; distinguished in *Berndtson v. Strang*, 1867, L.R. 4 Eq. 492; and see Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), ss. 39-46; Indian Contract Act, (Act ix. of 1872), ss. 99-106; (ii.) mate's receipts, see *Hothusing v. Laing*, 1873, L.R. 17 Eq. 92; Factor's Act, 1889 (52 and 53 Vict. c. 45), s. 1 (4); (iii.) as to "Free on board" (5 Moo. P.C. 173) see *Brown v. Hare*, 1858, 27 L.J. Ex. at p. 377; *Stock v. Inglis*, 1884, 12 Q.B.D. at p. 573; affirmed, 10 A.C. 263.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

JOHN THOMAS EDWARD FLINT,—*Appellant*; THOMAS WALKER and ARCHIBALD WALKER,—*Respondents* * [July 18, 1845; Dec. 9, 1847].

F., and three others, W. D., F. D., and J. D., purchased from J. a herd of cattle, in the following shares: F. one third, W. D., F. D., and J. D., two thirds between them. At the time of the purchase, F. and W. D. wrote a letter to W. and Co., which, after stating the purchase, and that they had given their promissory notes for the purchase-money, at one and two years date, proceeded thus:—"We request you to endorse these Bills for the satisfaction of Mr. J., for which endorsement we will allow you the usual commission of £2 10s. per cent.; and will, for your security, place at your unreserved disposal, the whole of the herd in question, and its increase; trusting, however, that our recommendation of allowing such part of it to be disposed of, as will cover the amount of your endorsements, and confiding to J. D., acting under your instructions from us, to remit you all the proceeds as they arise, will meet with your satisfaction." W. and Co. assented to this arrangement, endorsed the notes, and handed them over to J. At the same time F. and W. D. wrote a further letter to W. and Co., as follows:—"In consequence of your complying with our request, to endorse our bills for the purchase of J.'s herd, we hereby make over the said herd to you, requesting you to give J. D. instructions how to dispose of the herd, and remit you the proceeds, until by such remittances your endorsement is covered." W. and Co. in no way interfered with the sale of the cattle, nor was any part of the proceeds of the sale ever handed to them, and the herd was lost. Upon a Bill filed by F. against W. and Co. seeking to make them liable, as trustees, for the loss; Held by the Judicial Committee, affirming the Decree of the Supreme Court of New South Wales, that, under the above agreement, W. and Co. could not be considered as having been in possession of the cattle, as mortgagees, or as equitable assignees, and that the letter operated only as a collateral security, and that they were not liable in equity to account for the loss [5 Moo. P.C. 200].

The Bill, besides seeking to make the Defendants liable to account, for a particular transaction, prayed for a general account. No general account, however, was asked for in the Court below. Upon the Judicial Committee, affirming the Decree of the Court below, deciding against the liability of the Defendants as to the particular transaction, they refused to decree a general account, as it had not been asked for at the hearing in the Courts below [5 Moo. P.C. 201].

The Charter of Justice of New South Wales, of the 13th of October 1823, (made in pursuance of the powers conferred by the 4th Geo. IV., c. 96.) gave a right of Appeal, from the Court of Appeals in the Colony, to the King in Council, where the subject at issue involved the sum of £2000 sterling. The 4th Geo. IV., c. 96, being about to expire, the 9th Geo. IV., c. 83, was passed, in which no provision was made for the continuance of the Court of Appeals; but power was given to His Majesty, by Charter, Orders in Council, or Letters Patent, to make rules for allowing Appeals from the Supreme Court of the Colony. No new Charter, Order in Council, or Letters Patent, issued under this Act. In such circumstances, the Judges in New South Wales held that they had no jurisdiction to allow an Appeal from the Supreme Court to Her Majesty in Council: the Judicial Committee, upon Special Petition, under their general jurisdiction, advised Her Majesty to admit such Appeal [5 Moo. P.C. 193].

In the month of March 1840, the Respondents, Thomas and Archibald Walker,

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

of Sydney, in New South Wales, together with William Walker, of the [180] City of London, carried on business in co-partnership as merchants, at Sydney, under the firm of William Walker and Co. The Appellant, John Thomas Edward Flint, (who was, at that time, the Commander of a vessel called the *Alfred* staying at Sydney,) had embarked in several speculations and adventures in New South Wales, and had invested money on mortgage, and also in the purchase of lands at Port-Philip. Being about to proceed from the Colony to England, he executed a general power of attorney to the Respon-[181]-dents, Thomas and Archibald Walker, authorising them, during his absence, to lease or sell his lands, and perform other acts for him, therein particularly specified and mentioned.

On the 9th of March, in the same year, the Appellant, and one William Hampden Dutton, applied to the firm of Walker and Co., to become sureties for them, in respect of a joint speculation, which had been entered into by them, and Frederick Dutton, and James Monckton Darlot, for the purchase, on their joint account, from one John Jobbins, of a large herd of cattle at Port Philip, for the sum of £7900.

This proposal being reduced into writing, and signed by the Appellant and Dutton, was sent in the form of a letter, and was as follows:—

“Messrs. William Walker and Co.

“Sydney, March 9, 1840.

“Gentlemen,—We have, in conjunction with Mr. Frederick Dutton and Mr James Monckton Darlot, purchased from Mr. John Jobbins, a general herd of cattle, the shares in which are to be taken by us in the following proportions; viz.

J. T. E. Flint	One third share.
W. H. Dutton	} Two thirds between them;
F. H. Dutton	
J. M. Darlot	

and have given our promissory notes for the same, due 13th April 1841, and 13th April 1842, for the respective sums of £3300 and £3600. We request you to endorse these bills for the satisfaction of Mr. Jobbins; for which endorsement we will allow you the usual commission of $2\frac{1}{2}$ per cent., and will, for your security, place at your unreserved disposal the whole of the herd in question, and its increase; trusting, [182] however, that our recommendation of allowing such part of it to be disposed of as will cover the amount of your endorsements, and confiding such disposal to Mr. Darlot, acting under instructions from us to remit you all the proceeds as they arise, will meet with your sanction.—We are, gentlemen, your obedient servants, W. H. Dutton, John T. E. Flint.”

This request was assented to by Walker and Co., who, on the 12th of March 1840, wrote on the same sheet of paper as the letter of the 9th of March 1840 was written on, their assent, as follows:—

“Gentlemen,—We assent to the arrangements proposed on the other side.—We are, gentlemen, yours obediently, William Walker and Co.”

“To Messrs W. H. Dutton and J. T. E. Flint.”

On the same 12th of March, a further letter was written on the same sheet of paper, and signed by W. H. Dutton and the Appellant, which was as follows:—

“Messrs. Walker and Co.—Gentlemen,—In consequence of your complying with our request on the other side, to endorse our bills for the purchase of Mr. Jobbins’ herd, we hereby make over the said herd to you (consisting of 1400 head, more or less, exclusive of about 300 calves, and branded N-J No. 2), requesting you to give Mr. Darlot instructions how to dispose of the herd, and remit you the proceeds, until by such remittances your endorsement is covered. Be pleased to hand over the promissory notes to Mr. Jobbins.—We are, gentlemen, your obedient servants, W. H. Dutton, John T. E. Flint.”

On the same day, two promissory notes for £3300 and £3600 were, in pursuance of the letter of the 9th of March, endorsed by Walker and Co., as sureties [183] for the Appellant and W. H. Dutton, and the same were delivered by Walker and Co. to John Jobbins, in respect of the purchase-money of the herd of cattle; who acknowledged their receipt by a memorandum as follows:—

“Gentlemen,—I have to acknowledge the receipt from you of two promissory notes, £3300 due 13th of April 1841, and £3600 due 13th of April 1842, by William

Hampden Dutton and J. T. E. Flint, in your favour, and endorsed by you, being the amount of a purchase of cattle made by those gentlemen.—I am, your obedient servant, John Jobbins.”

“Messrs. Walker and Co.”

On the 6th of March 1841, Walker and Co. sent the following letter to James Monckton Darlot :—

“Sydney, 6th March 1841.

“Dear Sir,—Mr. Jobbins has just been with us, and reminds us of the promissory note due to him on the 13th of April (next month). This bill bears our endorsement; and I now write to urge you to be sure to remit in time for its retirement; that we may not be put to the inconvenience of having to take it up.

“You are aware that we address you on the subject, on the ground that all the cattle for which it was given, were made over to us by Captain Flint and Mr. Dutton, on the 12th of March 1840; and, as a part of the agreement on the subject, they were left in your charge, to make such sales as were necessary to provide for the bills as they became due. This you have no doubt duly attended to; and it is only, therefore, as a matter of greater precaution, that we remind you of the matter.

“Trusting that no disappointment may possibly [184] occur, we are, yours faithfully, William Walker and Co.”

Darlot did not comply with this application, or make any remittance to the firm of Walker and Co. The promissory note for £3300 became due on the 13th of April 1841, and was dishonoured by the Appellant and William Hampden Dutton, as the makers thereof; and Walker and Co., as the endorsers and sureties, were compelled to pay and take up the same.

On the 13th of April 1842, the other promissory note for £3600 became due, and was dishonoured by the Appellant and Dutton, the makers thereof; and Walker and Co., as the endorsers and sureties, were also compelled to pay and take it up.

On the 12th of July 1843, Walker and Co. brought an action in the Colony against the Appellant, to recover from him the amount paid by them, upon the two promissory notes, and the interest thereof; and they obtained judgment against the Appellant.

In order to prevent this judgment being enforced against him, the Appellant filed a bill of complaint in the Supreme Court of New South Wales, against Thomas Walker, Archibald Walker, and also against William Walker, and William Hampden Dutton, when they should come within the jurisdiction of the Supreme Court; the Bill, after stating to the effect hereinbefore stated, charged, that although the power of attorney was executed to two only of the firm of Walker and Co., yet that, in fact, the firm were employed by and acted as the general agents of the Appellant during his absence, and that they made no distinction as to their agency; and the whole course of their dealings on behalf of the Appellant, whether osten-[185]sibly under the said power or not, was really as if the firm was therein named; and that the firm mixed up their receipts on behalf of the Appellant with the receipts under the power, in such a manner as to annul any distinction between their acts and the acts of the two members of the firm, who were named in the power of attorney. And the bill further charged, that the real nature of the aforesaid transaction between the Appellant and Walker and Co. was, and that it was the true intent and meaning of the parties thereto, that Walker and Co. were, by the specific appropriation of the herd of cattle, to have the promissory notes, when mature, met; and that they were trustees for the benefit of the makers of the notes, to sell the herd, or so much thereof as was necessary to provide for the promissory notes; and that, in fact, the Appellant and William Hampden Dutton surrendered and gave up to Walker and Co., as such trustees, the absolute and unfettered disposal of the herd, and full power to receive the proceeds thereof, and relinquish to them all right and title to interfere therein, until such trust was satisfied, and the promissory notes paid. And it was further charged, that it was not until they had accepted such trust, and the cattle had been delivered and placed at their disposal, that Walker and Co. were authorized to hand over the said promissory notes to the vendor; and that the trust, power or authority of Walker and Co. to sell and dispose of the cattle was amply sufficient, and that it was accepted and taken by them as sufficient, without any subsequent request for further power; and the bill

further charged to the effect, that it was the duty of Walker and Co., not only under the terms of the arrangement, but also on the footing of their being the agents nominated by [186] the Appellant, during his absence from Sydney, to look after and protect his interests, and to take all such active steps and measures as were necessary for that purpose, and to prevent any loss accruing to the Appellant, and especially to give the necessary directions to J. M. Darlot, how he was to dispose of the cattle, and to remit them the proceeds, as they undertook and agreed to do; and that if they had given such instructions, ample funds would have been provided in good time to meet the promissory notes. And the bill further charged, that Walker and Co. had fraudulently neglected their duty, and suffered Dutton and Darlot to make away with the cattle and the proceeds. And the bill further charged, that Walker and Co. were positively and wilfully negligent in the discharge of their duty as such trustees, and as the agents of the Appellant, in respect of the sale of the herd of cattle, and that, by reason thereof, the funds so specifically appropriated for payment of the promissory notes had become wasted, and wholly lost to the Appellant; and that, as between the Appellant and Walker and Co., the loss ought to be borne by them. And the bill prayed that Walker and Co. might be decreed to account with the Appellant for all monies, and other effects, of or belonging to the Appellant or his estate, received by them, or in their custody, possession, or power, and for or in respect of their dealings, transactions, and intromissions therewith, or in respect thereof; and that in taking such accounts, Walker and Co. might be debited, not only with their actual receipts, but with all monies, goods, chattels, and effects which, but for their own wilful default or neglect, they could or might have received; and that in taking such accounts, it might be declared that Walker and Co. were not entitled to debit the [187] Appellant with payments, if any made by them, for, or on account of, the said two promissory notes; and that Walker and Co. might be restrained from issuing or levying execution upon the judgment obtained upon the promissory notes so endorsed by them; and from further proceedings in or under the action at law, against the Appellant, his lands, goods, chattels, or effects, for the recovery of the amount of the notes and judgment, and that such execution might be perpetually stayed as against the Appellant; and that Walker and Co. might be decreed to make good to the Appellant all such losses as had occurred by or through their own wilful neglect or default; and that they might be decreed to pay over the amount thereof to the Appellant, together with the balance which might be found due to him on the taking of the accounts, without any deduction, on account, or for or in respect of their endorsement of the two promissory notes, or the judgment obtained thereon; and that all necessary directions might be given, and accounts taken, and inquiries made, for effectuating the several purposes aforesaid, as the Court should think fit, and for further and general relief.

The Respondents, Thomas Walker and Archibald Walker, put in their answer to the bill, and thereby stated, that the Appellant being, in the month of March 1840, on the point of departing for England, did, by deed poll, under his hand and seal, authorise and confirm Thomas Walker and Archibald Walker, and not the firm of Walker and Co., to act for him during his absence from the Colony, in the manner in the deed poll provided; and they admitted that they were then, and still were, with William Walker, trading under the firm of Walker and Co., but they [188] stated that William Walker had nothing to do with the deed poll. And they denied that the Appellant, and Dutton, did, upon the receipt of the Respondents' assent, of the 12th of March 1840, sign or deliver an assignment or transfer of the herd of cattle; but that Dutton and the Appellant, by the letter of the same date, purported to make over to them, for their security, a herd consisting of 1400 head, exclusive of about 300 calves; but the Respondents insisted that the cattle were not placed in the disposal of the firm of Walker and Co.; and further, that at the times when the letters were written, the Appellant, and Dutton, were not in possession of the herd. And they further denied that it was agreed that they should have the entire control of the cattle, or should send the proper or requisite directions to Darlot, for sale of the herd of cattle, or such part thereof as it might be necessary to sell for the purpose of covering their endorsements, or that they had any power to sell the herd, or any part thereof, or that it was in any way understood or agreed, between the Appellant and Walker and Co., that the cattle were to furnish the

monies to meet the promissory notes, inasmuch as the cattle were merely to form a collateral security to Walker and Co.; and they denied that it was the duty of the firm of Walker and Co. to have sold the herd of cattle to meet the promissory notes. And they admitted that Walker and Co. did not give any instructions to Darlot, or any one else, respecting the disposal of the cattle, and that they did not direct anything whatever to be done with the cattle, for the purpose of providing for the payment of the promissory notes.

The Appellant replied, and the cause being at issue, came on for hearing before Sir James Dowling, the [189] Chief Justice of the Supreme Court, on the 5th, 7th, and 8th days of December 1843, and by the decree thereupon made, bearing date the 16th of December 1843, it was declared, that Thomas Walker, Archibald Walker, and William Walker, were, under and by virtue of the agreement and assignment, in the pleadings mentioned, trustees of the herd of cattle thereby assigned for the Plaintiff, John Thomas Edward Flint, and the Defendant, William Hampden Dutton, upon trust for the sale thereof; and it was ordered and decreed that it should be referred to the Master, to take an account of all sums of money received by the Defendants, Thomas Walker, Archibald Walker, and William Walker, or either of them, for or in respect of the herd of cattle, or which might have been received by them, or either of them, but for their or either of their wilful neglect or default; and it was ordered, that an injunction should be awarded, to restrain the Defendants, Thomas Walker, Archibald Walker, and William Walker, from taking out execution, or otherwise proceeding in their action against the Plaintiff.

The Respondents appealed to the full Court, consisting of the Chief Justice, and Mr. Justice Burton, and Mr. Justice Stephen, the other Judges of the Supreme Court. The cause was heard before them, on the 27th, 29th, and 30th days of January, and the 1st, 2nd, 6th, 8th, 9th, 12th, 13th, and 15th days of February 1844: when it was ordered that the Decree, made by the Chief Justice, should be reversed, and instead thereof, that the Appellants' bill should be dismissed out of Court, without costs.

The reasons given by the Judges in their judgment for the reversal of the Decree were, first, that the [190] paper writing relied upon, as creating a trust, really amounted to no more than a collateral security, to be enforced at the option of the Respondents; and, secondly, because, supposing it to be a trust accepted by Archibald Walker, his partners were not bound by it, nor answerable for his acts or defaults.

The Chief Justice differed in opinion with the other Judges, on the first point, but agreed with them upon the second.

The Appellant then presented a Petition to Her Majesty in Council, praying for leave to appeal from the last-mentioned Decree of the Supreme Court. The Petition, after reciting the proceedings in the cause, set forth, that by the 9th of Geo. IV., cap. 83, it was enacted that it should and might be lawful for His Majesty, by Charter or Letters Patent, or by any Order or Orders of His Majesty in Council, to allow any person or persons feeling aggrieved by any judgment, decree, order or sentence of the said Supreme Court of New South Wales, to appeal therefrom to His Majesty in Council, in such manner, within such time, and subject to such rules and regulations as His Majesty, by any such Charter, or Letters Patent, or Order or Orders in Council, should appoint or prescribe. That there was no Court of Error, or Appeal, in the Colony from the decisions of the supreme Court either at law or in equity. That no mode of appealing, or of entertaining petitions for leave to appeal from such decisions, to Her Majesty in Council, had been prescribed by any Charter or Letters Patent, or by any such Order or Orders in Council, or by the Charter of Justice of the Colony, or by any Imperial or Local Statute, or by the rules or practice of the Supreme Court, or by any Royal instructions to the [191] Governor of the Colony: and that the Judges of the Supreme Court had expressed their opinion that they had no jurisdiction to entertain Petitions for leave to appeal from the decisions of that Court, to Her Majesty in Council, and that they had no power to withhold or grant such leave. That by the 7th and 8th Vict., c. 69, it was enacted that it should be competent to Her Majesty, by an Order or Orders, to be from time to time for that purpose

made, with the advice of her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council, from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or possession abroad, although such Court should not be a Court of Error, or Court of Appeal, within such Colony or possession, and also to make provision for instituting any such appeals, and for carrying into effect such decisions or sentences as should be pronounced thereon. And that any such Order as aforesaid might be either general, and extending to all appeals to be brought from any such Court of Justice as aforesaid, or special, and extending only to any appeal to be brought, in any particular case. That no such general Order or Orders in Council, for the admission of appeals, had been made under the above Act.

Mr. Cooper, Q.C., and Mr. Speed, in support of the Petition (July 18, 1845 *).—This is the first application to appeal from a decision of the Supreme Court in New South Wales, since the institution of that Court, in the Colony. The present [192] application is made under peculiar circumstances: the Judges of the Supreme Court have held that they have no power to grant an appeal.—[Lord Brougham: Is there any mode of applying in the Colony for leave to appeal?]

—The right of appeal to Her Majesty in Council was originally given by the 4th Geo. IV., c. 96, and the Charter of Justice of 1823. The appeal, however, was not from the Judgment or Decree of the Supreme Court, but from the Judgment or Decree of the Court of Appeals: an intermediate tribunal, composed of the Governor and Chief Justice. The Court of Appeals was created by the Statute, 4th Geo. IV., c. 96, s. 15, and established by the Charter of Justice of 13th of October 1823. The 4th Geo. IV., c. 96, having expired, the 9th Geo. IV., c. 83, was passed, to provide for the administration of justice in New South Wales. No mention is made in that Statute, of the Court of Appeals, but the Supreme Court, as established under the Charter of 1823, is expressly continued, until His Majesty should grant a new Charter, which the Act empowers him to do; and there is express provision in section 16, for the allowance in such Charter, of Appeals to His Majesty in Council, from the Supreme Court. No Charter or Order in Council has been issued in pursuance of this power, and the result is, that the Judges in New South Wales hold, that as the Appeal from the Supreme Court was to the Court of Appeals, they have only power to grant leave to Appeal to that Court, which being abrogated, and no fresh authority conferred on the Supreme Court, they as Judges of the Supreme Court have no authority to grant an Appeal. The grievous hardship of such a state of things, even if the Judges are in Error, in their construction of the Charter and Acts of Parlia-[193]-ment, is too obvious to require argument. We, therefore, apply for liberty to appeal, under the recent Act, 7 and 8 Vict., c. 69, which authorizes Her Majesty to admit an appeal from any judgment, decree or sentence of any Court of Justice from any British Colony, although there may not be a Court of Error or of Appeal in such Colony.

Mr. Wood, Q.C., *contra*.—Although the 9th Geo. IV., c. 83, abolished the Court of Appeals, still it does not in express terms take away the right of appeal given by the 4th Geo. IV., c. 96, and provided for in the Charter of 1823. It must, therefore, be considered to be still in operation. If the Petitioner applies to be let in as an indulgence, his Petition ought not to be granted, under the circumstances of the case. There has been great laches in not applying before. The allegations of the Petition are not verified by affidavit.

Lord Brougham.—It would operate as a very great grievance, if no appeal is given to parties in the Colony of New South Wales. There is, however, a discretion vested in us under the recent Act of Parliament [7 and 8 Vict. 69], to recommend an appeal, and we think that this is a case for the exercise of that discretion. We think that the appeal ought to be allowed, upon the Petitioner filing an affidavit, verifying the facts which are stated in the Petition, and giving security for costs, and lodging the Petition of Appeal within one month after the arrival of the

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

transcript. This we shall recommend to Her Majesty, under our general jurisdiction.

[194] An Order in Council, having been approved of by Her Majesty to this effect, and an affidavit made by the Appellant in pursuance thereof, verifying the statements contained in the Petition, the appeal now came on for argument.

Mr. Cooper, Q.C., and Mr. Speed, for the Appellant.—There are two points for consideration. First. The Appellant is entitled to a general account against Walker and Co., as agents. Secondly. The letters and the transaction relative to the cattle amount to an equitable assignment of the cattle to Walker and Co., and they were bound to see that the cattle were sold, to meet the promissory notes as they became due. These questions are quite distinct and independent of each other. Upon the first point, it is a common practice to address a power of attorney to two members only of a firm; and if the transaction be such that a profit arises to the firm, and it is placed to their account, it will be considered by a Court of Equity as a partnership transaction, and all the members of the firm being equally benefited thereby, will be held equally liable. The present is a transaction of that description. Irrespective of the trust created by the letters of the 9th and 12th of March 1840, it was the duty of the Respondents as the general agents of the Appellant, acting under the power of Attorney, during his absence from the Colony, to have given directions for the disposal of the cattle, and to receive and apply the proceeds in payment of the promissory notes. They wilfully neglected and omitted to give instructions to Darlot for the disposal of the cattle. We are, therefore, clearly entitled on [195] this ground, to an account against the firm of Walker and Co., as the general agents of the Appellant. To entitle him to a Decree for such an account as is sought by the pleadings, it is only necessary to show that, as such agents, Walker and Co. were guilty of negligence. *Caffrey v. Darby* (6 Ves. 488), *Story on Bailments*, s. 231-2-3.

The second point was in truth the only question in dispute in the Court below. Now although there was no legal assignment of the herd of cattle at law, yet in equity, the letters of the 9th and 12th of March amounted to an equitable assignment of a chose in action. To effect such assignment, it is only necessary that the intent should appear. *Massey v. Banner* (1 Jac. and Wal. 241), *The Attorney-General v. The Corporation of Leicester* (7 Beav. 176), *Bertram v. Godfray* (1 Knapp's P.C. Cases, 381). The object of these letters was, that Darlot should hold the cattle, which was assigned to, and placed at the unreserved disposal of, the Respondents. They say, that they never acquired the control over the cattle, and that the effect of the transaction was only to give a collateral security which they might use, if they thought fit. We submit, however, that these letters created a trust, and amounted to an equitable assignment; making the Respondents trustees. As such, it was their duty to have given instructions to Darlot, how to dispose of the herd, and to remit the proceeds to the Respondents; to enable them to provide for the bills they had endorsed, before they became due. Supposing that, before the letter of the 12th of March was communicated to Darlot, Flint and Dutton had become bankrupts, the legal estate in the cattle would be in their assignees, but the equitable estate would be in Walker and Co. [196] *Burn v. Carvalho* (4 Myl. and Cr. 690). Lord Cottenham, in that case, expressly determined this point. No distinction exists between that case and the present, except that the goods eventually reached Burn and Co. No further act on the part of the Appellant and Dutton was necessary, to give effect to the assignment in equity. The effect of the transaction might be open to this objection, that if upon the letter of the 12th March being presented to Darlot, and he refused to make over the cattle or acknowledge the assignment, the assignment would have been incomplete; but it is nowhere asserted that such application was ever made to Darlot. [Lord Langdale: Your position is, that Darlot's possession of the cattle was the possession of Walker and Co., that Darlot was their agent, and that they had control over him?—Yes: Walker and Co. were in possession of the cattle by Darlot, as their agent. We submit that, at all events, we are entitled to a Decree for account, upon the general pleadings, against Walker and Co., although this account has not been asked for in the Court below.

Mr. Wood, Q.C., and Mr. Cole, for the Respondents.—The account now asked for against Walker and Co., as general agents of Flint, cannot be granted. It is

not sought for by the Bill, nor was it ever asked for, in the Court below. The Appellant never presented a cross Appeal from the first Decree.—[Lord Campbell: It is not necessary to argue that point: you will apply your argument to the second question.]—The only question, then, that is open to them, is the special case of trust. The letters of the [197] 9th and 12th of March were respectively meant, and intended, merely as an equitable security, to the firm of Walker and Co., for their own protection and exclusive benefit, as sureties and endorsers of the promissory notes for the Appellant and Dutton, and the same were not intended to have the effect, and did not in fact have the effect, of making the firm either trustees, or mortgagees in possession, of the herd of cattle, or any part thereof, or accountable in any such character to the Appellant. The letter of the 12th of March made over the herd of cattle as a security, and the sound construction and intention of this document was, that, in case of default, we might show some security in the shape of a mortgage, the mortgage remaining in possession. The case of *Burn v. Carvalho* [4 My. and Cr. 690], cited by the Appellant, does not apply to this case: there, Rigo assented to the assignment, and actually handed over the property. Suppose, that, by Flint and Dutton writing a letter to Darlot, the assignment to Walker and Co. would have been complete; here no letter was written to Darlot, and if there had been, it would have been different from *Burn v. Carvalho*, for Darlot was a part owner. How could we have compelled Darlot to hand over the cattle? The herd was handed over to him by Jobbins, to manage and dispose of for the benefit of himself and his co-partners or co-adventurers. There is no evidence that he ever knew that there was such an agreement; how, then, could he be the agent of Walker and Co.?

Mr. Cooper, in reply.

Lord Campbell (Dec. 10, 1847).—Upon this Appeal, the question is, whether the Appellant is entitled to a Decree, for an account of the [198] sums of money received by the Respondents, or which, but for their wilful neglect or default, might have been received by them, in respect of the herd of cattle, in the pleadings mentioned.

This, the Counsel for the Appellant admit, depends upon whether the Respondents are to be considered as having been in possession of the cattle as mortgagees, or under an equitable assignment. The vague and artificial mode of treating the case in the Court below, as to "whether the Respondents were trustees of the cattle," was properly abandoned.

Although the hearing of the case before the Supreme Court in New South Wales lasted eleven days, it appears to us to lie in a very narrow compass, and to depend entirely upon a few very short documents.

Let us first look at the letter of William Dutton and the Appellant, dated 9th of March 1840 (*ante* [5 Moo. P.C.], p. 181). [His Lordship read it.] Then comes the answer of the Respondents, addressed to William Dutton and the Appellant, dated 12th March (*ante* [5 Moo. P.C.], p. 182). [His Lordship read it.]

Now, stopping here, it is not contended that the possession of the cattle was to be transferred to the Respondents. Hitherto the transaction is merely of this nature. The Appellant, William Dutton, Frederick Dutton, and Darlot, were the purchasers jointly of the herd of cattle, in certain shares, from Jobbins. William Dutton and the Appellant were to give, in payment of the cattle, two promissory notes, one for £3300, due 13th April 1841, and the other for £3600, due 13th April 1842. These notes were to be made payable to the Respondents, and to be endorsed by them. The Respondents thus guaranteed the payment for the cattle, for which they were to receive a commission of two and [199] a half per cent., and, as a security, they were to be entitled to the disposal of the cattle; which, however, were to remain in the possession of Darlot, one of the joint owners, who was to receive instructions from William Dutton and the Appellant, to remit the proceeds of the sales of the cattle to the Respondents. As yet there is no pretence for saying that the possession of Darlot was their possession.

The whole reliance is placed on the subsequent letter, also of the 12th of March, of William Dutton and the Appellant to the Respondents (*ante* [5 Moo. P.C.], 182). [His Lordship read it.]

To give any effect to this letter, it is assumed (I think quite gratuitously) that in the meantime Frederick Dutton and Darlot had parted with all their interest

in the adventure. It would have been strange if there had been such a new arrangement, for this letter was written on the 12th of March, the very same day on which the Respondents had agreed to the former arrangement. The only material fact suggested, from which the inference is to be drawn that Frederick Dutton and Darlot had given up their shares in the adventure, is, that William Dutton and the Appellant alone were makers of the promissory notes given in payment; but it was previously settled that the promissory notes should be in this form, when Frederick Dutton and Darlot were certainly jointly concerned in the adventure.

The only way in which it is contended that the Respondents were in possession of the cattle was, that the cattle were delivered to Darlot, and that Darlot held them as the agent of the Respondents. But Darlot must be taken to have still continued an owner of the cattle, and he was to hold them as before; there being no authority vested in the Respondents, [200] except to give instructions to Darlot, to dispose of the cattle, and to remit the proceeds as a security for the liability, which the Respondents incurred by endorsing the notes. I do not think that this last letter materially alters the rights or liabilities of the parties. There is no new consideration moving to the Respondents. The commission which they were to receive remains the same, and their security is not improved.

There is nothing, therefore, to show that Darlot ever held the cattle as the agent for the Respondents. The Respondents could not have taken the cattle from Darlot: and they never possessed authority to do more than to give Darlot directions to dispose of them.

Great reliance was placed upon the case of *Burn v. Carvalho* (4 Myl. and Cr. 690), but that case merely turned on the doctrine, that an undertaking to pay a debt out of a particular fund is an equitable assignment, and does not at all establish the doctrine, that when there is an equitable assignment of funds in the hands of a third person, he thereby becomes the agent of the party to whom the assignment is made.

In no point of view can Darlot be considered the agent of the Respondents, and the Respondents never actually, or constructively, were in possession of the cattle. If they were guilty of any default, therefore, the remedy against them is by an action at law, and the bill seeking an account of the sale of the cattle cannot be sustained.

But we are pressed by the alleged right of the Appellant, to a decree, for a general account, of the dealings between the Appellant and Respondents. The Respondents' Counsel's objection, that no such account is given by the original decree of the Chief Justice, of the 16th of December 1843, is not conclusive, [201] for what is called the Appeal from the Chief Justice to the whole Court, seems to be only in the nature of a re-hearing. But neither before the Chief Justice, nor before the full Court, was a general account ever asked, and the only matter really in controversy, was the liability of the Respondents to account to the Appellant for the sale of the cattle. This being decided against the Appellant, their Lordships are of opinion, that the Appellant is not entitled now, before this Court, for the first time, to ask a decree for a general account. Their Lordships will, therefore, advise Her Majesty, that the decree, dismissing the Bill, should be affirmed, with the costs of this Appeal.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to appeal*; tit. MORTGAGE, F. MANAGEMENT AND ACCOUNT, 2. *Mortgagee in possession*, a. *who is*. S.C. 12 Jur. 1. On point (i.) as to equitable assignment, see *Bell v. London and North-Western Ry. Co.* 1852, 15 Beav. 548; *Thayer v. Lister*, 1861, 30 L.J.Ch. 427; *In re Foster*, 1873, Ir. R. 7 Eq. 294; and notes to *Ryall v. Roules*, 1747-1750 (1 Ves. senr. 348), in 1 Wh. and T. L. C. 7th Ed. 102; (ii.) as to appeals, see *Bank of Australasia v. Breillat*, 1847, 6 Moo. P.C. at pp. 168-9; *Bute (Marchioness of) v. Mason*, 1849, 7 Moo. P.C. at p. 13; *Ex parte Kensington*, 1863, 15 Moo. P.C. 209; Commonwealth of Australia Constitution Act 1900 (63 and 64 Vict. c. 12), ss. 6, 9 (*The Constitution*, chap. iii., clauses 73, 74), and O. in C. of 13th Nov. 1850 (Stat. R. and O. Rev. iv. 347); also, as to special leave in civil cases, note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

RALPH BARNES. *Appellant*: GEORGE GILES VINCENT and Others.*Respondents* * [Feb. 4, 1846].

The Prerogative Court refused probate to a Will of a *feme covert* made in pursuance of a power, because it was, upon the face of it, not executed according to the requisites of the power. Held, on appeal by the Judicial Committee of the Privy Council, reversing such sentence, that such Will was entitled to probate, the Ecclesiastical Courts having no jurisdiction to inquire as to the due execution of the power, but simply to grant probate, leaving it to a Court of Equity to determine the question, of the due execution of the power.

This was an Appeal from a decree of the Prerogative Court of Canterbury, pronounced on the 17th of [202] March 1845, in a cause or business, of proving, in solemn form of law, the Will of Susanna Ireland, deceased (the wife of the Very Reverend John Ireland, late Dean of Westminster), bearing date the 17th of February 1826, which purported to be made by virtue and in pursuance of certain powers and authorities given to, and vested in her for that purpose, by an indenture of settlement of the 28th of January 1794. The cause was promoted by Ralph Barnes, one of the executors named in such Will; against George Giles Vincent, and the Reverend William Short, the executors, and also against Sarah Douglas Edwards, Elizabeth Calley, and Susan Soper, the nieces and residuary legatees, named in the Will of the Very Reverend John Ireland, also deceased, who would have been entitled to her separate estate and effects, under and in virtue of the indenture of settlement, in case she had died intestate.

By the indenture of settlement, (being the settlement made previously to, and in contemplation of, the marriage of the deceased, with the Very Reverend John Ireland,) several sums of money and securities were assigned to, and became vested in, the Reverend Nutcombe Nutcombe, Clerk, and John Jeffrey Short, upon trust, after the solemnization of the marriage, for the use of John Ireland, for life, with remainder to the use of his wife, for her life, in case she should survive him, and after the decease of the survivor of them, upon certain trusts for the benefit of their children, and in case there should be no children, and John Ireland should survive his wife, then, at his decease, upon trust for such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents, and purposes, and [203] subject to such limitations as Susanna Ireland should, by any deed, to be attested by two or more witnesses, or by her last Will and Testament, to be by her signed and published in the presence of, and attested by, the like number of witnesses, direct or appoint, and in default of, and subject to, such direction and appointment, upon trust for the absolute use and benefit of John Ireland, his executors, administrators, and assigns.

There were no children of the marriage, and Susanna Ireland, during her coverture, in pursuance of the power so vested in her, made and executed the Will in question, bearing date the 17th of February 1826, which was signed and sealed, but not published, in presence of two witnesses.

The Will was as follows:—

“After the death of the Dean of Westminster, I bequeath my fortune as follows. To my sister in law, Mrs. Short, of Bickham, one hundred pds. sterling. To my sister in law, Mrs. William Short, one hundred pds. sterling. My fortune to be then divided into 2 equal shares, one share to be given into the hands of trustees: I appoint for this trust, the Rev^d. Tho^s. Vowler Short, of Christchurch, Oxford; the Rev^d. William Short, (his brother,) Vicar of Chippenham; and Ralph Barnes, Esq^r attorney at law, of Exeter: this half of my fortune is to ^{be}_A used for the benefit of my brothers

* Present: The Lord President (the Duke of Buccleuch), Lord Brougham, Lord Cottenham, Lord Campbell, and the Vice-Chancellor Knight Bruce.

George and Bartholomew Short. The principal money being secured during their lives on government security, one-half of the income of this moiety to be paid to my brother ^{Bartholomew} A for his life; the other half to be used for the benefit of my brother George and his children; some portion of it to be allotted to my [204] brother for his life, the rest to his children. After the death of my two brothers the whole to be allotted, as the trustees shall think fit, to the use of my brother George's children. The principal money to be divided between them, or the interest only given them, whilst the principal remains secured. The other half of my fortune I bequeath to the eight persons here mentioned:—Eliz. Susanna Short, Frances Short, Francis Baring Short, Elizabeth Hodgkinson Short, children of John Jeffery Short; Thomas Vowler Short, William Short, Jane Susanna Short, Laura Short, children of my brother William Short. These eight persons to have equal shares of this half of my fortune; and if any of them die before the Dean of Westminster, I desire that their share be divided equally between such of the eight as are alive.

"I appoint for executors of this my Will the Rev^d. Thomas Vowler Short, the Rev^d. William Short, (my two nephews,) and Ralph Barnes, Esq., attorney at law, Exeter.

"Susanna Ireland." (L. S.)

"February 17th, 1826."

& sealed
"Signed A in the presence of

Humph^r. Pritchett,
Apothecary, 13, Gt. Queen St., Westminster.
Mary Eames, housekeeper to Mrs. Ireland."

The Very Reverend John Ireland died on the 2nd of September 1842, having made a Will, and thereby appointed the Respondent, George Giles Vincent, Esquire, and the Reverend William Short, executors.

The Judge of the Prerogative Court of Canterbury rejected an allegation, pleading the above facts, and refused probate to the Will, upon the ground that the Will purporting to be made in pursuance of a power, was defectively executed, so as not to comply with [205] the requisitions of the power, and was not entitled to probate.

From this Decree, the present Appeal was brought.

The Queen's Advocate (Sir John Dodson), and Mr. Humphry, Q.C., and Mr. W. H. Clarke, for the Appellant.—This is a question of the due execution of a Will of a married woman, under a power. The power, if executed by deed, requires such deed to be attested by two or more witnesses, or if executed by Will, to be signed, published, and attested by a like number of witnesses. The attestation clause to the Will, made in pursuance of the power, mentions only signing and sealing.—[The Vice-Chancellor Knight Bruce.—The only question is, whether the attestation clause is sufficient.]—The rule upon which the Court below proceeded, in refusing probate, was deduced from the case of *Wright v. Wakeford* (17 Ves. 454; S.C. 4 Taunt. 213). In that case, sealing and delivery, without signing, which was required by the power, was held to be insufficient. Chief Justice Mansfield, however, dissented from the other Judges. The cases of *Doe dem. Mansfield v. Peach* (2 Mau. and Sel. 576), *Wright v. Barlow* (3 Mau. and Sel. 512), and *Waterman v. Smith* (9 Sim. 629), are to the same effect. But in *Simoon v. Simeon* (4 Sim. 555), *Curteis v. Kenrick* (3 Mee. and Wel. 461), *Ward v. Swift* (1 Crom. and Mee. 171; S.C. 3 Tyrw. 122), delivery was held to be tantamount to publication.—[The Vice-Chancellor Knight Bruce.—What is held to amount to publication in the Ecclesiastical Courts? Is declaration of test[206]-tamentary intention sufficient? When does it appear that the word, publication, got into practice in the Ecclesiastical Courts?—It appears very early; the common Condidit always contains the word.—[Lord Brougham.—Publication applies more to a deed than a Will: it is death that publishes a Will.]—Again, in *Mackinley v. Nison* (8 Sim. 561), the production of a Will to witnesses was held equivalent to publication. The cases of *Moodie v. Reid* (7 Taunt. 355), *Stanhope v. Keir* (2 Sim. and Stu. 37), and *Burdett v. Spilsbury* (10 Clk. and Fin. 340), are distinguishable from the present.—[Lord Brougham.—Their Lordships are of opinion, that it will be convenient to deal, in the first instance, with the question, whether or not (supposing there is no other objection

to probate, except that it is the Will of a *feme covert*) the Prerogative Court should grant probate, leaving the question of due execution of the power open to a Court of construction.]—The question then is twofold: first, Will or no Will; and, secondly, whether it has been well executed. Formerly the Ecclesiastical Courts were not allowed to have jurisdiction over a Will of a *feme covert*, made in pursuance of a power. *Shardelow v. Naylor* (1 Salk. 314), *Daniel v. Goodwin* (cited 2 Sug. on Powers, 21, 6 edit.). But Courts of Equity will not now read the appointment by Will, under a power, by a *feme covert*, until it is duly proved, as a proper Will in the Spiritual Court, *Ross v. Ewer* (3 Atk. 156), *Jenkins v. Whitehouse* (1 Burr. 431), 2 Sug. on Powers, 21; nor will the probate preclude the necessity of proving the instrument, as an appointment, upon any claim under it in a Court of Equity. *Rich v. [207] Cockell* (9 Ves. 396), *Watt v. Watt* (3 Ves. 244), *Cothay v. Sydenham* (2 Bro. C.C. 391), *Douglas v. Cooper* (3 Myl. and K. 378), *Henley v. Philips* (2 Atk. 48), *Tatnall v. Hankey* (2 Moore's P.C. Cases, 342). The temporal Courts say you must obtain probate of a Will of personalty from the Spiritual Court, and the seal of that Court, as to what is within its jurisdiction, is final and conclusive. *Ross v. Ewer*, *Rich v. Cockell*, *Stone v. Forsyth* (Douglas, 707). If the Ecclesiastical Court, therefore, decides that the paper is not entitled to probate, it excludes a Court of law, or equity, from looking at the power at all, 1 Williams on Exors., p. 47; but the admission to probate of a Will by a *feme covert* is not conclusive of the due execution of the power, 1 Williams on Executors, 45-6. 4 Burns' Ecc. Law, 65.—[Lord Brougham.—The Court of Probate could not admit a Will which, on the face of it, appeared to be of a *feme covert*: is not the Court bound to look to see if she had the power, and if it has been well executed?—The Court is only to get rid of this objection, that the party is a *feme covert*; that is all it can inquire into; the Court cannot question whether the Will is a due execution of the power; that is for a Court of construction. In refusing probate to this Will, the Court appears to have been guided by *Hughes v. Turner* (4 Hagg. 30), which case was followed by *Allen v. Bradshaw* (1 Curt. 110). They are no authorities upon this point, they do not determine that the Ecclesiastical Court must decide whether the power is well executed or not. *Hughes v. Turner* was not a ques-[208]tion of due execution of a power, but of Will or no Will, which was within the exclusive jurisdiction of the Ecclesiastical Court. *Allen v. Bradshaw* [1 Curt. 110] followed; there the Court refused probate to a Will made by a *feme covert*, because it was not executed according to the requisites of the power, acting under their supposed jurisdiction, as decided by *Hughes v. Turner* [4 Hagg. 30]; and ever since this latter case, the Ecclesiastical Court has exercised the jurisdiction to decide upon the due execution of a power.—[The Vice-Chancellor Knight Bruce.—What objection would there be for the Ecclesiastical Courts to admit the Will to probate, saving the right to a Court of Equity to determine the due execution of the power?—It is an important consideration, whether they ought not to admit it, if for the purpose only of enabling a Court of Equity to adjudicate. When a power is given to a *feme covert* to dispose by Will, to be executed in a particular manner, Courts of Equity have decided that it must be a proper Will. *Ross v. Ewer* [3 Atk. 156]. The question, then, of Will or no Will, is one for the Ecclesiastical Court. This at once separates the question of the Will and the execution of the power. No difficulty can arise under the right of a married woman to make a Will of her separate estate. In *Tatnall v. Hankey* (2 Moore's P.C. Cases, 342), this Court held that a Court of Probate had jurisdiction to examine into the execution of a power, so far only, as to determine whether the instrument executing it, was testamentary; and this agrees with *Watt v. Watt* (3 Ves. 246). In the goods of *Bigger* (2 Curt. 336), *George v. Rully* (2 Curt. 1), *Walters v. Metford* (2 Curt. 221). The Will was well [209] executed, according to the Will Act, 1 Vict., c. 26, which only requires it to be witnessed by two witnesses, and the Court ought to have admitted it to probate, and left a Court of Equity to say, whether the power was properly executed or not. A Court of Equity will supply defect of execution, as in the case of want of surrenders to Wills in copyholds, or in favour of children or creditors.

Dr. Haggard, (with whom was Mr. Bacon,) for the Respondent, Vincent.—The point now taken by the Appellant, that a Court of Equity will supply the defect of execution of a power in favour of children or creditors, was not raised in the Court

below, neither was it suggested at the hearing: if it is sustained, it will reverse the decisions in *Hughes v. Turner* [4 Hagg. 30], and *Allen v. Bradshaw* [1 Curt. 110].—[Lord Campbell: How do you answer the Appellant's argument; namely, if the Ecclesiastical Court refuse probate to a Will, where there is an imperfect execution of a power, can a Court of Equity supply the defect?]—There may be cases of hardship, but if the Ecclesiastical Court has jurisdiction to grant probate to Wills, made under a power, it must also inquire into the due execution of the power. The present case cannot be distinguished from *Allen v. Bradshaw*.

Dr. Addams, (with whom was Mr. Malins,) for the other Respondents.—*Hughes v. Turner* [4 Hagg. 30] is a direct authority that an Ecclesiastical Court must look to the due execution of the power. There the Court did not voluntarily assume a jurisdiction, it was forced upon it. The Court of Delegates held that they must decide whether the Will was well executed, according to the power.—[210] [The Vice-Chancellor Knight Bruce: In *Hughes v. Turner* [4 Hagg. 30], the question of due execution was not decided. In that case there were two Wills, one in 1815, and the other in 1829. The Ecclesiastical Court granted probate of the latter instrument. The Court only acted as if it was a question of revocation.]—In *Henfrey v. Henfrey* (1 Moore's P.C. Cases, 29), the Testator left two substantive Wills; by the first Will he appointed executors. The second Will, which contained no revocation of the former one, made no appointment of executors. This Court refused probate to both Wills, holding, that the second Will was alone entitled to probate.

The Queen's Advocate [Sir John Dodson] in reply.

Lord Brougham (Feb. 14, 1846).—This was the case of a Will of a *feme covert*, but professed to be made, under a power in her marriage settlement, and the execution being alleged to be defective, inasmuch as the power required the Will to be not only signed, but published, by her, in the presence of witnesses; the attestation did not set forth the publication: the question was raised below, whether or not, the execution sufficiently followed the power. Before allowing this question to be argued, their Lordships directed that Counsel should confine themselves to the preliminary question, whether, supposing no other objection to the Will had existed, except that raised on the execution of the power, the Court below ought not to have admitted it to probate, and left the question of the execution to be dealt with by the Court which might have to deal with the property passed under the Will. This point was accordingly fully argued, and we are now to dispose of it. The question [211] is one of great importance, and not unincumbered with difficulty, arising chiefly from the practice, which has for a considerable length of time prevailed in the Ecclesiastical Courts.

These Courts have been in use in later times to deal with the question when raised, before admitting to probate: and they have, according to their judgment on that question, granted probate or refused it; granting it, when they held the power to authorise the testamentary act and to have been duly executed: refusing it when these things did not appear, in their judgment, to concur.

It is obvious in the outset of this argument, that nothing can be more unsatisfactory than the state in which this course leaves the law. For, if probate be granted, no one denies,—it is, indeed, beyond all doubt certain,—that the grant does not bind the Courts which may have to deal with the property under the Will. Such Courts may, notwithstanding the probate, which had proceeded upon the supposition of the power being sufficient, and being duly executed, reject the instrument altogether, and upon the express ground of the power not having been lawfully created, or when given conditionally: and the condition not having been performed, or when given contingently; and the contingency not having happened: or on the ground of the power not authorising the testamentary act, or, though authorising it, and in all other respects sufficient, yet having been insufficiently pursued in the execution. Here, then, is the proof, that the sentence of the Court of Probate is anything rather than conclusive: and it is held inconclusive on the ground of the power, which had formed the ground of the sentence admitting to probate. Then nothing can be more unfortunate than it [212] would be, should it appear clear that the sentence granting probate being thus inconclusive one way, the sentence refusing

probate is conclusive the other way ; and yet this must be the inevitable consequence of the Court of Probate entertaining the question respecting the power ; because, if probate be refused, the Courts of Equity never can know anything of the Will at all. It is true, we find some of the books speaking of an interest under a power, when probate has been refused, or without the Will having been even propounded, yet, on being brought before a Court of Equity, being considered there, not, perhaps, as a Will, but as a testamentary disposition. However, this doctrine, if it ever was established, has long since been departed from, and on both sides of Westminster Hall, when a power is to be executed by a last Will, probate of the instrument must be obtained before any Court can look at it, or know of its existence. *Ross v. Ewer* (3 Atk. 160), *Jenkin v. Whitehouse* (1 Burr. 431). Thus we have the Courts of Equity alone competent conclusively to decide that the power has been duly executed ; alone competent conclusively to reject the execution as defective, or the power as insufficient ; and yet not competent to declare the power and the execution sufficient, if the Court of Probate shall have declared the contrary. It is exactly as if a Court of Appellate jurisdiction should have jurisdiction to decide if the Court below had given judgment for the Plaintiff, but not competent to decide if that Court had given judgment for the Defendant.

Another consideration also strikes us immediately on this point. It is certain that there is a considerable class of cases, in which equity will relieve against a defective execution of a power. Thus in favour of a [213] purchaser ; of a creditor ; of a child ; equity will relieve. But if probate shall have been refused by the Ecclesiastical Court, on the ground of the execution being defective, no such relief ever can be extended in any case ; because the Court which alone can relieve, never can know if the instrument existed, nor can see the defect in the execution ; and the Court of Probate is bound by the fact of the defective execution, and cannot remedy it. Thus, a *feme covert* having made a Will in favour of a child, and imperfectly executed it, the child must be excluded, by probate being refused ; when, had a Court of Equity been put in possession of the instrument, it would have held the defective execution relievable in the child's behalf.

Surely, these considerations are sufficient to show that the safest and most consistent course, is to grant probate, wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention is clear, and no other objection occurs, save those connected with the power ; for example, no objection under the provisions of the late Wills Act ; and leave the Court which has to deal with the rights under that instrument, to decide whether or not, it is authorised by that power, and by its execution.

If it be said, that this breaks down the distinction between the Court of Probate and other Courts ; that it, to a certain extent, makes the Court of Equity, a Court of Probate ; the answer is obvious. The Court of Equity already is a Court of Probate, almost as much as this decision could make it, for it now decides, whether or not, the power has been duly executed ; that is, whether or not, the paper should have been admitted to probate, that is to say, it decides whether or not, the [214] paper is testamentary. It now rejects a Will, proved in the Ecclesiastical Court. It would still only decide that it ought not to have been proved, or rather, that, though proved, it is not made in due execution of the power, or, conversely, it would decide, that it ought to be proved, as made in due execution of the power.

It is said, that a paper may purport, on the face of it, to be the Will of a *feme covert*, and that such a party is intestable ; therefore, unless a power is alleged, the probate must be refused. Then it is argued that the Court, to whom such allegation is made, has no choice, but must look to see the power under which the Will is alleged to have been made, before it can decide whether that paper is testamentary or not. But there seems no insuperable objection to holding, that, on a power being alleged, the probate should be granted ; because this really decides nothing ; it only saves the point for the Courts which can competently deal with the question, and avoids the glaring inconvenience and inconsistency of such a decision, as we have already described ; a decision which is final, conclusive, and binding, if given one way, and only leaves another Court to determine conclusively, if given the other way.

Their Lordships are, therefore, of opinion, that this is the proper course to pursue, and that the contrary practice being at variance with principle, inconsistent

in itself, pregnant with inconvenience, and even working a failure of justice, ought to be henceforth departed from, or rather the more ancient and laudable practice, be restored, for we shall presently see that this has apparently of late years been departed from.

It has been suggested that, supposing the Courts of Probate saw a question likely to arise upon a power, and yet were inclined to decide against the party pro-[215] pounding the Will, under the power, they could pursue some such course as referring the whole question to the Courts of Equity. We are much too imperfectly informed on this supposed authority, and much too little furnished with cases showing any such practice, to rely upon it, in impeachment of the conclusion to which we have arrived. What we do know for certain is, that the whole argument, for and against the power, and its execution, is now habitually gone into before the Ecclesiastical Courts, and consequently that these Courts assume to dispose of the question entirely, and to grant or refuse probate, according to the judgment formed upon the power. That is quite sufficient for their Lordships.

But it may, no doubt, be said, that, were every Will admitted which assumes to be made in execution of a power (supposing, of course, no other objection to exist against granting probate), then, before the Courts of Equity could interfere and declare against the power, administration might be taken out and the property distributed. In the first place, this is not, of necessity, the consequence of our present decision, for the Ecclesiastical Court might direct the probate not to issue for a certain time, and thus secure the property, until the decision of the competent Court should be obtained on the power. But, secondly, the very same objection might have been urged against the older practice, to which all we are now deciding only brings back the Courts Christian.

It appears clearly that the course formerly taken, was for the Ecclesiastical Court to grant probate, or administration, with the Will annexed; almost, if not quite, of course, whenever there was a question raised, or likely to be raised, touching a power or its execu-[216]-tion, supposing no other ground existed for refusing probate. In these times, that is, till within about twenty or eighty years, the Temporal Courts were in use to prohibit the Spiritual from entertaining any question respecting the execution of powers or their constitution. Nay, we find it laid down by Mr. Powell, in his learned note to Swinburne, 155, that probate itself was not so exclusively of Ecclesiastical cognizance, but that a trust might be considered as created by a Will, executed under a power, and to which probate had been refused. It is true that Lord Hardwicke, in *Ross v. Ewer* (3 Atk. 161), and Lord Mansfield, following that authority, in *Jenkins v. Whitehouse* (1 Burr. 431), held it impossible to proceed upon any instrument professing to execute a power given to appoint by Will, until that instrument had been admitted to probate in the Ecclesiastical Courts. But the language of both these great Judges clearly shows that they considered the granting probate in such cases, as quite of course. Consequently the mischief now apprehended must have been equally apt to arise then. The cases of *Brook v. Turner* (1 Mod. 211), and *Taylor v. Rains* (7 Mod. 148), all point to the assumption by the Temporal Courts that the Spiritual Courts never would really entertain a question touching a power, so as substantially to dispose of it. In *Taylor v. Rains* [7 Mod. 148], it was held that not probate, but administration with the Will annexed, is the proper course for the Courts Christian to pursue in such causes; and Lord Mansfield, in *Jenkins v. Whitehouse* [1 Burr. 431], seems of this opinion. But it seems quite immaterial which course is pursued, as both alike save the question of the power.

Finally it is fit that we refer to the decision of this [217] Court in the case of *Tatnall v. Hankey* (2 Moore's P.C. Cases, 342), for the purpose of removing all idea of the present determination being any departure from, or showing any inconsistency with, that Judgment of their Lordships. There the Master of the Rolls had given his opinion upon the power, and had holden it well executed, but recommended the parties to take probate in respect of the alleged foreign domicile of the Testatrix. They accordingly propounded the Will, and the Ecclesiastical Court repudiated its jurisdiction, on the ground that, although the requisites of the Neapolitan law, the *lex loci domicilii*, had not been complied with, yet those of Mr. Boone's Will, creating the power, had been complied with; but that the Courts

of Law and Equity had alike declared that the Court of Probate had not jurisdiction to deal with the question. Now what was the decision of this high Court upon the Appeal from that Judgment? We held that the Court of Probate could alone declare a writing to be testamentary; but we expressly said that in the case before us, it was not necessary to say that the Court of Probate was called on to look at the power, either as to its creation, constitution or execution; but only that it was bound to say, if the Testatrix had the power, her paper was testamentary: a decision which is manifestly in accordance with the present.

In now deciding this question, it is naturally a satisfaction that our determination tends to narrow, and not to extend, the range of cases, in which a conflict arises between different jurisdictions dealing with the same subject-matter. It is no sufficient reason for deciding against any known principle, or any current of consistent authority, that we may thereby be enabled to establish a more exact harmony between different Courts, [218] or systems of jurisprudence. But where matters hang evenly balanced, and still more where both sound principle and the better practice authorizes our determination, we cannot avoid feeling that it is highly desirable to place the law as administered by the different tribunals, touching the same subject-matter, in a state of uniformity and consistency.

The Judgment of their Lordships, therefore, is to reverse the sentence of the Court below; to admit the allegation and to retain the cause. To direct evidence to be taken to prove the execution of the Will, taking into no consideration whatever, the execution of the power.

I ought to state, that the Judgment now given is in concurrence with the opinion, not only of the Noble Lords who heard the argument, but has been submitted to the Lords Chancellors, both of England (Lord Lyndhurst) and Ireland (Rt. Hon. Sir Edward Sugden, Knt.), and has their entire approval.

[Mews' Dig. tit. POWERS, IX. EXECUTION, f. 2; tit. WILL, VII. PROBATE AND LETTERS OF ADMINISTRATION, b. 13. On point (i.) as to jurisdiction of Court of Probate to inquire into validity of execution of power by will, see now Judicature Act, 1873, s. 24 (6), (7); *In the Goods of Sharp*, 1878, 3 P.D. 80; and *Phillips v. Jenkins*, 1881, 44 L.T. 281; (ii.) as to law by which validity of testamentary appointment is governed (5 Moo. P.C. 217), see note to *Tatnall v. Hankey*, 1838, 2 Moo. P.C. 342; (iii.) as to testamentary powers of married women, see Married Women's Property Act, 1882 (45 and 46 Vict. c. 75), ss. 1, 2, 4; (iv.) as to expression of existence of divergence or unanimity of opinion among members of Judicial Committee (5 Moo. P.C. 218), see O. in C. of 4th Feb. 1878, and authorities collected in Phillimore's *Eccl. Law*, 2nd ed. p. 975.]

[219] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT MADRAS.

ARCHIBALD FRANCIS ARBUTHNOT, GEORGE ARBUTHNOT, WILLIAM MTAGGART and ALEXANDER MACKENZIE.—*Appellants*: JOHN BRUCE NORTON,—*Respondent* * [Feb. 9, 1846].

An assignment, by a Puisne Judge of the Supreme Court at Madras, of the sum "equal to the amount of six months' salary," directed by the 6 Geo. IV., c. 85, to be paid to the "legal personal representatives" of such Judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge: and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 and 6

* Present: Members of the Judicial Committee,—The Lord President (the Duke of Buccleuch), the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan.

Edw. VI., c. 16, and 49 Geo. III., c. 126, and, therefore, contrary to public policy.

The question in this case was the validity of an assignment, made to the Appellants, by the late Sir John David Norton, a Puisne Judge of the Supreme Court of Judicature, at Madras, of the sum of R. 25,000 (£2500), which, by virtue of the Act, 6 Geo. IV., c. 85, was payable to his legal personal representatives, in the event of his death, while in possession of the office of Judge.

By the Act of Parliament, 6 Geo. IV., c. 85 [see now Indian High Courts Act, 1861 (24 and 25 Vict. c. 104), s. 6; and, for rules, Indian List, 1901, p. 228], intitled, "An Act for further regulating the Payment [220] of Salaries and Pensions to the Judges of His Majesty's Courts in India," and which in its preamble recites, "That it was deemed expedient to make further provision for all such Judges, so as that the acceptance of their respective offices should not be the occasion of actual loss to their representatives, in the event of the death of any such Judges taking place after their arrival in India," it is, by the 5th section, enacted, "That when and as often as it shall happen that any such Judge should depart this life, while in possession of such office, and after the expiration of six calendar months from the time of his arrival in India, for the purpose of taking upon him the office of Judge, then and in such case, the Court of Directors of the East India Company shall, and they are thereby required to pay, or direct and cause to be paid, out of the territorial revenues, from which the salary of such Judge so dying should be payable, to the legal personal representatives of such Judge so dying as aforesaid, over and above what might have been due to such Judge at the time of his death, a sum equal to the amount of six calendar months' salary of the office of such Judge."

On the 23rd of October 1841, Sir John Norton was appointed a Puisne Judge of the Supreme Court of Judicature at Madras, where he arrived in April 1842, and entered upon his judicial duties, and died on the 24th of September 1843, while in the possession of his office, leaving the Respondent his executor, and legal personal representative.

Upon the death of Sir John Norton, a sum of money, equal to one half year's salary (R. 25,000), became, in accordance with the terms of the before-mentioned Act of Parliament [6 Geo. IV. c. 85], payable to his legal [221] personal representatives, which sum the Respondent, as such legal personal representative, received.

Previous to the month of August 1842, Sir John Norton had obtained certain pecuniary advances from the Appellants, who were merchants and agents at Madras; to secure the repayment of which, he made an assignment to them of a policy of insurance, effected on his life, for £2500; and subsequently becoming further indebted to the Appellants, he, upon their demand for additional security, addressed a letter to them, dated the 20th of August 1842, which was as follows:—

"Gentlemen,—I acknowledge to have received from you a second bill on Messrs. Coutts and Co., in favour of Felix Pryor, Esq. Now, for the repayment to you of the monies payable in respect of such bill, I pledge and make liable, not only the policy of insurance in your hands, and the other property made liable to you for previous advances; I further make liable for all such advances, including the monies in respect of the aforesaid bill of exchange, and to agree to assign, and do assign to you the sum of £2500, payable to my personal representatives, in case I should die in possession of my office of one of the Judges of the Supreme Court; and do agree that this sum shall be received by, and be payable to you, as a further security for all such advances, and any balance I may owe to you."

At the time of the decease of Sir John Norton, a balance was due to the Appellants, amounting to the sum of Rs. 51,421. 13a. 8p.; and they claimed to be entitled to receive, in part discharge of that balance, the sum of money which the Respondent had received in respect of the allowance directed to be made by the [222] Statute before-mentioned, to the legal personal representatives of a deceased Judge in India.

On the 3rd of April 1844, the Appellants filed their Bill of Complaint on the Equity side of the Supreme Court of Judicature at Madras, against the Respondent, stating the facts and circumstances above set forth, and further stating that, under the aforesaid assignment of the 20th of August 1842, they, the Appellants, were

entitled to have the said sum of Rs. 25,000, applied towards the payment and discharge, so far as the same would extend, of the balance of Rs. 51,421. 13s. 8p., due by Sir John Norton to them, the Appellants, as aforesaid, and praying that the assignment, bearing date the 20th of August 1842, might be declared to be a good and valid assignment to the Appellants, of the monies payable under and by virtue of the Act of Parliament as aforesaid; and that the Respondent might be decreed to be a trustee for the Appellants of the said sum of Rs. 25,000, so received by him under such Act, and that if the Respondent did not admit the correctness of the account so sent to him by the Appellants on the 2nd of November 1843, as aforesaid, then that an account might be taken of what was due and owing to the Appellants, for and on account of Sir John Norton, deceased, and that an account might be taken, of all sums of money received, or to be received, by the Appellants, for and on account of the policy of insurance, the Appellants offering to give credit for the same when the same should be received by them or their agents, and that the balance due to the Appellants, after such receipts, might be ascertained, and that the Respondent might be decreed to pay to the Appellants the sum of Rs. 25,000, [223] so far as the same would extend, in discharge of such balance.

The Respondent by his answer, admitted all the facts and circumstances hereinbefore stated; but submitted, as a matter of law for the judgment of the Court, whether or not, the letter of the 20th of August 1842 was a valid and effectual assignment of the sum in question; and he insisted that such sum was not assignable or disposable by Sir John Norton, as part of his estate.

The cause came on to be heard on bill and answer, on the 29th and 31st of July 1844, before the Supreme Court at Madras, and on the 12th of September 1844, judgment was pronounced by Sir Edward Gambier, Chief Justice, when the Court ordered and decreed, that the bill of complaint of the Appellants should be dismissed without costs.

From this Decree, the Appellants brought the present Appeal.

Mr. Kindersley, Q.C., and Mr. H. Prendergast, for the Appellants.—Under the 6th Geo. IV., c. 85, Sir John Norton, having been six months in the possession of his office of Puisne Judge, acquired a right to have the sum of 25,000 rupees paid to his legal personal representatives, in the event of his dying while in such possession; he had, therefore, such an interest as was assignable in equity. The letter of the 20th of August 1842 constitutes a valid and effectual assignment of such interest. The question turns upon the words, legal personal representatives.—[The Vice-Chancellor Knight Bruce: The word personal, is not to be found in [224] the Statute of Distributions. I do not think there is any case in which the words, legal personal representatives, have been held to be next of kin.]—The cases in which Courts of Equity have decided that the words legal, or personal representatives meant next of kin, have always been either upon the construction of a Will or a Deed; where it was evidently the intention of the testator or the parties to the Deed, to exclude executors or administrators. *Bridge v. Abbott* (3 Bro. C.C. 224). *Palin v. Hills* (1 Myl. and K. 470). *Evans v. Charles* (1 Anst. 128). *Bulmer v. Jay* (4 Sim. 48). Here the question arises upon the words of the Act of Parliament, where the legal effect must be given to the words “legal personal representatives,” this must mean executors or administrators. The intention of the Legislature is clear. A sum of money, equal to half a year’s salary, is to be paid to the legal personal representatives of a Judge, dying in office—that can only mean the persons who shall represent his estate. The Court below proceeded on the assumption that Sir John Norton had no vested interest in this sum, and could not, therefore, assign it; but if the words of the Act of Parliament [6 Geo. IV., c. 85] mean any thing, they make it part of his personal estate, and he had a right to select to whom it might go; he could choose his own executors. How can it be said that, if undisposed of, this sum would not form assets in the hands of his executors, and, as such, liable to the claims of creditors? If that is so, what is there to prevent him prospectively charging it by deed, *inter vivos*? Many cases might be put, of property which could not, by any possibility, fall into possession in the party’s life—[225]—time, and yet it is assignable, such as a *post obit* bond, payable at the party’s death.

Then it is said, that the assignment of such an interest is contrary to the policy

of law, and within the meaning of the 5 and 6 Edw. VI., c. 16, which was extended to India, by the 19 Geo. III., c. 126. This is not an assignment of salary; for the Act expressly calls it "a sum equal to half a year's salary." It is true that the law will not allow the emoluments of an office to be aliened, where the separation of those emoluments from the office to which they are annexed, would be inconsistent with public policy. It will not admit the enjoyment of the emoluments to be in one person, while the office remains in another. In the case of military half pay, it is not merely a reward, but a retainer for future services; but here, when this sum becomes payable, the party must be dead. [The Vice-Chancellor Knight Bruce: Have not the public an interest in seeing that a person holding the high office of a Judge, should not die in such circumstances, as that there should not be assets sufficient to defray the expenses of his funeral!]—In *Davis v. The Duke of Marlborough* (1 Swan. 79), it was laid down by Lord Eldon, that a pension for past services might be alienated. Where there is no cure of souls, the profits of a Canonry may be assigned. *Grenfell v. The Dean and Canons of Windsor* (2 Beav. 544). In the same way it has been held that half-pay is not assignable, future services being contemplated. *McCarthy v. Gould* (1 B. and B. 387). *Gibson v. The East India Company* (5 Bing. N.C. 262). *Stone v. Lidderdale* (2 Aust. 533). But in none of these cases has it ever been held that a [226] pension given in remuneration of past services, and not for the purpose of keeping the party in a situation for future services, was not capable of being assigned.

Mr. Chilton, Q.C., and Mr. Jenkins, for the Respondent.—First. Upon the true construction of the 6th Geo. IV., c. 85, no interest in the fund thereby expressly directed to be paid to the "legal personal representatives" of a deceased Judge, vested in Sir John Norton, so as to enable him to assign or transfer the fund; on the contrary, the fund in question being intended by the Legislature as a gift or gratuity, to arise, and be payable only upon the decease of the Judge while in office, in order that the acceptance of office should not occasion loss to his personal representatives. We do not dispute that, where the term, legal personal representative, occurs in the Act of Parliament, it means executor or administrator, for the same hand is to receive it that is to receive the other part of his personal estate; but it is also clear, from the preamble, that the meaning of the Legislature was, that the next of kin of any Judge, dying in office, are the persons who would be entitled according to the Statute of Distributions. *Cotton v. Cotton* (2 Beav. 67). *Robinson v. Smith* (6 Sim. 47). *Styth v. Monro* (6 Sim. 49). *Baines v. Ottey* (1 Myl. and K. 465). And we submit that, from the preamble of the Act, it is to be inferred that the Legislature intended to make some provision for the family of the Judge dying in office, to enable them to return home. If the Legislature had intended to give this benefit to the [227] party himself, irrespective of his family, why should not the Act of Parliament have made the half year's salary payable in advance? But no; the party himself can never, by any possibility, become possessed of this sum. It is nothing but a bare possibility, and not coupled with any interest, and is, therefore, not assignable at law. *Jones v. Roe* (3 Term Rep. 88; and see note to *Purefoy v. Rogers*; 2 Saund. Rep. 388 n. (Ed. 1845); see also *Prosser v. Edmonds*, 1 Y. and Coll. 481).

Secondly. It is against public policy to allow this sum to be assigned. The distinction attempted to be made between a pension for past services, without reference to future employment, and that with reference to future employment, is untenable. The assignment is void, as against public policy. *Lidderdale v. The Duke of Montrose* (4 Term. Rep. 248). *Davis v. The Duke of Marlborough*.

Mr. Kindersley, in reply.—The principle upon which Courts have held pensions and salaries of public officers inalienable, is, either that they are given to keep up the dignity of the office, or to ensure a due discharge of its duties. And it has been held in either case, that it is against public policy to assign such a salary. But the question here is, what is this half-year's salary. It is obvious that it is given to prevent loss to the personal estate of the party, by his going out of this country to take office in India. Then, if it is to be considered as personal estate, and subject to debts, why may not the party himself pay a particular creditor in preference to the others?

[228] The Right Hon. Dr. Lushington (July 10, 1846).—The question in this case

arises between Messrs. Arbuthnot and Co., who are merchants and bankers carrying on business at Madras, and Mr John Bruce Norton, who is the son and executor of the late Sir John David Norton, who was one of the Puisne Judges of the Supreme Court of Madras; and it relates to a sum of £2500, which is payable by virtue of the Statute 6th of Geo. IV., cap. 85, and which is granted in the following manner (so far as relates to this question): "that when and so often as it shall thereafter happen, that any Puisne Judge of the Supreme Court of Judicature at Madras shall depart this life, while in possession of the said office, and after the expiration of six calendar months from the time of his arrival in India, for the purpose of taking upon him the office of Puisne Judge, then, and in all and every of such cases, the Court of Directors shall, and they are thereby required to pay or direct, and cause to be paid out of the territorial revenues, from which the salary of such Puisne Judge, so dying, should be payable, to the legal personal representatives of such Puisne Judge, so dying, as aforesaid, over and above what may have been due to such Puisne Judge at the time of his death, a sum equal to the amount of six calendar months' salary of the office of Puisne Judge."

The sum on the present occasion, that is equal to the amount of six months' salary, is £2500, and the claim of the Appellants is limited to that sum; and the question is, whether, under the circumstances, they are entitled to it, within the provisions of this Act.

Now, it appears that some time anterior to the [229] death of the late Sir John Norton, he, for a good and valuable consideration, purported to make an equitable assignment of all his right and interest in this £2500, to Messrs. Arbuthnot, in consideration of monies received from them; and the first question is, whether Sir John Norton had the power of making such an assignment, or whether, by virtue of this Act of Parliament [6 Geo. IV., c. 85], this fund was destined to go to some other persons, or in some other direction.

With regard to this sum of £2500, their Lordships are all of opinion, that the intention of the legislature was to provide against a contingency, which had arisen in two or three antecedent instances, and which contingency, in cases to come, is specifically provided for by this Act of Parliament, viz. that a person taking upon himself the office of a Judge in India, and dying in the possession of the office, having been put to great expenses at the time of making his outfit from this country to India, might have some certain means, whereby his estate would be enabled to be reimbursed that loss, in case of his death whilst in office.

Their Lordships think, that any construction of this Statute, which would appropriate this fund in any other way, would be against the whole intention of the legislature. Without saying what might be the meaning of the words which I have read, especially the words "legal personal representatives," in any other case, and without reference to any other context or construction, the only question here is, what is the meaning of those words in this Act of Parliament; and we are all of opinion that they mean the executor or administrator of the Judge [230] deceased, and that the money is to be taken as part of his general assets, and to be administered as such.

That being so, the second question is, whether it was in the power of Sir John Norton to assign this sum of money.

No question has been raised at all, that if it was in his power, the letter, which forms part of these proceedings, is sufficient to constitute an equitable assignment.

Now we consider the £2500 to have been part of his estate, precisely in the same light, and precisely of the same description, as if it had been a policy of assurance upon his life; that is to say, a certain sum of money to which he would be entitled, upon the contingency of a certain event; over which he had complete power of disposition by assignment in his lifetime, or by testamentary disposition, if he thought fit to exercise the power in that way.

With regard to the last question, which is a question certainly which their Lordships have thought deserving of greater attention and consideration than either of the preceding points that were discussed at the bar; viz. whether this assignment is against public policy or not,—we have come to the conclusion that it is not against public policy.

In giving this opinion, we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices: on the contrary, we acknowledge the sound-

ness of the principles which govern those cases, but we think that this case does not fall within any of these principles: and we think so because this is not a sum of money which, at any time, during the lifetime of [231] Sir John Norton, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with decorum and propriety the high rank in life, in which he was placed in India. We do not see any of the evils, which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his lifetime his personal means would, in no respect whatever, have been diminished, but remain exactly in the same state as they were. It is for these reasons, that their Lordships are of opinion, that the Judgment of the Court below was erroneous, and that we are under the necessity of reversing that Judgment: but being all of opinion that this was a case in which it was necessary for an executor to have the Judgment of a Court upon, we think under the special circumstances, that the costs on both sides, both here and in India, should be paid out of the fund.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*; tit. CONTRACT, C. 5. *Illegal Contracts, c. Contrary to Statute* ii.; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. *Judges, c. Salary*. S.C. 10 Jur. 145; 3 Moo. Ind. App. 435. On point (i.) as to alienation of official salaries, cf. the provisions of s. 53 of the Bankruptcy Act, 1883 (46 and 47 Vict. c. 52); *Ex parte Huggins*, 1882, 21 Ch.D. 91; and *Ex parte Saunders* (1895), 2 Q.B. 424; and see also *Liverpool Corporation v. Wright*, 1859, Johns. 359, and notes to *Ryall v. Rowles*, 1747-50 (1 Ves. Sen. 348), in 1 Wh. and T. L. C., 7th ed., at p. 141; (ii.) as to allowance of costs out of fund, see *Luximon Row v. Bajee Row*, 1831, 2 Knapp, at p. 65; and cf. *Croker v. Hertford (Marquis of)*, 1844, 4 Moo. P.C. at p. 368; *Bremer v. Freeman*, 1857, 10 Moo. P.C. at p. 374; *Dimes v. Dimes*, 1856, 10 Moo. P.C. at p. 440; *Scouler v. Plowright*, 1856, 10 Moo. P.C. at p. 458; and *Boughton v. Knight*, 1873, 3 P. and D. 77-80. For general powers of Judicial Committee as to costs, see O. in C. of 13th June, 1853, s. 1 (Stat. R. and O. Rev. iv. 306.]

[232] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT CALCUTTA.

JOHN COWIE and Others.—*Appellants*: WILLIAM REMFRY and Others.—*Respondents** [Feb. 10 and 11, 1846].

C. and Co. and H. and Co. were merchants at Calcutta. H. and Co. sold to C. and Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H. and Co., and submitted it to H. for his approval, when H. having objected to a particular word remaining, the broker took the sold note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. and Co. The broker delivered to C. and Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H. and Co. against C. and Co. for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion, that the sold note alone formed the contract, and found for the Plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note and affixing

* Present—Members of the Judicial Committee: The Lord President (the Duke of Buccleuch), Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors—Sir E. H. East, Bart., and Sir E. Ryan.

his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract.

This was an action brought in the Supreme Court at Calcutta, to recover damages for the non-perform[233]-ance of a contract by which the Appellants (the Defendants) engaged to purchase of the Respondents (the Plaintiffs) a certain quantity of indigo.

The Appellants and Respondents both constituted mercantile houses at Calcutta.

The contract was made through the instrumentality of a broker of the name of Holmes, who then carried on business in partnership at Calcutta.

The breach of the contract consisted in the Appellants' refusal to receive and pay for 147 chests of indigo, being part of a much larger parcel delivered to the Appellants by the Respondents, and which the Appellants afterwards returned, and refused to receive or pay for, upon the ground that by the specific terms of the contract, they were authorised to reject these 147 chests, on account of the inferior quality of the indigo contained in them. The entire parcel consisted of 1166 chests.

The declaration stated, that the Defendants and one William Ainslie, who was then without the jurisdiction of the Supreme Court, bargained for and bought of the Plaintiffs and Robert John Dring in his lifetime, and the Plaintiffs and Dring sold to the Defendants and Ainslie, a large quantity of indigo, being the whole produce of the season's indigo of two factories and six-sixteenths of the produce of the season's indigo of another factory, at the rate or price of 205 Company's rupees per factory maund, for each and every maund thereof, free of brokerage, with the usual allowance on rejections, viz., on broken, dusts, washings, and on stuff inferior to the run of the parcels; delivery to be taken as the indigo should arrive, and to be paid for by the Defendants and [234] Ainslie to the Plaintiffs and Dring on delivery thereof; and that the Plaintiffs and Dring should have the option of giving the rejections at the price they might be valued at by one Mr. A. Lacroix, or to withdraw them; and that in consideration that the Plaintiffs and Dring would deliver the said indigo, Defendants and Ainslie promised the Plaintiffs and Dring, to take delivery of and accept the said indigo, and pay them for the same on delivery. It then averred that the produce of the two factories and six-sixteenths of the third factory amounted to 4361 maunds and 11 chittahs, and that Plaintiffs and Dring were ready and willing to deliver, and tendered and offered to deliver, to the Defendants and Ainslie the said indigo as it arrived, and requested the Defendants and Ainslie to take delivery of, and accept and pay for, the same, and that Defendants and Ainslie accepted and paid for part of the said indigo; and assigned for breach, that they would not accept or pay for the residue, and alleged special damage.

To this declaration the Defendants pleaded three pleas:—First, that they did not promise as alleged; Secondly, that Plaintiffs and Dring did not tender and offer to deliver the residue of the indigo to the Defendants and Ainslie as alleged; Thirdly, that the said residue consisted of broken, dust, washings, and stuff inferior to the run of the parcels, and that Defendants and Ainslie, in pursuance of, and according to, the terms of the contract, rejected the said residue. That the residue so rejected was afterwards valued by the said Lacroix at the price of 154 Company's rupees per factory maund; that the Defendants and Ainslie were always ready and willing to accept and pay for [235] such residue, according to the valuation of Lacroix, of which the Plaintiffs and Dring had notice; but that the Plaintiffs and Dring would not deliver the residue at that price or valuation, but withdrew the same.

The Plaintiffs took issue on all these pleas, and thereupon issue was joined.

On the 1st of July 1842, and before the trial of these issues, a commission to examine witnesses in London, on behalf of the Plaintiffs, and of the Defendants, was obtained.

Upon the return of the evidence taken under the commission, the cause came on for trial, before Sir Lawrence Peel, Chief Justice, and Sir John Peter Grant and Sir Henry Wilmot Seton, Justices of the Supreme Court, on the 22nd and 23rd of November 1843.

It was proved, on behalf of the Plaintiffs, that Messrs. Whyte, Holmes and Co., were Brokers at Calcutta, and that that firm was employed by both Plaintiffs and Defendants, in negotiating the sale and purchase of the indigo, in the declaration mentioned; and in order to establish the contract declared upon, the Plaintiffs put in evidence the following letter written by Holmes, one of the partners in the firm of Whyte, Holmes and Co., dated the 19th November 1840, addressed to the Plaintiffs, and purporting to be the sold note of the indigo in question:—

“ Calcutta, 19th Nov. 1840.

“ Messrs. Hamilton and Co.

“ Dear Sirs,—We have this day sold for you to Messrs. Colvin, Ainslie, Cowie and Co., the whole produce of this season's indigo of the Big and Little [236] Union, in Kishnagur, and 6-16ths of the Mulnauth factory, on the following terms, viz.:—

Quantity.....About 4500 Mds.

Price.....Two hundred and five Co.'s rupees, per factory maund, free of brokerage, with the usual allowance on rejections, viz., on broken, dust, washings, and on stuff inferior to the
H.C.
usual run of the parcel.

Delivery.....To be taken as it arrives, and to be paid for on delivery. You are to have the option of giving the rejections at the price they are valued at by Mr. A. Lacroix, or to withdraw them.

“ We remain, dear Sirs, yours faithfully,

“ WHYTE, HOLMES AND CO., Brokers.”

This letter was proved to have been delivered by Holmes to the Plaintiff, Woollaston. And it was further proved, that at the time the letter was delivered to Woollaston, it contained the word “usual”; that Woollaston objected to the word “usual” remaining in, and required that word to be struck out. That, thereupon, Holmes took the letter to the Defendant, Henry Cowie, who struck out the word “usual” with his pen, and put his initials over it, for the purpose of vouching the expunction of that word, and that Holmes afterwards gave the letter to Woollaston, as the sale-note of the contract.

The Defendants objected to this letter being received as evidence of the contract, on the ground, that it was [237] not in itself a contract: that it was in its form a sold note, forming part only of a contract, and that to make it a contract, a corresponding bought note ought to be produced. That further, as a contract it was imperfect and not binding, under the Statute of Frauds, for want of the signature of the Defendants. The Supreme Court, however, received it as evidence, and gave leave to the Defendants to move for a non suit.

It was proved by the Defendants, as part of their case, that on the 20th of November 1840, Messrs. Whyte, Holmes and Co., wrote, and sent to the Defendants, a letter of corresponding date with the sold note, and purporting to be the bought note of the indigo mentioned, which was as follows:—

“ Calcutta, 19th Novr. 1840.

“ Messrs. Colvin, Ainslie, Cowie and Co.

“ Dear Sirs,—We have this day purchased on your a/c from Messrs. Hamilton and Co. about 4500 maunds of indigo, being the present season's produce of the Big and Little Union in Kishnagur, and 6-16ths of the Mulnauth concern, on the following terms, viz.:

Price, Co.'s Rs. 205 ½ F.Md. and 1 % brokge. from you, rejecting broken, dust, washings, and any thing that is inferior to the run of the parcels.

Delivery, To be taken as it arrives, and to be paid for on being delivered.

“ Mr. Lacroix of our establishment is to examine the indigo, and state any that he considers to be inferior, and also to value it, and the other rejections, Messrs. Hamilton and Co. reserving for themselves the option of giving the rejections or not, as they may choose.—We remain, dear sirs, yrs. faithfully.,

“ WHYTE, HOLMES AND CO.”

[238] It was further proved, that the deliveries of indigo under the contract made by Whyte, Holmes and Co., commenced on the 30th November 1840, and ended on the 14th January 1841, and consisted of 1151 chests, or 4361 factory maunds, and 11 chittacks, and that the whole of them were inspected and approved or rejected by Lacroix, the person named in the bought and sold notes, who attended all the deliveries, and made his rejections mostly in the presence of a Mr. Savi, one of the manufacturers of a large portion of the indigo, and that Lacroix valued all the rejected chests, which were afterwards accepted by the Defendants. That in the month of December 1840, the Defendants shipped for London 1012 of the chests of indigo so bought by them of the Plaintiffs, and paid for as aforesaid, and afterwards sold the same by auction at the indigo sales in London in July 1841. That in March 1841, the Plaintiffs applied to Defendants, through Messrs. Whyte, Holmes and Co., to obtain the Defendants' consent to have the rejected chests of indigo, then in the bonded warehouse, sold by public auction, but the Defendants declined to interfere. That in May 1841, the Plaintiffs obtained from the bonded warehouse at Calcutta 147 chests of indigo, which included the whole number of chests rejected by the Defendants, and 10 chests beyond. That in June 1841, the Plaintiffs, by Messrs. Holmes, Faudon and Co., their brokers, sold the whole of the 147 chests received by them from the bonded warehouse, by public auction in Calcutta, at prices considerably less than the valuation of chests rejected by Lacroix, for being inferior, and which the Plaintiffs delivered at such valuation, without observation or objection. That between the 29th of November 1841, and 2nd of [239] February 1842, 64 chests of the indigo rejected by the Defendants, and part of the 132 chests which had been deposited in the bonded warehouse in Calcutta by the Defendants, and sold by auction in Calcutta by the Plaintiffs in June 1841, as aforesaid, arrived in London, and were put up for sale by auction in London in April 1842, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1012 chests. That the 64 chests so sold in April 1842, were compared and examined with the 1012 chests of indigo sold in July 1841, the rejected chests were contrasted with the accepted chests of the corresponding marks and parcels, and the 1012 were found to be of very superior quality, and the 64 chests were found to be very far inferior to the general run of the 1012 chests and to the accepted chests of the corresponding marks, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1012 chests.

The evidence given respecting the custom of merchants at Calcutta to deliver bought and sold notes, was conflicting; but the Court, upon the evidence in general, found a verdict for the Plaintiffs, for the difference of amount between the contract price of the indigo, and that at which the Plaintiffs sold the 132 chests, through Messrs. Holmes, Faudon and Co., in June 1841, and directed that the amount should be calculated by the prothonotary. The prothonotary calculated the amount of the damages, and assessed them at Rs. 26,035. 5. 11.

Upon the 26th of January 1844, the Defendants obtained from the Supreme Court, a rule to show cause why a judgment of nonsuit should not be entered, or why a verdict should not be entered for the Defen-[240]-dants, or why a new trial should not be had, on the grounds, that the contract declared upon was not duly signed according to the Statute of Frauds, and that there was no written contract, and that the verdict was against evidence, or the weight of evidence.

The Plaintiffs showed cause against the rule, and the Court took time to consider their judgment, and on the 5th March 1844, Sir Lawrence Peel delivered judgment, that the Defendants' rule of the 26th of January 1844, should be discharged, with costs. This Judgment proceeded on the ground that the sold note put in by the Plaintiffs, alone evidenced the contract between the parties; and that the Plaintiffs, having proved the contract declared on, and the delivery of the whole quantity contracted for, it lay upon the Defendants to show, that they had rightly exercised their power of rejection, which the Court, upon the evidence in the cause, was not satisfied of, and was, therefore, of opinion that the Defendants were bound to pay the contract price for the indigo rejected.

From this verdict and judgment of the Supreme Court, the present Appeal was brought.

The Solicitor-General (Sir F. Kelly), Mr. Hill, Q.C., and Sir John Bayley, for

the Appellants.—This was a contract by bought and sold notes, according to the usual mode of mercantile transactions at Calcutta; and it cannot be disputed that, if there be any variation in any material part, between the bought and sold notes, the contract is void and gone. *Thornton v. Meur* (1 Moody and Malkin, 43). *Thornton v. Kempster* (5 Taunt. 786). [241] *Pitts v. Beckett* (13 Mee. and W. 743). *Short v. Spackman* (2 Barn. and Adol. 962). *Hawes v. Foster* (1 Moody and Rob. 368). Smith's Mercantile Law, 3 Edit. p. 455. There must be mutuality of contract. The sold note is a document which expresses only a sale; it cannot, therefore, even though signed by the intended buyer and seller, amount in law to a contract of sale and purchase, so as to satisfy the Statute of Frauds (29 Car. II. cap. 3, sec. 17), the contract required by that Act being a mutual agreement, binding on, and enforceable against, both parties, which a sold note is not. In this case, the sold note differs in many particulars from the bought note. But assuming the contract to be contained in the sold note alone, the note proved by the Plaintiffs was altered in a material particular, after it had been signed by the brokers, and was not, subsequent to such alteration, signed by the Respondents, or any agent lawfully authorised on their behalf. The insertion of the initials H. C. above the erasure of the word "usual" in the note was not intended to operate, and could not operate, further than as an authentication of the erasure: it did not in law amount to a signature sufficient to bind the Appellants to the performance of the contract, so as to satisfy the Statute of Frauds. *Eastwood v. Kenyon* (11 Add. and Ell. 438). *Allen v. Bennett* (3 Taunt. 169). *Stokes v. Moore* (1 Cox, 219). The Court below thought that this case fell within the principle of *Rowe v. Osborne* (1 Stark, *Visi Prius* Cases, 140), but we submit that the present is wholly different from that case. In that case there were none of the incidents of a bought note, in the mercantile acceptance of the term; the contract was [242] not effected through the medium of bought and sold notes, nor was it signed by the broker, but by the party himself; and Lord Ellenborough was of opinion that that was the real contract, and not the note of such contract, which was sent by the broker to the Defendant, and which varied from the contract itself.—[Lord Brougham: In *Hawes v. Forster* (1 Moody and Rob. 368), the jury were desired to say, whether it was a bought and sold note; so here we are a jury as much as the Judges of the Supreme Court were.]—It cannot be contended that, at the time the broker went to Cowie, and he struck out the word "usual," the transaction was complete; and that the necessity of a bought note was dispensed with, by Cowie agreeing to the alteration. Suppose a draft release brought to one of the parties to have an alteration agreed to, his signing that alteration is not the formation of a contract. The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement for a lease, will not constitute a signature within the meaning of the Statute of Frauds. *Stokes v. Moore*. This must be considered as a transaction effected by a broker between other parties, by means of bought and sold notes; and the effect of the bought note varying materially from the sold note, is to render the contract void. Nothing has been done to waive the effect of such variation.

Sir Thomas Wilde, and Mr. Charles Buller, for the Respondents.—The question is, whether this sold note, containing all the terms of the contract of the parties, is within the meaning of the Statute of Frauds. The bought note [243] was not necessary—the transaction was complete without it.—[Lord Brougham: The question is, whether this is a transaction of bought and sold notes. If it is so, the law is clear. *Rowe v. Osborne* [1 Stark. N.P. 140] was not a case of bought and sold notes.]—This note was signed by the party sought to be bound. There is no doubt whatever that White, Holmes and Co. had authority to enter into the contract. Holmes tendered the note which contained the contract to Woollaston for his approbation, but upon his dissenting to the word "usual" remaining; he took it to Cowie; and the effect of his conversation with him was, that he agreed to it, with the word "usual" struck out of it. Cowie drew his pen through the word, put his initials over it, and handed it back to Holmes to be delivered to the seller. We have, therefore, a paper containing the terms of the contract, signed by the party authorised by the buyer, and delivered to the seller, with the approbation of the buyer. This was the signature of the purchaser for all legal purposes (before the delivery of the bought note); if it was not so, at the delivery, it never could be afterwards made

a contract within the Statute of Frauds. The bought note was not the means of completing the transaction; it was not the means by which the fact of buying was known to the buyer; it was not delivered at the time. All the evidence goes to prove the contract complete without the bought note, and it not being the general custom at Calcutta, to complete mercantile transactions by bought and sold notes, there was no occasion for the bought note here, and the contract was a binding contract without it.

The Solicitor-General [Sir F. Kelly], in reply.—This is undoubtedly a case of bought and sold notes; [244] the broker himself states that he delivered both a bought and a sold note. The contract, in such cases, is not binding upon either party until both are delivered. *Thornton v. Kempster* (5 Taunt. 786; 1 Marsh. 355).—[Dr. Lushington referred to *Humphries v. Carvalho* (16 East. 45).]—That case is in our favour; it goes to show that the notes must correspond at the time that the contract is completed.—[Dr. Lushington: There was parol evidence, that the seller acquiesced in the sale.]—There was no variation of the contract on the bought and sold notes. That case only shows that the authority might be disputed; the question was, whether the seller might reject it on other grounds than discrepancy.

The Right Hon. Dr. Lushington (August 19, 1846).—The Appellants and the Respondents were two mercantile firms at Calcutta. The Appellants were the purchasers of a large quantity of indigo from the Respondents, who brought an action against them, for damages for non-performance of a contract, dated the 19th of November 1840.

The Supreme Court was of opinion, that the contract was solely constituted by a note, signed by Messrs. White, Holmes and Co., the brokers employed by both parties, that note being dated the 19th of November 1840.

The Court being of opinion, that there had been a breach of this contract, gave damages, assessed in pursuance of the contract, to the Respondents, the Plaintiffs. The Appellants, the Defendants, contended that this sold note did not alone constitute the contract, but that the contract consisted of the sold note, [245] and also of the bought note, bearing the same date, and signed by the brokers.

The Defendants also insisted, at the trial, that the Plaintiffs were bound to give in evidence the bought note, as well as the sold note. The Court, however, was of a contrary opinion, and the Defendants produced the bought note as part of their evidence.

A question arose, as to whether it was customary, in Calcutta, to deliver bought and sold notes, and the Court declared, in its Judgment, that the evidence in favour of the custom preponderated.

The questions for us to decide, are, first, what document, or documents, constitute the contract between the parties; next, what is the construction of the contract; and, lastly, whether the contract was void, or has been broken.

The facts of the transaction must be taken from the evidence of Mr. Holmes (a partner in the brokers' firm), who was living in London, and examined under a commission. He states, that his firm acted as brokers; that he communicated, as to the purchase, with Mr. Henry Cowie, one of the firm of the Defendants; that he wrote the sold note addressed to the Respondents; that Mr. Woollaston, one of the Respondents, objected to the word "usual,"—the word "usual" occurring in this manner: "Two hundred and five Company's rupees per factory *maund*, free of brokerage, with the usual allowance on rejections, viz., on broken, dust, washings, and on stuff inferior to the usual run of the parcel;" the objection taken was to the word "usual." He says, that he stated this objection to Mr. Cowie, who, he thinks, read the letter, struck through the word "usual," and put his initials, "H. C." over. Mr. Holmes adds, that he delivered this note, so [246] altered, to Mr. Woollaston, to bind the sale, as a contract between the parties.

Mr. Holmes, on his cross-examination, states, that there was a bought note as well as a sold note. He says he delivered the bought note to the Defendants, for the purpose of their advising their friends of the purchase; he did not deliver it as a contract, but subsequently to the day of the contract, for the purpose aforesaid. He says it was not then customary, at Calcutta, to deliver a bought note to the purchaser, or a note to the seller.

Mr. Ferguson, however, a witness of much greater experience, and whose opinion was adopted by the Court, sitting as a jury, says, he considered it "the invariable custom, at Calcutta, to deliver bought and sold notes: it was so in 1840, and it is so now."

Then, upon the whole of this evidence, we must determine what is the legal conclusion, as to the way in which it was the intention of the parties that the contract should be made, and whether any, and what contract was made. According to the custom prevailing amongst merchants at Calcutta, the contract should have been by bought and sold notes, and the necessary inference is, that the parties intended to contract according to this custom: but this is not all: there is delivered to both parties a bought and sold note, according to such custom. The actual dealing corresponds with the usual practice. What is to be set off against this? nothing but the statement of Mr. Holmes, evidently a young and inexperienced person, who deposes that he did not believe such a custom to exist, though, at the very moment he was, *de facto*, following it. All the acts of the two parties show they were acting in observance of the custom. Mr. Woollaston [247] requires the sold note to be corrected, according to his sense of what the contract should be. Mr. Cowie, one of the Defendants, requires a bought note to be delivered.

Looking at all these facts, we think that if there be no other evidence, or circumstances to the contrary, we must come to this conclusion, that the transaction is to be considered as a contract by bought and sold notes, and to be governed by the rules applicable to such a contract. What is there in this case which militates against such a conclusion? The fact that after the sold note had been shown to Mr. Woollaston, and he had objected to the word "usual," the same note had been shown to Mr. Cowie, and as Mr. Holmes says, he thinks, read over by him, and afterwards, as he deposes, the word "usual" struck through, and the initials "H. C." of Cowie's name added by him.

It is contended, on the part of the Respondents, that the conclusion to be drawn from this circumstance is, that Mr. Cowie, by this act, so sanctioned the sold note, that he and his firm were bound by all the conditions therein contained, that such note immediately constituted the contract between the parties, and, if accepted by the Respondents, became binding upon the Appellants, entirely abrogating, *pro hac vice*, the customary mode of dealing by bought and sold notes, and all the legal results arising therefrom. It may be true, that merchants dealing, *inter se*, are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but we are of opinion, that the presumption is strongly in favour of the custom, and that any alleged deviation therefrom must be strictly proved.

Now, what was the subject of this transaction? Mr. [248] Cowie, as the acting partner of his firm, communicates with Mr. Holmes, the broker, and they come to some understanding as to the terms on which the indigo is to be purchased. The custom of dealing by bought and sold notes having been proved, it must be presumed that Mr. Cowie intended so to deal, till the contrary be proved. Mr. Holmes, conceiving that he understood the terms agreed upon by Mr. Cowie, embodied them in the sold note, which he sent to Mr. Woollaston, the seller. There is neither proof nor presumption that Mr. Cowie saw this note before it was sent. Mr. Woollaston returns the note through Mr. Holmes, with an objection to the word "usual." Mr. Holmes has an interview with Mr. Cowie, and tells him that he cannot finish the transaction unless the word "usual" be struck out; and so far as it appears, it was for this, and this purpose only, that the sold note was shown to Mr. Cowie. Mr. Holmes thinks he read it; assuming he did, he read it for the purpose of considering whether he should comply with the demand made—whether he should consent to one professed and designated alteration; he was not (whatever might be the legal consequence), *de facto*, required to read it, with a view to determine whether it contained the terms he intended to contract upon; first of all, was it intimated to him, that by the act he was asked to do, he would depart from the accustomed usage, and irrevocably bind himself and partners by that single note? This signature of the alteration can only be taken to indicate his approval of, or rather his assent to, that alteration.

We are of opinion, that it would be exceedingly dangerous to the safety of all mercantile transactions, which so mainly depend upon usage, and the observance of it, if we were to infer from a circumstance of this [249] description, that the purchasers were bound by this sold note alone, contrary to the custom, contrary to the course of the transaction itself, thereby establishing a contract by an act not in itself purporting so to do, and of the consequences of which Mr. Cowie was not apprized, and which no mercantile man could be expected to surmise.

We are of opinion, that the contract was not, as held in the Judgment, evidenced by the sold note alone; but that it was a contract by bought and sold notes, according to the custom in use, and to be so dealt with. We think that the established usage of dealing in the mercantile world, should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour, and no departure from it is to be inferred from doubtful circumstances, and especially not from circumstances, which, in the opinion of mercantile men generally, would not be conceived to produce any such consequences.

The Court below relied on the case of *Rowe v. Osborne* [1 Stark. N.P. 140]. Though this was only a decision at *Nisi Prius*, yet we acknowledge its weight, as being the opinion of a most eminent Judge (Lord Ellenborough), peculiarly conversant with mercantile contracts; but we think that case is so materially distinguishable from the present, that it is not only not directly applicable, as was admitted by the Court below, but that the principle on which Lord Ellenborough relied, cannot be made applicable to the circumstances of the present case. In *Rowe v. Osborne*, the note delivered to the vendor was actually signed by the purchaser; the note of the contract afterwards sent to the purchaser differed from it. Lord Ellenborough held that the note signed [250] by the purchaser constituted the real contract. The principle, upon which Lord Ellenborough so ruled, is not stated, but we apprehend it must have been this, that the signature clearly evidenced the consent of the purchaser, to buy on the terms stated in the document; for that purpose, and that purpose only, could the document have been submitted to him, for his signature, and being so signed by him, the necessary and inevitable conclusion, in the absence of fraud, is, that he knew and approved of the terms, and expressed such approval by his signature. The vendor having assented to those terms, there was a complete contract between the two parties; and the very fact of such a signature by a party being contrary to the custom of buying by bought and sold notes (which are signed by the broker), showed that he relied upon himself, upon his own act and deed, in concluding the bargain, and not upon the broker, or on any note to be hereafter delivered to him.

The present case we think essentially different. Here the note received no signature from the party; it was submitted to the party, not for the purpose of considering if it contained his intentions, but solely and exclusively for the purpose of asking Mr. Cowie's consent to the removal of one word, and to that removal he consents, and affixes his initials in approbation of that removal, and nothing else. We cannot consider this as a proof of knowledge of contents, and consent to be bound by the whole instrument, abandoning the usual mode of contract by bought and sold notes. We have examined all the other authorities cited at the Bar, but we do not think they apply with sufficient closeness to require any further investigation.

[251] We feel bound, therefore, to differ from the Supreme Court, and the Judgment they have pronounced, on this part of the case. We think that this must be considered as a transaction, in the contemplation of the parties, by bought and sold notes, and that the contract is contained in both of the notes, and not in one. If this be so, it is admitted that there is a material variation between the two notes; and then the consequence follows, from all legal principles, that no binding contract has been effected. To such purport is the decision of the Court of Common Pleas, in *Thornton v. Kempster* (5 Taunt. 786). To use the words of Mr. Baron Parke in another case, the parties never have contracted in writing *ad idem*.

For these reasons we are of opinion, that the Judgment of the Court below must be reversed, and judgment be entered for the Defendants below, the Appellants here.

I must add, however, that this is the Judgment of the majority of their Lordships,

and that the Chancellor of the Duchy of Cornwall [The Right Hon. T. Pemberton Leigh] was inclined to have taken a different view of this case.

[Mews' Dig. tit. CONTRACT; A. 2. *Statute of Frauds*, b. vi.; E. DISCHARGE AND BREACH OF CONTRACTS; 2. *Alteration*: tit. SALE OF GOODS; B. STATUTE OF FRAUDS, 2. f. S.C. 3 Moo. Ind. App. 448; 10 Jur. 789. See *Sievwright v. Archibald*, 1851, 17 Q.B. 103; *Parton v. Crofts*, 1864, 33 L.J. C.P. 189; *Thompson v. Gardiner*, 1876, 1 C.P.D. 777. Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), s. 4; Indian Contract Act (Act ix. of 1872), ss. 7, 20, 29; Indian Transfer of Property Act (Act iv. of 1882), s. 54. As to expression of existence of divergence or unanimity of opinion among members of Judicial Committee, see O. in C. of 4th Feb. 1878, and authorities collected in Phillimore, *Eccl. Law*, 2nd Ed. p. 975. See also, as to Judicial Committee reversing finding of fact, *Reg. v. Eduljee Byramjee*, 1846, 5 Moo. P.C. 284.]

[252] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

EMMA CURTIS.—*Appellant*; GEORGE SAVAGE CURTIS.—*Respondent*
[June 14, 1845,* and Feb. 18, 1846†].

In a suit for a divorce, *a mensa et thoro*, a decree of confrontation was issued, for the wife, who had eloped to America, to appear to be identified, when her proctor tendered a defensive allegation. The Arches Court of Canterbury, rejected the allegation, as she was in contempt, by reason of her non-appearance to the decree of confrontation. Such rejection affirmed, on Appeal, by the Judicial Committee of the Privy Council [5 Moo. P.C. 256].

A divorce *a mensa et thoro*, on the ground of adultery, pronounced for, upon the evidence of a single witness, as to the cohabitation of the wife, after her elopement, there being corroborating circumstances [5 Moo. P.C. 258].

This was a cause, retained on an Appeal from a grievance, in suit for a divorce *a mensa et thoro*, upon the ground of adultery, promoted by George Savage Curtis against Emma Curtis, his wife. The libel pleaded, that the parties were married in 1826, and had cohabited together till the 10th of September 1843, when Mrs. Curtis eloped from her husband's house; that there were six children, the issue of such marriage. That in the summer of 1842, it was intimated to the proponent, that a Mr. John Huxham, with whom and his family, consisting of a wife and eight children, proponent and his family had been on visiting terms, was too particular in his attentions to Mrs. Curtis; [253] that proponent broke with John Huxham, and insisted upon Mrs. Curtis abstaining from any future communications with him, which request she promised to comply with. That, notwithstanding such promise, she had repeated clandestine interviews, by preconcert, with John Huxham, in bye and unfrequented places, from that time down to her elopement. That on the 10th of September 1843, at which time the proponent was absent from home, Mrs. Curtis left her home, telling her children that she was going, on particular business, to Bath, and she would be back on the following day, and proceeded to Exeter, and then to Bath, and on the 12th of September she arrived at Liverpool with John Huxham. That they lived together as man and wife, under the name of Hamilton, in lodgings at Liverpool, until they sailed, under the assumed name of Hamilton, to Boston in America, and from thence went to Baltimore, where they resided as man and wife. That about ten days after the elopement of Emma Curtis, a letter, being in the handwriting of John Huxham, and signed "J. H.," but without any

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

† Present: Lord Brougham, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

address, was found in the wardrobe, and amongst the clothes, of Emma Curtis. This letter was filed as an exhibit. It was of an improper and amorous nature, signed "J. H.," and dated the 6th of November.

The proctor for Mrs. Curtis confessed the marriage as pleaded, but otherwise contested the suit negatively.

Upon this libel and exhibits, nine witnesses were examined, some of whom deposed to having seen Emma Curtis and Huxham together in unfrequented places, at various times, in the years 1842-3. One of them deposed to having seen Huxham's arm being round Emma Curtis's waist. The only witness who deposed [254] to the fact of Emma Curtis's cohabitation with Huxham, was Andrew Payne; he deposed, that he went over to New York, in America, at the desire of the proponent, to endeavour to trace Emma Curtis and John Huxham, and that he discovered them living together in lodgings at No. 60, North Charles Street, Baltimore. That upon inquiring for Mr. and Mrs. Hamilton, he was admitted into a back room on the third floor, where he found Emma Curtis and John Huxham, both of whom he knew perfectly, being in the constant habit of seeing them when they were at Teignmouth. That Mrs. Curtis was reclining on a sofa in the room, and that she immediately recognized him, and exclaimed—"Dear! Payne! what brought you here?" that he replied, "Why you, ma'am, and that gentleman," pointing to Mr. Huxham; and she then burst into tears, and exclaimed—"Oh, then, I suppose Mr. Curtis is going to seek a divorce;" that he replied, "that is the very fact of my being here;" she was greatly distressed, and I was greatly hurt to see the poor creature; and she twice asked, in the midst of her crying, "Do you think Mr. Curtis would let me come back to him?" The witness then deposed, that Mrs. Curtis asked him a great many questions concerning her husband and children; and that, being thirsty, he asked Mrs. Curtis for a glass of water, and with that, she asked Huxham to get me one. She addressed him as "My Dear," just as he had done her. He asked her where he should get the water, and she answered, "In our bed-room." I noticed these words; and with that he opened a little door, opening out of the sitting-room into one adjoining, where I caught sight of some drapery. I could not see a bed, but the drapery looked like [255] bed-furniture, and she called it their bed-room. Mr. Huxham brought me out a water-bottle glass, just such as are used on wash-stands. That Mrs. Curtis entreated him to urge Mr. Curtis, when he returned, to take her home, and she added, "that she would go down on her knees to him if he would but forgive her." That he had no doubt Mrs. Curtis and Huxham were living there as man and wife. Witnesses also proved, that the exhibit dated the 6th of November, and signed "J. H.," was in the handwriting of John Huxham.

After the production of the above witnesses, and on the 4th of June 1843, the Judge of the Arches Court, on the petition of Mr. Curtis's proctor, decreed a decree of confrontation (see form of a decree of confrontation, Coote's Ecclesiastical Practice and Forms, 336). The proctor returned the decree of confrontation, when the term probatory was extended to the 6th of August, when the Judge granted a decree of confrontation by ways and means; the certificate of the decree of confrontation, and the term probatory, was continued from time to time; and on the 2nd of November, Mr. Curtis's proctor prayed publication, when the proctor for Mrs. Curtis asserted a defensive allegation, on her behalf, and the proctor for Mr. Curtis prayed that such allegation might not be received till Mrs. Curtis should have appeared to the decree of confrontation, and on the 30th of the same month, the proctor for Mrs. Curtis tendered his asserted allegation, and prayed that the same might be received; Mr. Curtis's proctor objected thereto, as Mrs. Curtis had not appeared to the decree of confrontation, by ways and means, heretofore returned into Court executed. The Judge, on petition of Mr. [256] Curtis's proctor, rejected the prayer of Mrs. Curtis's proctor, and decreed publication, and all facts to be propounded. From this order, the proctor for Mrs. Curtis protested a grievance, and brought an appeal.

Dr. Haggard and Dr. Harding, for Mrs. Curtis, contended (14th June 1845 *).

* Present: The Lord President [Lord Wharncliffe], Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

that the Appellant ought not, by reason of non-appearance to the decree of confrontation, to have been denied her right of giving in a defensive allegation.

The Queen's Advocate (Sir John Dodson), and Dr. Addams, for Mr. Curtis, *contra*, submitted, that it would have been contrary to law, and the practice of the Ecclesiastical Courts, to have permitted the Appellant to plead in the principal cause, whilst guilty of contumacy towards the Court, in not having appeared to the decree of confrontation issued in the cause.

The following authorities were referred to: *Hoile v. Scales* (2 Hagg. 566), *Oughton's Ordo Judiciorum* (tit. 37), *Ayliffe's Parergon* (p. 15), *Lancelotus* (Inst. Jur. Can. lib. iii. tit. vi.), *Maranta* (Aurea Prac. p. vi.).

Lord Brougham.—It is a general rule of all Courts, that no party shall be allowed to take active proceedings, if in contempt. It appears to us, not merely the right of the party to object to the admission of this defensive allegation, but it is the right of the Court. The Court has a [257] right to say that it will not allow a process issuing out of the Court to be treated with contempt. Mrs. Curtis's identity was material; it was upon her identity that the cause was to be determined. She goes to a distant country with her paramour, and does not appear to the decree for confrontation. In such circumstances, the learned Judge was quite right in refusing to admit the defensive allegation on her behalf, when she refused to appear; and his decree must be affirmed.

Upon the motion of the Queen's Advocate, their Lordships retained the principal cause, in all its incidents.

The original depositions having been brought in, the cause now came on for hearing (18th Feb. 1846 *).

The Queen's Advocate (Sir John Dodson), and Dr. Addams, for Mr. Curtis.

Dr. Haggard, and Dr. Harding, for Mrs. Curtis, cited *Evans v. Evans* (1 Robt. 165), contending that the unconfirmed evidence of the witness, Payne, was not sufficient to warrant the Court pronouncing in favour of the divorce.

Lord Brougham.—Their Lordships do not say anything whatever against the rule laid down by the learned Judge of the Prerogative Court, in *Evans v. Evans* (1 Robt. 165). That case does not apply to the present. It is only a decision against pronouncing for a divorce, by reason [258] of adultery, upon the evidence of one witness only, without corroborating circumstances. In this case there are corroborating circumstances: the fact of the elopement;—Huxham's letter, which was found in Mrs. Curtis's wardrobe, which is proved to be in his handwriting. Would it not be a most extraordinary thing, if Huxham, who is proved by Payne to be cohabiting with Mrs. Curtis, at Baltimore, should have written this letter to another person, and that that person should have deposited it in Mrs. Curtis's wardrobe? These are such corroborating circumstances, as take the case out of the rule. There is, besides, the refusal of the wife to submit to confrontage. Decree, sentence of divorce.

[259] ON PETITION FROM THE ISLAND OF CAPE BRETON †

[April 1, 2, 6 and 7, 1846].

By the treaty of Paris, of the 10th February 1763, the Island of Cape Breton (which had been invaded and taken by the British forces), was ceded by France to the King and Crown of Great Britain. By a proclamation issued by the King in October 1763, the Islands of Cape Breton and St. John's were annexed to the Government of Nova Scotia, and the proclamation authorised

* Present: Lord Brougham, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

† Present: The Lord Chancellor [Lord Lyndhurst], the Lord President, (the Duke of Buccleuch,) Lord Cottenham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

the Governor to call General Assemblies, in the said Governments respectively, as soon as the circumstances of the colonies would admit. In the year 1784, the Crown, by a commission to the Governor-in-Chief of Nova Scotia, and the Islands of St. John's and Cape Breton, granted a constitution to the Island of Cape Breton, to consist of a Lieutenant-Governor, Council, and Assembly, distinct from that of Nova Scotia. The government of the Island continued, however, to be regulated by a Lieutenant-Governor and Council, but no General Assembly was convened, as directed by the commission of 1784. In the year 1820, the Crown, in the commission to the Governor-in-Chief of Nova Scotia, annexed Cape Breton to Nova Scotia. The inhabitants of Cape Breton petitioned the Crown, complaining of the illegality of the re-annexation by the act of the Crown alone, without their consent, or by an act of the Imperial Parliament, as contrary to the proclamation of 1763 and the commission of 1784. Held by the Judicial Committee of the Privy Council, that such re-annexation was legal, and that the Petitioners were not entitled to a separate constitution under the commission of 1784.

This was a Petition from certain of the inhabitants of the Island of Cape Breton, against the annexation of that Island, to the province of Nova Scotia.

The object of the Petition was to obtain the restoration of the constitution, alleged to have been granted by His Majesty King George the Third in 1784, and for the convening of a local Legislature, under a Lieutenant-Governor, Council, and Assembly, conformably to such grant; and that the laws of Nova Scotia, and the authority of its Legislature, might no longer be enforced over the Island of Cape Breton.

By the treaty of Utrecht, in the year 1713 [1 Chalm. Collect. pp. 380, 381], the pro-[260]-vince of Nova Scotia, or Acadia, was finally ceded to the Crown of England, by the French Government. By the same treaty, the Island of Cape Breton was retained by France, and was afterwards colonized by that nation, and became a French settlement. In the year 1758, the Island was invaded and taken by the British forces, and on the 26th July in that year, Louisbourg, the capital, surrendered by capitulation. By the 4th article of the treaty of Paris, of the 10th February 1763 [1 Chalm. Collect. 467], all pretensions of France to Nova Scotia were again renounced, and the Island of Cape Breton was, with Canada and other French colonies in America, finally guaranteed, ceded, and transferred in absolute sovereignty by France, to the King and Crown of Great Britain.

On the 7th of October 1763, his late Majesty King George the Third issued a proclamation to regulate the government and constitution of the dominions in America, acquired by the above treaty. This proclamation, after publishing and declaring that His Majesty had, with the advice of His Privy Council, erected four distinct and separate Governments within the ceded territories, (that is to say,) the Governments of Quebec, East Florida, West Florida, and Grenada, proceeded to state that His Majesty had thought fit to annex the Islands of St. John and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to the Government of Nova Scotia. The proclamation went on to publish and declare that His Majesty had in the letters patent, by which the said Governments were constituted, given express power and direction to the Governors to call, with the advice of their Council, as soon as the circumstances of the colonies would admit, General Assemblies, within the said Governments re-[261]-spectively, in such manner and form as is used and directed in those colonies and provinces in America which were under His Majesty's immediate Government: and the proclamation proceeded to state, that His Majesty had given power to the Governors, with the consent of the Council and the representatives of the people so to be summoned, to make laws for the government of the said colonies, as near as might be agreeable to the laws of England, and in the mean time and until such assemblies could be called, the inhabitants, and persons resorting to the said colonies, might confide in the Royal Protection, for the enjoyment of the laws of England.

In conformity with this proclamation, a Commission issued under the Great Seal, in October 1763, appointing Montague Wilmot, Esquire, Governor of the Province of Nova Scotia, which was therein stated to be bounded to the eastward by the Bay des Chaleurs and the Gulf of St. Lawrence, to the cape or promontory

called Cape Breton, in the Island of that name, including that Island, etc. This Commission (amongst other things) gave full power to the Governor, "with the advice and consent of the Council of the Province, from time to time, as need shall require, to summon and call General Assemblies of freeholders and planters within his Government," and after pointing out the mode of election, and the qualification by taking certain oaths, proceeded to declare "that the persons so elected and qualified should be called and deemed the General Assembly of the province of Nova Scotia," which, together with the Governor and his Council, was to make laws for the province, and the people and inhabitants thereof. The Governor was also authorised and empowered, [262] "with the advice and consent of the Council, to erect, constitute, and establish Courts of Judicature and Public Justice, within the said province and dominion, and to appoint Judges, Commissioners of Oyer and Terminer, and Justices of the Peace, and other necessary Officers and Ministers within the said province, and to levy, arm, muster, command, and employ all persons whatsoever residing within the said province."

This state of things continued, without any material change, until the year 1784, when the Government of Nova Scotia was divided into two Governments, viz. New Brunswick and Nova Scotia. The Island of Cape Breton was included in the new Government of Nova Scotia, but a change was made with reference to that Island, by the appointment of a Lieutenant-Governor, whose commission (dated 3rd September 1784) directed him "to exercise the office of Lieutenant-Governor of Cape Breton and its dependencies, with such powers and authorities, etc., as should be expressed in the commission of the Governor-in-Chief of the province of Nova Scotia and the Islands of St. John and Cape Breton then and for the time being."

The new Commission to the Governor-General of the new province of Nova Scotia issued on the 11th of the same month, and included Cape Breton and St. John within its limits. It provided for the government of Cape Breton, St. John, and Nova Scotia respectively, by a separate and independent Council and General Assembly. The Lieutenant-Governor of Cape Breton entered upon his functions immediately, and a Council was formed, but no General Assembly was ever convened for the Island of Cape Breton, as directed by the Commission.

This state of things continued until the year 1820, [263] when the alteration took place which formed the subject of the present petition. In the commission of the Governor-in-Chief of Nova Scotia, bearing date 27th April in that year, that Government was described "as including the Island of Cape Breton (which we do hereby expressly direct and declare shall in future form part of our said province of Nova Scotia)," and no mention was made of a Council or General Assembly, or any separate legislature for Cape Breton.

In the instructions to the new Governor-General, it was stated to be the intention of His Majesty, that the Island of Cape Breton should no longer form a separate Government, and accordingly the Governor was directed as follows:—"Whenever you summon General Assemblies for our province of Nova Scotia, you are to summon and call to those Assemblies such a number of the freeholders and planters of the Island of Cape Breton as were usually summoned to such Assemblies, immediately before the time when our said Island was first separated from our province of Nova Scotia."

In order to carry the Royal intentions into effect, a proclamation was issued in October 1820, by the Lieutenant Governor of Nova Scotia, declaring "Cape Breton to be a separate and distinct Colony of the province of Nova Scotia, by the name of the County of Cape Breton; that a writ had been issued for the election of two members to represent it in the General Assembly of Nova Scotia, and dissolving the Council of the Island, etc." From which time Cape Breton has been a County of Nova Scotia, sending representatives to the General Assembly of that province, and in every respect part of that province, and under the same laws and government.

The case stated by the Petitioners was, in substance, [264] as follows: That the measure of which they complained was the annexation, in the year 1820, of the Island of Cape Breton as a County to the province of Nova Scotia, whereby they were deprived of the Legislature, which had been solemnly pledged and granted to them in 1784; in explanation of which matter they stated that on the 7th of October 1763, His Majesty King George the Third issued a proclamation relative to certain colonies

which had been ceded to Great Britain by the Treaty of Paris of the 10th of February of that year, wherein the following announcement was made in reference to Cape Breton: "We have also, with the advice of our Privy Council, thought fit to annex the Islands of St. John and Cape Breton, or Isle Royal, with the lesser Islands adjacent thereto, to our Government of Nova Scotia;" and, immediately following, was found this clause relative to the province of Georgia: "We have also, with the advice of our Privy Council aforesaid, annexed to our province of Georgia, all the lands lying between the rivers of Attamaha and St. Mary," and that thus in the proclamation, a distinction was made at the outset,—in one case, the annexation being made to the Government, in the other to the province. That the same proclamation proceeded to constitute the Government of Grenada, as "comprehending the Island of that name, together with Grenadines and the Islands of Dominica, St. Vincent, and Tobago," yet the Petitioners alleged that those last-mentioned Islands were never considered as being, by virtue of that proclamation, parts of the province of Grenada, but merely thereby comprehended under the general government of the Governor-General of that Island; Dominica, St. Vincent and Tobago having [265] each a separate Lieutenant-Governor, Council, and Assembly, distinct from and independent of, each other, as well as distinct from and independent of those of Grenada, except as under the same Governor-in-Chief. That it appeared that Cape Breton, as well as the Island of St. John, was evidently not intended to be annexed by the said proclamation as a County, to the province of Nova Scotia, but merely annexed to the Government of the Governor-General of that province, in the same manner that Dominica, St. Vincent and Tobago were annexed to the Government of the Governor-General of Grenada, to each of which first-named Islands Lieutenant-Governors were afterwards actually appointed, in the same manner as the latter Island, who repaired to their respective local Governments, and immediately and respectively organized the Governments there, under a Governor and Council. The Petitioners further proceeded to state, that, on the 3rd of September 1784, His Majesty granted a Commission addressed to Joseph Frederick Mallet Desbarres, Esquire, the Lieutenant-Governor of Cape Breton and its dependencies, wherein he was directed to "exercise and enjoy the said office of Lieutenant-Governor of our said Island and its dependencies, with such powers and authorities, and according to such directions, as are or shall be expressed in our Commission and instructions to our Captain-General and Governor-in-Chief of our province of Nova Scotia, and our Islands of St. John and Cape Breton, now and for the time being." That the said Lieutenant-Governor of Cape Breton soon after repaired to the Island, and, upon his arrival there, organized the Government; which Government was, from that period until the year 1820, always adminis-[266]-tered by a succession of Lieutenant-Governors or Presidents of the Island, with the assistance of a Council, independent of the Council and Assembly of Nova Scotia. That His Majesty's Commission to the Governor-in-Chief of the province of Nova Scotia and the Islands of St. John and Cape Breton, alluded to in the above-recited Commission to the Lieutenant-Governor of the said Island, and dated the 11th of September 1784, amongst other things, stated that about the same time His Majesty, in the ninth year of his reign, had been pleased to appoint Walter Patterson, Esquire, to be Captain-General and Governor-in-Chief, in and over the said Island of St. John, and territories adjacent thereto in America, and had also thought fit to erect that part of the province of Nova Scotia, lying to the northward of the Bay of Fundy, into a separate province, by the name of New Brunswick; and proceeded as follows; "We have thought fit to re-annex the Island of St. John and its dependencies to our Government of Nova Scotia;" and after revoking a former Commission to the Governor-General of Nova Scotia, and also a former Commission to Walter Patterson, as Governor-in-Chief of St. John's Island, proceeded in this new Commission to the Governor-General to describe the boundaries of Nova Scotia, including the Island of St. John, as well as Cape Breton and all other Islands within six leagues of the coast. That this new Commission further pledged the faith of the Crown, and conferred, as well on the Island of Cape Breton as on Nova Scotia, and on the Island of Prince Edward, separately, distinctly, and respectively, full legislative power in these words: "And we do hereby require and command you to do and execute all things, in due manner, that shall belong to your said com-[267]-

mand, and the trust we have reposed in you, according to the several powers and authorities granted or appointed you by the present Commission and instructions herewith given you, or by such further powers, instructions and authorities, as shall at any time hereafter be granted or appointed you under our Signet and Sign Manual, or by our Order in our Privy Council, and according to such reasonable laws and Statutes as are now in force, or shall hereafter be made or agreed upon by you, with the advice and consent of our respective Councils and Assemblies, of our province of Nova Scotia, and our Islands of St. John and Cape Breton, under your Government. And we do hereby give and grant unto you full power and authority, with the advice and consent of our said respective Councils, from time to time, as need shall require, to summon and call General Assemblies of the freeholders and planters, within your Government, in such manner and form as has been already appointed and used, or according to such further powers, instructions and authorities as shall, at any time hereafter, be granted or appointed you under our Signet and Sign Manual, or by our Order, in our Privy Council." And the Commission further proceeded: "And our will and pleasure is, that the persons thereupon duly elected by the major part of the freeholders of the respective counties and places, and so returned, shall, before their sitting, take the oaths mentioned in the first recited Act of Parliament (*viz.* of allegiance and supremacy), altered as above, as also make and subscribe the aforementioned declaration, (against papacy,) which oaths and declaration you shall commissionate fit persons under our seals of Nova Scotia, St. John, and Cape Breton, respectively, to tender and administer [268] unto them; and until the same shall be taken and subscribed, no person shall be capable of sitting, though elected. And we do hereby declare, that the persons so elected and qualified, shall be called and deemed the General Assembly, of our province of Nova Scotia, of our Island of St. John, and of our Island of Cape Breton, respectively."

That instructions were given to the Governor-General, of a corresponding date, to the following purport, *viz.*—"And whereas the situation and circumstances, of our Island of Cape Breton, will not at present admit the calling of an Assembly, you or our Lieutenant-Governor of our said Island shall, until it appears expedient to call such Assembly, in the meantime make such rules and regulations, by the advice of our Council for the said Island, as shall appear to be necessary for the peace, order and good government thereof, taking care that nothing be passed or done that shall any way tend to affect the life, limb or liberty of the subject, or to the imposing of any duties or taxes, and that all rules and regulations be transmitted by the first opportunity after they are passed and made, for our approbation or disallowance."

That by further subsequent instructions from His Majesty to the Governor-General of Nova Scotia, the Legislature of Nova Scotia were forbidden, in the words following, to interfere with Cape Breton: "It is nevertheless our will and pleasure, that due care be taken in all laws, statutes and ordinances passed in our province of Nova Scotia, that the same do not extend to our Islands of Prince Edward (formerly St. John's) and Cape Breton, under colour or pretence that our said Islands are included in this our Commission to you, and are parts of our Government of Nova Scotia." [269] "And it is our will and pleasure, and we do hereby declare and ordain, that all and singular the powers, authorities and directions in and by this our Commission given and granted to you, so far as the same extend and have relation to our Islands of Prince Edward and Cape Breton and their respective dependencies, shall be executed and enjoyed by you, or the Commander-in-Chief of our province of Nova Scotia, at such times only as he or you shall be actually upon the spot in either of our said Islands, but that at all other times all and singular the said powers, authorities and directions shall be executed and enjoyed by such persons whom we shall respectively appoint to be our Lieutenant-Governors of our said Islands."

And the Petitioners contended, that from the terms of the above in part recited proclamation, commissions, and instructions, no doubt existed of its being the intention of His Majesty, King George the Third, that the Islands of St. John and Cape Breton should have a Legislature, separate and distinct from that of Nova Scotia; and they alleged that, in that persuasion and with that expectation, numerous persons from the year 1784 had been induced to settle in the Island, and had expended and acquired property in commerce and manufacture, in the belief and

expectancy that such constitution would be granted to the Island. The Petitioners then, after arguing at much length against the legality, as well as expediency, of the annexation, and claiming the rights and privileges which they alleged were expressly, immediately, and irrevocably pledged to them by His Majesty King George the Third, in the year 1784, and which they contended could not be annihilated or abrogated, unless by an Act of the Imperial Parliament, prayed for the resto-[270]-ration of the constitution so granted to them, and for the convening of their Local Legislature, under a Lieutenant-Governor, Council, and Assembly, conformable to the grant of His Majesty King George the Third, and consequently that the laws of Nova Scotia, and the authority of its Legislature, might no longer be enforced over the Island, but that if there should possibly exist a doubt of the Petitioners' strict, legal, and constitutional rights, they prayed that as a matter of expediency, and to promote the interests of the inhabitants of the Island, and in consideration of the injuries inflicted on them by the annexation, Her Majesty would be pleased, in the exercise of Her prerogative, to grant as an act of grace and favour, the separation of Cape Breton from the province of Nova Scotia, and permit the Island to enjoy a similar constitution to that of its sister Island of Prince Edward, by directing the convening of the Legislature prayed for.

The Petition was referred by Her Majesty to the Judicial Committee of the Privy Council, with directions that the Petitioners should be confined in their argument, before that tribunal, to the legal question raised by the Petition, and were not to be permitted to enter into any questions of public convenience or policy. Notice was also required to be given, of the Petition having been so referred to the Legislative Council and House of Assembly of Nova Scotia, who were authorised, if they thought fit, to appoint Counsel to appear on their behalf, and oppose the claim of the Petitioners.

The Legislature, Council, and House of Assembly, having been specially summoned by the Lieutenant-Governor, in pursuance of the above direction, declined appointing an agent or instructing Counsel to represent them at the Bar of the Judicial Committee, expressing [271] their "confidence in the learning and ability of the officers of the Crown, and the integrity and wisdom of the eminent tribunal before whom those officers were to vindicate the legality of the annexation." They accordingly put in no case, nor did they appear by Counsel.

The Petitioners, being so directed, lodged a case, in which they set forth the facts above stated, together with a summary of the constitution of the colony, and referred to a variety of precedents and authorities, from which they contended, that the annexation in 1820, of Cape Breton to the province of Nova Scotia, and the legislative authority of that province over the Island, ought to be adjudged illegal, for the following reasons:—

I. Because the Island of Cape Breton was, by the proclamation of 1763, annexed to the Government of Nova Scotia, in the same sense only as the Government of Grenada was, by the same proclamation, declared to comprehend also the Islands of St. Vincent, Dominica, and Tobago: and that, as the promise afterwards made by the same proclamation "to call General Assemblies within the said Governments respectively, in such manner and form as used and directed" in the other colonies and provinces in America, applied to St. Vincent, Dominica, and Tobago severally, no less than to Grenada, so the same promise ought also to apply severally to the Island of Cape Breton, and seemed to have been actually so applied, and performed in regard to the Island of St. John or Prince Edward, which was annexed to the Government of Nova Scotia, by the same sentence of the proclamation as annexed Cape Breton: such several application of that promise, and its several performance, being only consistent with the [272] manner and form, used and directed in the other colonies, as well in the West Indies, as on the continent of America.

II. Because, if the promise made by the proclamation of 1763, to call Assemblies in those Governments respectively, was not to be understood as applying to Cape Breton, yet neither the annexation of the Island to the Government of Nova Scotia by the proclamation, nor the including that Island in the commission to the Governor of Nova Scotia, could or did confer upon an Assembly, already constituted for that province, as it existed before such annexation, the power of legislating for Cape Breton.

III. Because, even if by the proclamation of 1763, or by the subsequent Commission for Nova Scotia, or by any other act of the prerogative, the Island of Cape Breton had been so annexed to Nova Scotia, as to give its Assembly the power of legislating for the Island, still the Letters Patent of 1784, granting powers to constitute a several and distinct Council, and to summon a several and distinct Assembly in that Island, and by their consent to make laws for it, were authorised by usage and precedents, and were valid and effectual to confer such institutions severally and distinctly from the Province or Legislature of Nova Scotia.

IV. Because such institutions, so conferred upon Cape Breton, could not thereafter be revoked or annulled by an act of the prerogative alone, which had then parted with its power of legislating for the Island, except through the instrumentality of those institutions, and could not, therefore, confer such a power, upon any other person or body politic, as the Legislature of Nova Scotia.

[273] V. Because the several and distinct existence of Cape Breton, as a colony apart from Nova Scotia, had, between 1784 and 1820, been recognised by several Acts of Parliament then in force, assuming and embodying that distinction, by which Acts Cape Breton and Nova Scotia were, in 1820, severally and respectively governed under different laws of trade and navigation, each colony being thereby liable to restrictions or exemptions from which the other was excluded (these Statutes were, the 28 Geo. III., c. 6; 33 Geo. III., c. 50; 47 Geo. III., c. 38; 49 Geo. III., c. 49; and 58 Geo. III., c. 19).

VI. Because the validity of such an act of the prerogative as, in 1820, annexed Cape Breton to Nova Scotia, is inconsistent with the private rights of the inhabitants of that Island, and irreconcilable with all the principles and precedents upon which the constitutional rights of British Colonies depend.

A case was also put in on the part of the Crown, wherein it was submitted that the re-annexation of the Island of Cape Breton to the province of Nova Scotia was, in the circumstances, strictly legal, for the following reasons:—

I. The legal effect of the proclamation of 1763, and the first Commission issued thereupon, to the Governor of Nova Scotia, was to constitute Cape Breton a component part of that province, giving to the inhabitants of Cape Breton a clear title to all the rights and privileges of the other inhabitants of that province. Of these rights and privileges, which had once vested in them by the act of the prerogative, they could not afterwards be deprived by the mere act of the Crown.

[274] II. If the annexation of Cape Breton to Nova Scotia, in 1763, was not final and irrevocable, still less could their separation in 1784 have that character, so as to prevent the Crown from making, at its pleasure, a further change.

III. The change made by the Government of Cape Breton, in 1784, was not final and definitive, but was a mere experiment, and was only partially carried into effect, as no General Assembly for the Island ever was, or could be, by law convoked. The intention, therefore, of the Crown to give, when circumstances should admit, a separate constitution and General Assembly to Cape Breton, even if it could under the circumstances have been legally effected, could not be carried out in point of fact, and might properly be abandoned.

IV. There was no pretence for contending that, by the true construction of the proclamation of 1763, the then inhabitants of the conquered Island of Cape Breton acquired a right to have a separate Assembly called for the Island; they acquired only the right to send, or to vote for, representatives in the General Assembly of the Government or province with which they were united. That right, the exercise of which had been suspended in 1784, was restored by the re-annexation in 1820.

Mr. Bliss and Mr. Warren, for the Petitioners—Referred to *Campbell v. Hall* (Cowp. 204); *The History of the Island of Grenada* (Clark's Col. Law, p. 198); *Prince Edward's Island* (Clark's Col. Law, p. 462); *Comyn's Dig.*, tit. Wales; Tit. Franchise, G. 1; 1 *Chalmers' Opinions*, 38, 141, 283.

[275] The Attorney-General (Sir Frederick Thesiger), the Solicitor-General (Sir Fitzroy Kelly), and Mr. Waddington, for the Crown—Cited and referred to 1 *Chalmers' Collec. of Treaties*, p. 340-1; *the History of the Colony of British Guiana* (Clark's Col. Law, p. 236, 263); of the *Canadas* (Clark's Col. Law, p. 397), as instances where the Crown had, by force of its prerogative, annexed separate colonies under one government.

No Judgment was delivered on this Petition, but the report of their Lordships, which was confirmed by Her Majesty in Council, was as follows:—

“The Lords of the Committee, in obedience to Your Majesty’s said order of reference, have taken the said Petition into consideration, and have heard Counsel on behalf of the said Petitioners, and have likewise heard Your Majesty’s Attorney and Solicitor-General on behalf of Your Majesty’s Crown, and their Lordships, understanding it to be Your Majesty’s pleasure, that their Lordships’ consideration of the matters referred to them, by Your Majesty’s said order of reference, should be confined to the question, whether the inhabitants of Cape Breton are by law entitled to the constitution, purporting to be granted to them by the Letters Patent of 1781, mentioned in the said Petition, do agree humbly to report their opinion to Your Majesty, that the inhabitants of Cape Breton are not so entitled.”

[Mews’ Dig. tit. COLONY; II. PARTICULAR COLONIES; 4. *British North America*. S.C. 6 St. Tr. (N.S.) 283, where the arguments are fully set out (293-302). With regard to the prerogative of the Crown as to the transfer on cession of territory, see *Damodhar Gordhan v. Deoram Kanji*, 1875, 1 A.C. 332; L.R. 3 Ind. App. 102; *Hans. Parl. Deb.*, vol. 347, p. 764 (debate on the Anglo-German Agreement Bill—afterwards 53 and 54 Vict. c. 32—confirming the cession of Heligoland), and cf. the Turks and Caicos Island Act, 1873 (36 and 37 Vict. c. 6).]

[276] ON PETITION FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

The QUEEN, on the Prosecution of the BOMBAY GOVERNMENT, against
EDULJEE BYRAMJEE and Seventeen Others* [April 4 and 8, 1846].

The Bombay Charter of the 8th Dec. 1823 (granted in pursuance of the powers conferred to the Crown, by 4 Geo. IV., c. 71), after providing “That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at Bombay shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved,” proceeds thus—“And we do hereby also reserve to ourselves, our heirs, and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at Bombay, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary, such Judgment or determination as to us or them shall seem meet.”

Upon a petition, praying for leave to Appeal from a conviction for felony: held by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the Charter, to allow Appeals in criminal cases, such Appeal being confined to civil cases only.

Held also, that the Charter having been granted by the Crown by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: and that the Supreme Court alone has full and absolute power to allow or deny permission to appeal in criminal cases.

Semble. No Appeal lies, in cases of felony, to the Queen in Council, from any of the dominions of the Crown of Great Britain, which are governed by the law of England.

* Present—Members of the Judicial Committee: The Lord President (the Duke of Buccleuch), the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors—Assessors: Sir E. H. East, Bart., Sir A. Johnston, and Sir E. Ryan.

There were two Petitions in this matter. The first was the Petition of Eduljee Byramjee, a tent-maker, late of Bombay, but now a prisoner at Singapore, undergoing sentence of transportation, presented [277] on behalf of himself and eight Parsees, also undergoing sentence of transportation at Singapore, and praying that Her Majesty would be graciously pleased to direct the issue of a free pardon to the Petitioner, and the other convicted parties, or that Her Majesty would be pleased to refer the matter of the Petition, and the case of the Petitioner, with the circumstances of the trial, to the consideration of the Judicial Committee of Her Majesty's Privy Council, to report thereon, or that Her Majesty would be pleased, by and with the advice of Her Privy Council, to make such order for the admission and prosecution of an Appeal from the Judgment of the Supreme Court; and that Her Majesty would in like manner be pleased to make an order for the production of true and exact copies of all evidence, proceedings, judgments, decrees, and orders, had or made in the prosecution in the Supreme Court, and of the Judges' notes of the evidence taken before the Court, and of the reasons given by the Judges of the Court, and also the evidence taken before the Chief Magistrate of Bombay, by the direction of the Chief Justice of the Supreme Court, and all papers in the possession of the Right Honourable the Earl of Ripon (the then President of the Board of Control), and the Secretary of State, relating to the trial and the case of the Petitioner, and for the taking any necessary evidence; and that Her Majesty would be pleased to reform, correct, or vary such Judgment, [278] and make such former or other order in the forms, as to Her Majesty might seem meet.

The Petition set forth, that an indictment was preferred in the Supreme Court of Judicature at Bombay, in the second sessions of the year 1844, against the Petitioner and seventeen other persons, Parsees, for the murder of a Parsee, named Muncherjee Hormusjee. That the Petitioner and sixteen others were charged as accessories to the murder. That the trial took place on the 17th July 1844, and lasted ten days, before Sir Henry Roper, Chief Justice, and Sir E. Perry, Puisne Judge, and a jury of Europeans, when the jury returned a verdict of guilty against ten, including the Petitioner, and acquitted the remainder of the parties charged. That the Petitioners presented a Petition to the Judges of the Supreme Court, for leave to Appeal to Her Majesty in Council, against the direction of the Chief Justice, and the verdict and conviction founded thereon, upon the grounds and under the circumstances therein specially set forth. That such Petition was not complied with by the Judges, but that the extreme penalty of the law was carried into effect against one of the parties charged, and the remainder were sentenced to be transported for life to Singapore.

The principal allegations contained in this Petition were verified by affidavit.

The second Petition was presented on the part of upwards of six thousand inhabitants of Bombay, and after setting forth, in substance, the circumstances contained in the first-named Petition, prayed that Her Majesty would be pleased to exercise her prerogative of mercy, in favour of such of the convicts as she might deem entitled to remission of their sentences, and to grant them pardon.

[279] Both Petitions were referred by the Crown to the Judicial Committee of Her Majesty's Privy Council, and now came on for hearing.

Mr. Hill, Q.C., and Sir John Bayley, in support of the first Petition.—The jurisdiction of Her Majesty in Council, to entertain Appeals in criminal suits in India, is undoubted. *Poonneekooty Moodeliar v. The King* (3 Knapp's P.C. Cases, 384). *Aga Mahomed Kurboolie v. The Queen* (4 Moore's P.C. Cases, 239). Both these cases were upon indictment.—[Sir E. Ryan: These are cases in which the Appeal was allowed by the Court below, which differs from the present application.]—The Charter of Justice of Bombay (c), gives a right of Appeal, in all indictments, informations, and

(c) The following are the clauses relating to the Criminal Jurisdiction, and the right of Appeal to the Queen in Council, as contained in the Charter, or Letters Patent, of the 8th December 1823, for establishing the Supreme Court of Judicature at Bombay.

“And it is our further will and pleasure, and we do hereby grant, order, ordain, and appoint, that the said Supreme Court of Judicature, at Bombay, shall also be a Court of Oyer and Terminer, and Gaol delivery, in and for the town and island of

criminal suits, and expressly reserves to the Crown, the power to refuse or admit an Appeal, from any Judgment or [280] determination of the Supreme Court, upon such restrictions and regulations, as the Crown shall think fit [281] to impose. The Statute 7th and 8th Vict., c. 69, also provides for the admission of Appeals from any judg[282]ments, sentences, decrees, or orders, of any Court of Justice, within any British colony or possession abroad, although such Court should not be a Court of Error, or a Court of Appeal, within such colony or possession. It is true that the Bombay Charter gives the Supreme Court the power to allow or deny Appeals, but the Crown has expressly reserved to itself the power to refuse or admit an Appeal, even though denied by the Supreme Court. It never could be meant, that the Supreme Court should have the power of saying, peremptorily, that its decisions, in criminal matters, should not be reversed, which it would in effect do, by refusing leave to Appeal. Such Appeal is an incident to the powers of this Court, which stands in relation to Colonial Courts, as the Queen's Bench does to the inferior Courts in this country. In *Re Ames* (3 Moore's P.C. Cases, 409), leave was granted here to appeal from a criminal proceeding in Jersey, which being found to be contrary to an express Ordinance, in force in Jersey, [283] such leave was afterwards rescinded. Mr. Baron Parke, in delivering judgment, says, "We are not disposed to say, that we have not the power so to have done; as Her Majesty is the head of justice, and we are sitting here, not merely as a judicial body, but as Privy Coun-

Bombay, and the limits thereof, and the factories subordinate thereto: and shall have and be invested with the like power and authority, as Commissioners, or Justices of Oyer and Terminer, and Gaol delivery, have, or may exercise, in that part of Great Britain called England, to enquire, by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanours heretofore had, made, done, or committed, or which shall hereafter be had, done, or committed, within the said town and island of Bombay, or the limits thereof, or the factories subordinate thereto." [The Charter then proceeds to give authority to the Court to issue a precept to the sheriff to summon juries and witnesses, with power to punish for contempt, etc.] "And to proceed to hear, examine, try, and determine the said indictments and offences, and to give judgments thereupon, and to award execution thereof. And in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, or as our Courts of Oyer and Terminer and Gaol delivery do or may in that part of Great Britain called England, due attention being had to the religion, manners, and usages of the native inhabitants.

"And whereas cases may arise, wherein it may be proper to remit the general severity of the law, we do hereby authorize and empower the said Court of Oyer and Terminer and Gaol delivery to reprieve and suspend the execution of any capital sentence wherein there shall appear, in the judgment of the said Court, a proper occasion for mercy, until our pleasure shall be known. And the said Court shall, in such case, transmit to us, under the seal of the said Court, a state of the case, and of the evidence, and of the reasons for recommending the criminal to our mercy, or for such reprieve or suspension, as the case may be: in the mean time, the said Court shall cause such offender to be kept in strict custody, or deliver him or her out to sufficient bail or mainprise, as the circumstances shall seem to require.

"And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person or persons shall find him, her, or themselves aggrieved, by any Judgment or determination of the said Supreme Court of Judicature at Bombay, in any case whatsoever, it shall and may be lawful for him, her or them to Appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all Judgments or determinations made by the said Supreme Court of Judicature at Bombay, in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said Judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose, to the said Court, pray leave to Appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of Appeal. And in case such leave to Appeal shall be prayed by the party or parties who is or are directed to

cillors, and the matter of the former Petition was referred to us generally." So, here the matter is referred generally.—[The Right Hon. T. Pemberton Leigh: Is this merely a Petition for leave to Appeal?—The Attorney-General: More than that is prayed for: the exercise of the Royal mercy; but your Lordships cannot advise on that part of the Petition. It could never have been intended to refer to your Lordships, sitting as the Judicial Committee of the Privy Council, an application to Her Majesty, to grant a free pardon.—[The Right Hon. T. Pemberton Leigh: In the Petition of the Bailiff and Royal Court of Guernsey (*ante*, [5 Moo. P.C.] 49), referred by the Crown, to the Committee for the affairs of Jersey, the reference was larger than was intended, but we reported only upon the law of the case, namely, the legality of the acts done.]—Mr. Hill: Enough appears on the face of the Petition, to authorize your Lordships to report to the Crown generally.—[Dr. Lushington: Their Lordships are of opinion, that it was not intended by the reference, to refer to them any question, whether mercy should be extended by the Crown to the Petitioners; you will, therefore, confine yourself to two questions: first, whether there is any power in the Judicial Committee, to advise Her Majesty to permit an Appeal; and, secondly, if they have such power, whether they would exercise a proper discretion, in so advising.]—Mr. Hill: This is a Charter granted by the Crown, by virtue of [284] the Statute 4 Geo. IV.,

pay any sum of money, or to perform any duty, the said Court shall, and is hereby empowered to award, that such determination or Judgment shall be carried into execution, or that sufficient security shall be given for the performance of the said Judgment or determination as shall be most expedient to real and substantial justice.

"Provided always, that where the said Court shall think fit to order the Judgment or determination to be executed, security shall be taken from the other party or parties for the due performance of such Judgment or Order, as we, our heirs or successors, shall think fit to make thereupon. And in all cases we will, and require, that security shall also be given to the satisfaction of the said Court for the payment of all such costs as the said Supreme Court of Judicature, at Bombay, may think likely to be incurred by the said Appeal, and also for the performance of such Judgment or Order as we, our heirs or successors, shall think fit to give or make thereupon; and upon such order or orders of the said Court thereupon made being performed to their satisfaction, the said Court shall allow the Appeal, and the party or parties, so thinking him, her or themselves aggrieved, shall be at liberty to prefer and prosecute his, her or their Appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form, and under such rules, as are observed in Appeals made to us from our plantations or Colonies, or from our Islands of Guernsey, Jersey, Sark or Alderney.

"And it is our further will and pleasure, and we do hereby direct and ordain, that in all such cases the said Supreme Court of Judicature, at Bombay, shall certify and transmit, under the Seal of the said Court, to us, our heirs or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed, as far as the same have relation to the matter of Appeal.

"And it is our further will and pleasure, that in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature, at Bombay, shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved, and also to award, order, and regulate the terms upon which Appeals shall be allowed in such cases in which the said Court may think fit to allow such Appeal.

"And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at Bombay, to refuse or admit his, her or their Appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such Judgment or determination, as to us or them shall seem meet." [See now letters patent of 28th December, 1865, establishing the High Court of Bombay, Art. 41 (Stat. R. and O. Rev. iv. p. 119).]

c. 71; and even if there were no reservation in the Charter to admit Appeals, not otherwise provided for, the power of the Crown to admit Appeals would not have been parted with; for the Crown has no power to denude itself of any prerogative necessary to the administration of justice. It has no more right to weaken its power to give protection to the subject, than the subject has to diminish or qualify his allegiance. The rights of the sovereign and the rights of the subject are strictly correlative. Nothing appears in the Charter to warrant a conclusion that an Appeal cannot lie here, in a criminal proceeding. The Crown can only be bound by express words. If a question is reserved by a Judge, upon the trial of a prisoner, for the opinion of the fifteen Judges, they advise the Crown, in their discretion, to grant a free pardon. Their powers are limited, as in this Court, to advise the Crown. Then why should not this Court advise a free pardon? Enough appears from the Petition to justify such an exercise of the prerogative.—[The Right Hon. T. Pemberton Leigh: Is there any instance in which we have dealt with evidence settled by the verdict of a jury, and considered whether it was well founded or not?—The Court sat as a jury in *Cowas-jee v. Thompson* (*ante*, [5 Moo. P.C.] 165), and *Cowie v. Remfry* (*ante*, [5 Moo. P.C.] 232); and in *Gahan v. Lafitte* (3 Moore's P.C. Cases, 382; and see *Le Breton v. Ennis*, 4 Moore's P.C. Cases, 323), though the verdict was sustained, yet the damages were cut down; this Court thereby exercising the highest discretion.—[Dr. Lushington: Has any instance occurred where an Appeal has been granted by the Courts in India, in the case of a felony?—None. The only criminal cases appealed [285] from India were *Poonceekooty Moodeliar v. The King* [3 Knapp, 384] and *Aga Mahomed Kurboolie v. The Queen* [4 Moo. P.C. 239], which were indictments for misdemeanours.

The Attorney-General (Sir F. Thesiger,) and Mr. Wigram, Q.C., for the Crown, and the East India Company.—It is contrary to the policy of the Criminal Law in England, to allow an Appeal in cases of felony, and nothing can be found in the Charter of Bombay which gives such power. No mention is made of criminal suit or information, in the reservation to the Crown, to refuse or admit an Appeal. If a party here is improperly convicted, the only redress that can be had, is by application to the Crown for a pardon. Even with regard to a question of law, that may arise upon the trial, the prisoner has no right of appealing to the fifteen Judges; it can only be done by the Judge, who presides at the trial, reserving the point. If then there exists no right of Appeal in criminal cases in England, it must follow, that none is given by this Charter to Bombay, where the English law prevails. The case of *Re Ames* [3 Moo. P.C. 409], establishes, that no Appeal lies from a criminal proceeding in Jersey. *Poonceekooty Moodeliar v. The King* [3 Knapp, 384] was an indictment for forgery, which was a misdemeanour by Statute, in India; and in *Aga Mahomed Kurboolie v. The Queen* [4 Moo. P.C. 239], the Appeal here was strictly confined to a question of law. In each of these cases, the Supreme Court had granted, under the Charter, leave to Appeal; here they refused it, and their refusal is, by the terms of the Charter, absolute. It would be most mischievous to grant this application, the object being to Appeal from a conviction for felony.

[286] The Right Hon. Dr. Lushington (June 26, 1847).—In the month of August, in the year 1844, eighteen natives of Bombay were tried before the Chief Justice, assisted by a Puisne Judge. One of the prisoners, Burjorjee Jamsetjee, was charged with the wilful murder of a Parsee, named Muncherjee Hormusjee. He was found guilty, and executed. The seventeen other prisoners were charged as accessories to the murder, and were convicted and transported.

Two Petitions, one signed by one of the individuals convicted, and another respectably and numerously signed by certain inhabitants of Bombay, were presented to Her Majesty. Those Petitions set forth, at great length, the circumstances attendant upon the trial, and prayed for the exercise of Her Majesty's prerogative in favour of the convicts, or that an Appeal might be allowed. Her Majesty has been pleased to refer the Petitions, above mentioned, to us, not for the purpose of advising as to the exercise of Her prerogative of mercy, but as containing, together with the affidavits in support of them, a full statement of all the facts, and for the purpose of enabling us to advise, whether the persons convicted can be permitted to

Appeal, under the circumstances, set forth in those affidavits and those Petitions, from the sentence of the Court.

Those Petitions did not allege that any error appeared on the face of the record, but they complained of the direction of the Judge, the evidence, and the verdict.

Now if this question were to be decided by the law of England, it is notorious, that no prisoner convicted of felony could claim a new trial, or a right of Appeal, in this sense. A writ of error is another question, [287] which it is not necessary for us to discuss in this case. The usual practice, where the Judgment is not postponed, is, if any objection be taken at the trial, which the Judge who tries the prisoners does not admit to be valid, but deems worthy of consideration, to reserve it for the opinion of the fifteen Judges. If the majority think the objection ought to have been sustained, the Judge who tried the prisoner, reports to the Secretary of State, and the prerogative of the Crown is exercised in such a manner as the advisers of the Crown think meet. The prisoner has no legal right, in the proper sense of the term, to demand a re-consideration by a Court of Law, of the verdict, or of any legal objection raised at the trial. Then if this be so by the law of England, if the trial had taken place here, the question to be considered is, whether the prisoners, being natives of Bombay, and British subjects, and the offence being committed and tried there, have, by the law prevailing at Bombay, any other, and what right.

It appears from the Charter of Bombay, which was granted under the authority of an Act of Parliament, that the Supreme Court was constituted a Court of Oyer and Terminer, and Gaol delivery, to administer Criminal Justice in such, or the like manner, or form, or as nearly as the condition and circumstances of the place and person will admit, as our Courts of Oyer and Terminer, and Gaol delivery, may or do in England, due attention being had to the religion, manners, and usages of the native inhabitants. So far it would seem, that the same law would be applicable to convictions for felonies, whether tried in England or Bombay, and consequently the Petitioners would have no legal right to an Appeal or re-hearing.

In the Charter, however, will be found several im-[288]-portant clauses touching Appeals, which require great attention, and more especially that clause which relates particularly to criminal cases. It is in the words following: "And it is our further will and pleasure, that in all indictments, informations and criminal suits and causes whatsoever, the said Supreme Court of Judicature at Bombay shall have full and absolute power and authority, to allow or deny the Appeal of a party pretending to be aggrieved, and also to award, order and regulate the terms upon which the Appeal shall be allowed, in such cases in which the said Court may think fit to allow such Appeal." Now, however extensive the right of Appeal in criminal cases may be, the Supreme Court has full and absolute power and authority to allow or deny that Appeal. Presuming, therefore, for the present, that the words of this clause would sanction the granting of an Appeal of whatsoever kind, in cases of felony, application for leave to Appeal was made to the Supreme Court, and was by that Court refused. If an appeal then can now be granted, it must be on other grounds than the clause in the Charter: for according to the clause already cited, the rejection of the application to Appeal in the Supreme Court must be considered final.

This brings us to the consideration of the clause which immediately follows, and which is in the following terms: "And we do hereby also reserve to ourselves, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by the Judgment or determination of the Supreme Court of Judicature at Bombay, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or [289] they shall think fit, and to reform, correct or vary such Judgment or determination, as to us or them shall seem meet."

The first question which arises upon this clause is one of considerable importance: and it is this, whether it applies at all to the preceding clause, or, in other words, whether the Crown has reserved to itself, by force of the latter clause, the right of Appeal in criminal cases, including, of course, felonies—for there is no express limitation. Of the power of the Crown to create or reserve such right there can be no doubt, because the Act of Parliament enables the Crown to grant such a

Charter, for the administration of justice in Bombay, as it may think fit. But in considering whether the Crown has done so or not, it is not unimportant to remember, that not only in England, but throughout the dominions of the Crown of Great Britain, governed by the law of England, no right of Appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to Appeal in any such case.

Under such circumstances, we think that it is not probable that the Crown, in granting this Charter, intended to make so extraordinary a deviation from the ordinary practice, and we are the more strongly inclined to this opinion from a consideration of the consequences which must inevitably follow. Where persons charged with the commission of felonies have been convicted, it is natural that they should resort to every possible means to escape from the penalty of the law, or to put off to the latest moment the execution of the sentence. Consequently, it is to be expected, that applications in almost every case for [290] leave to Appeal, (supposing by Appeal is meant a new trial, or an entire re-hearing,) would be made to the Supreme Court. As that Court is sitting upon the spot, no great delay or mischief might follow from the postponement of the execution of the sentence, till that application was heard and disposed of. But if the Crown has really, by this Charter, reserved to itself the right of granting an Appeal in such cases, what are the inevitable consequences? To cause execution to be done, would be, in effect, to prevent the right of granting an Appeal vested in the Crown, and to take away from the prisoner convicted, the right of laying his case before his Sovereign, and of obtaining a re-consideration of it. For it must be remembered, that if a re-consideration, by way of Appeal, be reserved to the Crown, the right of applying for it must be reserved also. But if this were really the state of the law, we doubt whether any Court, or any authority, would think itself justified in ordering execution to be done, till there had been an opportunity given to the prisoner, of applying to the Crown, for a re-consideration of the case, according to the right reserved to the Crown, and the prisoner. Many very evil consequences must necessarily follow from this state of things. A long period must elapse before an application to the Crown could be made, and its decision could be known. And eventually, where the leave to Appeal was refused (and it must be presumed, that this would generally be the case), execution would follow the sentence, after so long an interval, that all benefit to be expected from a public example would be lost; and to this it may be added, that in a great majority of cases, the convicts themselves would be kept in a state of miserable suspense, [291] to suffer in the end the same ignominious death to which they were sentenced.

For all these reasons, and especially because the reservation of the right of granting an Appeal would be to create an anomaly, unknown where the law of England prevails, we think the strong probability is, that the clause reserving to the Crown the right of granting an Appeal, after refusal by the Supreme Court, was not intended to apply to cases of felony.

However powerful this reasoning may be to our minds, we still, however, fully admit that if such be the clear and undoubted meaning of the Charter, we must give effect to its provisions, however injurious we may conceive the consequences to be. To ascertain the meaning of this clause, we must look at the whole Charter, at what precedes and at what succeeds, and not merely at the clause itself.

It is first to be observed that the clause in question does not contain one of the words used in the preceding clause, by which criminal cases were designated. There is not one word of "indictments, informations, or criminal suits." There is no expression directly referring to, and subjecting to further Appeal, the full and absolute power of allowing or denying Appeals in criminal cases conferred upon the Supreme Court. And yet if such had been the intention of the Charter, it would be natural to suppose that when such a power had been given to the Supreme Court in such very strong terms, the right of reviewing their decisions, if it were intended to be reserved, would have been expressed in language directly noticing the absolute power just before given, and in terms admitting of no doubt, establishing a control over that, as regards which, *prima facie*, by the plain meaning of [292] the words, they were not to be subjected to any control or revision whatever. We do not find in this reserving clause, that which we should have expected to find, if it applied to the

preceding one, but we do find that from the commencement to the end, it is peculiarly applicable to civil cases, and that every expression in it may be satisfied by confining it to civil cases only.

In the clause, of which the abstract in the margin is, "Appeal to King in Council," it is directed that "any person aggrieved by the Judgment or determination of the Supreme Court in any case whatever, may Appeal to the Crown or to the Privy Council, in the manner and under the restrictions and qualifications" mentioned. The parties aggrieved are to petition the Supreme Court, which Court is empowered to award that such Judgment or determination shall be carried into execution, or sufficient security given for the performance of it. Various other regulations are added, which being complied with, the Supreme Court is bound to allow an Appeal, and the parties are permitted to prosecute it in the same manner as Appeals from the colonies. The clause now commented on is clearly confined to civil cases only. Upon comparing it with the reserving clause, we find that the matter over which the power of the Crown to grant Appeals is reserved, is expressed and described by the very terms which are used with respect to Appeals in civil cases. We are inclined, therefore, to hold that as the reserving clause is fully satisfied by confining it to civil cases, that construction is conformable with the general usage where the English law prevails.

In the preceding clause in this Charter, the Court of Oyer and Terminer is authorised to suspend the execution of any capital offence until the pleasure of the Crown be known, where there shall appear, in the judgment of the Court, proper occasion for the exercise of mercy. If the power of granting an Appeal in capital cases was reserved to the Crown, and consequently the right of applying for it, notwithstanding the refusal of an Appeal by the Court, would not it have been almost necessary to have given the Court, in such case, a power to suspend the execution of its sentence, if not to the criminal a right to require such suspension, till he might avail himself of his reserved right to apply to the Crown, not for mercy, but by way of Appeal? But we find no such power given.

For these reasons, if in this case it were necessary to support the advice we intend to give to Her Majesty, upon the ground that the reserving clause does not extend to Appeals in capital cases, we should be disposed to come to that conclusion. If, however, we should have formed an erroneous opinion in this respect, we think, upon the supposition that the reserving clause does extend to felonies, that we should not advise Her Majesty to allow this Appeal. We conceive a power to grant an Appeal is confined by the words of the clause to a "Judgment or determination" of the Supreme Court; and that all, even in this view of the case, which could be done, would be to allow an Appeal for the purpose of ascertaining whether the "Judgment or determination" of the Court was erroneous in point of law with reference to the indictment, or, in other words, whether there was error upon the face of the record, as in England. We do not think that by any construction the Crown can grant an Appeal as to the verdict itself. We conceive that we could not go over again the merits of the case. That we have not, [294] and could not have, any materials for such an investigation. And that to presume that it was intended that a new trial should take place, is unwarranted by the words of the Charter, and would be an anomaly in the legal proceedings of this country. The present application is not against the "Judgment or determination" of the Court, but it is an application against what was done on the trial, and against the verdict.

It may be argued that the Crown could not, even by Charter, part with its prerogative. But it must be recollected that this is a case in which the Crown grants a Charter by virtue of an Act of Parliament, and that Charter, we conceive, must be considered as granted in the execution of the powers which were granted by that Act of Parliament.

A very similar case occurred upon a former occasion, though not with respect to a criminal cause. I mean the case of *Cuvillier v. Aylwin* (2 Knapp, P.C. 72). The very same argument which was used by Mr. Hill was used by Mr. Justice Colman, who was then Counsel for the Petitioner. It was this:—"An Act of the Parliament of Great Britain declared that all laws passed by the Legislature of Canada should be valid and binding within the colony, and directed, that the Colonial Court of Appeal should be subjected to such Appeal as it was previous to the passing of the Act, and also to such further and other provisions as might be made in that

behalf by any Act of the Colonial Legislature: Held, that an Act having been passed by the Colonial Legislature limiting the right of Appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to Appeal, in a cause where the sum was of less amount, could not be received by the King in Council, although there was a [295] special saving in the Colonial Act of the rights and prerogatives of the Crown."

In that case the Judgment was given in but few words. The Counsel for the Respondent was not heard, but it was observed, "It is not necessary to hear Counsel on the other side. The King has no power to deprive the subject of any of his rights, but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects in any of the countries under his dominion of any of his rights. This Petition must thereupon be dismissed."

It was, therefore, held, that though there was a reservation of the right of the Crown, yet as the Act in Canada was made in pursuance of an Act of Parliament of Great Britain, the powers contained in that Act did take away the prerogative of the Crown. So we apprehend this Charter in India, being granted in pursuance of an Act of Parliament here, if by the true construction of the Charter the prerogative of the Crown is in any way limited, it must be said to be limited, not by the Act of the Crown itself, but by the Act of the Crown acting under the authority of Parliament.

It is for these reasons that their Lordships are of opinion (and perhaps other reasons might be given arising from a consideration of the peculiar circumstances of the case), that they must humbly advise Her Majesty, that the prayer of the Petition cannot be granted.

[Mews' Dig. tit. CROWN, A. PREROGATIVES GENERALLY. S.C. 3 Moo. Ind. App. 468. As to appeals in criminal cases from Indian High Courts to Privy Council, see letters patent (i.) of 28th Dec. 1865, art. 41 (Stat. R. and O. Rev. iv. p. 119, Bombay); (ii.) of 28th Dec. 1865, art. 41 (*ib.* p. 94, Calcutta); (iii.) of 28th Dec. 1865, art. 41 (*ib.* p. 107, Madras); (iv.) of 17th March, 1866, art. 32 (*ib.* p. 130, North-Western Provinces). See also *In re Mac-Crea* (1893), A.C. 346 (special leave to appeal granted by Judicial Committee although leave had been refused by Indian High Court), and note to *In re Ames*, 1841, 3 Moo. P.C. 413].

[296] ON PETITION FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

The QUEEN, on the Prosecution of the BOMBAY GOVERNMENT, against SAMUEL STEPHENSON, ALLOO PAROO, and Others * [June 23, 1847].

Under the Bombay Charter of Justice, the Supreme Court at Bombay is invested with full and absolute power to allow or deny an Appeal in criminal cases, and no power is reserved to the Crown, by such Charter, to grant leave to appeal in such cases [5 Moo. P.C. 300, 304].

The case of *Christian v. Corren* (1 P. Williams, 329) observed upon [5 Moo. P.C. 302].

This was a Petition for leave to Appeal from a Judgment of the Supreme Court of Judicature at Bombay, whereby the Petitioner, Alloo Paroo, and two others, were found guilty of felony, as accessories before the fact, to the burning of a ship, called the *Belvidere*. The indictment was preferred in the Supreme Court against

* This and the preceding case being decisions upon the same point, it is thought advisable to place them together.

Present: Members of the Judicial Committee,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir A. Johnston, and Sir E. Ryan.

Samuel Stephenson, for feloniously burning the ship, and the Petitioner and two others for aiding and abetting in the said felony before the fact. The trial of the Petitioner and two others as accessories (Stephenson not having been arrested), took place before Sir H. Roper, Chief Justice, and Sir E. Perry, Puisne Judge, at an Admiralty Session of the Supreme Court, when they were found guilty, and sentenced to transportation for life. Shortly after this conviction, the Petitioner presented a Petition to the Supreme Court, praying for leave to Appeal to Her Majesty in Council against the [297] trial, conviction, judgment, and sentence, upon various grounds, the principal of which was an objection, taken upon his arraignment, by Counsel on his behalf, that under the Criminal and Statute Law existing in Bombay, he could not legally be tried upon an indictment, as an accessory before the fact, in the absence of, and until after the trial and conviction of, the party charged as principal, which, however, the Court overruled, and refused to grant leave to Appeal. The Petition set forth the indictment and proceedings on the trial, and prayed that Her Majesty would, by and with the advice of the Privy Council, make such Order as should seem fitting for the admission and prosecution of an Appeal from the Judgment of the Supreme Court, and for the production of true and exact copies of the indictment, and of all evidence, proceedings, judgments, decrees, and orders, given, had, or made, in the prosecution in the Supreme Court, and of the Judges' notes of the evidence, and of the reasons given by the Judges at the trial, and their refusal to allow leave to appeal against the conviction and judgment.

Mr. Hill, Q.C., Mr. Robinson, Sir John Bayley, and Mr. Acworth, in support of the Petition, cited the cases of *Poonceekooty Moodelur v. The King* (3 Knapp's P.C. Cases, 348), *Aga Mahomed Kurboolie v. The Queen* (3 Moore's P.C. Cases, 239), *In re Ames* (3 Moore's P.C. Cases, 409), *D'Orliac v. D'Orliac* (4 Moore's P.C. Cases, 374), *Hulm v. Hulm* (4 Moore's P.C. Cases, 262), *Christian v. Corren* (1 P. Williams, 329), *Rex v. Moreley* (2 Burr. 1041), and the Charter of Bombay of the 8th December 1823 (*ante* [5 Moo. P.C.], 279).

[298] Mr. Wigram, Q.C., and Mr. Forsyth, on the part of the East India Company, opposed the Petition.

Lord Brougham (26th June, 1847).—This case, to a certain degree, resembles the case which has been already spoken to. But in one material respect, no doubt, it may be said to differ from it, because I do not understand it to have been argued at the Bar, in the Petitioner's case, that there lay an Appeal from the verdict of a jury, for the purpose of obtaining a new trial. I understand the question raised there was, (at least it appears to me perfectly hopeless to argue any other point,) that a Writ of Error lay, or a proceeding in the nature of a Writ of Error, for some defect of law or jurisdiction appearing upon the record. Be that as it may, however, their Lordships are of opinion, that taking the terms of the Charter into consideration, and having regard to the origin of that Charter, namely, that it was not a mere act of the Crown, by force of the prerogative, but in execution of a power conferred upon the Crown, by Statute; the Charter, by its terms in execution of that Statute, does not reserve a power to the King in Council, of reviewing a determination of the Court below, in a criminal case, the Court below having denied the application for such a review.

That this is in execution of a statutory power, is clear. A Statute was made, in the 4th year of the late King, George IV. [4 Geo. IV., c. 71], which gave the Crown the power to grant a Charter to a Court of Justice in Bombay, with the same powers, immunities, jurisdiction and authority, as were vested in the Court at Fort William, by virtue of another statutory power, [299] granting that Charter, namely, the 13th of George III., chap. 63.

That Statute contains a power to the Crown, to grant an Appeal, in such manner, and in such cases, and on such security, as to the Crown shall seem meet. Then, when we look at the Charter granted in execution of that power, constituting the Supreme Court at Fort William; bearing in mind that, by the 4th of Geo. IV., c. 71, the Court in Bombay is to be a model of that Court, we find there that the reservation, after the grant of Appeal, is in the same terms with the section brought in question now before us, as to Bombay, respecting criminal cases;—that the reser-

vation, which follows the section touching Appeals in criminal cases, is confined strictly to civil cases.

Some doubt might have arisen upon the section in the Bombay Charter, following the section upon criminal cases. Some doubt might have arisen from the frame and structure of that section, whether it were confined to civil cases or not: for that part which clearly confines it to civil cases, limiting the sum appealed from to 10,000 Bombay rupees, is in a separate proviso, and follows, after an interval, from the first, and reserving part of the section, that interval being filled up by the power given to the Court to execute judgments and orders. But when we look at the Fort William Charter, which is to be the foundation and model of this Charter, we find, that no doubt whatever exists there, that the reserved power refers to civil cases, for it is part and parcel of that section, reserving the power to the King in Council, that it shall not exceed the sum of 1000 pagodas.

[300] The section itself, if it had stood alone, without that reserved power, appears to us clearly to vest an absolute discretion in the Court below, in which the Judgment is had; to refuse, as well as to grant, the Appeal: for it is said, that in "all indictments, informations, and criminal suits and causes whatever," which are large words certainly, "the said Supreme Court of Judicature shall have the full and absolute power and authority, to allow or deny the Appeal of the party, and also to order and regulate the terms upon which the Appeal shall be allowed, in such cases in which the said Court may think fit to allow such Appeal."

Now, first of all, arises upon this, the obvious consideration from the words, that it seems impossible to give a discretionary power, of either allowing or denying, in more clear and plain terms, than these terms are, "full and absolute power to allow or deny." And then, that is followed by saying that the terms may be regulated by the Court, "in cases in which the said Court may think fit to allow such Appeal," being a very ordinary expression used in Acts of Parliament, when it is intended that a power given to any officer or any body for public purposes, shall not be absolute and compulsory upon that individual officer, or that body, but shall be discretionary in that individual officer or body, to exercise or not, as he or they shall please, and be advised. If the words are "It shall and may" be so and so done, by such and such officer and body, then the word "may" is held in all soundness of construction to confer a power, but the word "shall" is held to make that power, or the exercise of that power, compulsory; cases are not wanting where, even without the use of so stringent a word as "shall," it has [301] been held that a power so conveyed must be executed. But where it is intended not to compel, but to leave it optional with the parties, the words "think fit" are the very ordinary technical and appointed words, to show that the power is not compulsory. And those words occurring in this clause, they seem really to leave no reasonable doubt, that a discretion is vested in the Court below, of denying as well as of allowing an Appeal.

This is still further clear when we come to look at other Charters, in which it is not intended to give the power absolutely, but in which it is intended that the Court shall be, to a certain degree, *quasi* ministerial in granting leave to Appeal. For in all those cases, if we look to them, we shall find that this is the course adopted by the Charter. The party is to Appeal to the King in Council. He is first, before appealing, to petition the Court, of whose sentence he complains, and then it is (this is the course in almost all cases, I know of no exception), that the party has the right to Appeal. In order to prosecute his Appeal, he must first petition the Court for leave; if the Court shall grant leave to Appeal, they are then to prescribe certain terms; as in the case of a Judgment, he is to give a certain security, and in some cases security must be given for the costs; but in none of those cases do we find anything like this other alternative, "in case the Court shall refuse leave to Appeal," because it is not intended to oust the party, of his privilege to apply here, even in the case of the Court having refused to comply with his petition. The words, "if they shall think fit," are never inserted there. This is a totally different clause, differently framed, and with another and entirely different object. The cases which have [302] been cited, have been already partly disposed of, by what has been said by their Lordships in the last case. The case of *Christian v. Corren*, from the Isle of Man, (1 Peere Williams, 329.) really proves nothing. The argument, is the argument of Mr.

Peere Williams himself, for it is not the Judgment of the Court. No doubt Peere Williams is a great authority as a reporter, a very learned person, and I believe a very accurate reporter he is generally allowed to be; but what he says there, is no part of the Judgment of the Court. He says, even if there be express words in the Charter, excluding the right of the subject, those words shall not be held to deprive the subject of his common-law right of Appeal to the Crown, in order that justice may not fail. The Court, which was assisted in that case by Lord Chief Justice Parker, in giving their Judgment, proceed upon no such ground. They only say, in this case there is nothing to take away the general right of Appeal, which is necessary to prevent a failure of justice. And Lord Chief Justice Parker, in that case, observes that the Court of Chancery, even in the case of a proceeding of a Copyhold Court, if anything were done against good conscience, would review it, and would direct that the Court should re-assemble, for the purpose of acting more conscientiously. But it is certain, that that case was not borne out by the judgment of the Court of Chancery, when an attempt was made in a case before Lord Jeffries, Lord Chancellor; which had been very much considered at the Rolls by Mr. Serjeant Trevor, who was then Master of the Rolls, and where such a power to interfere was wholly denied. *Ash v. Rogle* (1 Vern. 367).

It is quite unnecessary, however, to enter into that, [303] because it is quite sufficient to observe, that the Lord Chief Justice, in granting that right of Appeal which has been contended against, does not in the slightest degree bear out the generality of Mr. Peere William's argument.

But even if the argument of Mr. Peere Williams had been entirely confirmed and adopted by the Court, it does not apply to this case. Because there is no question here of the power of the Crown to abandon the prerogative. The Crown may abandon a prerogative, however high and essential to public justice, and valuable to the subject, if it is authorized by Statute to abandon it; and here it is in the execution of a power conferred by Statute, that this abandonment, if any abandonment has been made, has taken place.

It must be observed, likewise, that there is no abandonment of the right of a subject to Appeal to the King in Council; for there is an express provision made as to the manner in which that Appeal shall be exercised, and for the Crown having the power. It might be reasonably contended that the Crown may point out the manner in which the general common-law right of Appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to Appeal to the Crown generally. That Appeal shall be in civil cases at all times, but that Appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below, the right (the Crown may say) to refuse or to grant it, as they see fit. I see nothing contrary to the prerogative. I see nothing contrary to the right of the subject, as involved in the exercise of that prerogative of the Crown, having, even independently of the Statute, [304] laid down the right in that particular form; but that is wholly unnecessary in this case, and I throw it out only to meet the argument in Peere Williams, and not the argument here, which is quite another case, and rests upon other grounds. It is wholly unnecessary to deal with that abstract at all for our present purposes, because this is the case of the execution of a power granted by Statute, to which undoubtedly the case of *Curvillier v. Aylwin* (2 Knapp, P.C. 72) would almost in terms apply.

Their Lordships, therefore, are of opinion, that, in this case, even if the argument were confined to the matter of error appearing upon the record, there is no ground whatever for holding, that the Crown has reserved its power of receiving an application of this kind against the decision of the Court below, and that the Court below alone has the power of granting or refusing an Appeal in such cases.

It is unnecessary of course to argue the question of an application for a new trial or for a re-consideration of the whole case, because that is still more clear. But clear enough it is, even if the question were confined to a mere error upon the record.

[Mews' Dig. tit. CROWN, A. PREROGATIVES GENERALLY. S.C. 3 Moo. Ind. App. 488.

See note to last preceding case.]

[305] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

THE REVEREND JOHN BLUCK,—*Appellant*; MATTHEW RACKHAM,—*Respondent* * [May 12 and 13, 1846].

The proceeding under the Statute (1 and 2 Vict., 106, sec. 32), against a beneficed clergyman for penalties, for non-residence on his benefice, without licence or exemption, is in the nature of a civil, and not a criminal, proceeding [5 Moo. P.C. 314].

In condemning the Defendant for non-residence, in the penalty of one-third of the annual value of his benefice, the Court below did not decree a specific sum, but referred the matter to the Registrar of the Court to ascertain the same. Held on Appeal that such course was regular [5 Moo. P.C. 315].

It is not necessary for the promoter of such a suit, to allege or prove that the Defendant had not a licence, or was not resident on another benefice: those facts being within the Defendant's own knowledge are capable of being alleged and proved by him in defence [5 Moo. P.C. 314].

This was an Appeal from the Arches Court of Canterbury, in a proceeding originally instituted in the Episcopal Consistorial Court of Norwich, by the Respondent, authorized for that purpose by the Bishop of the diocese, against the Appellant, the Rector of the parish of Walsoken, in the county of Norfolk and diocese of Norwich. In the citation, which was issued on the 12th of September 1843, the Appellant cited him to appear and "to show cause why he should not be pronounced to have forfeited one-third of the annual value of his said benefice, by reason of his having been absent therefrom, for a period exceeding the space of three months, and not exceeding the space of six months, of and in the year ending the 31st day of December 1842, without any such licence or exemption as is [306] allowed by the Statute 1 and 2 Vict., c. 106, and without having been resident at some other benefice of which he was possessed; and why the payment of such forfeiture, together with the reasonable expense incurred in recovering the same, should not be enforced by monition and sequestration under the provisions of the above Statute."

The citation was served on the Appellant, who, not appearing in due form, was pronounced in contempt, and a *significavit* issued: he however afterwards put in an appearance. An allegation was then brought in on behalf of the promoter, which was admitted, and to which a negative issue was given by the Appellant's proctor. A Decree for the Appellant's answers thereto having been taken out, and the answers not given in, the Respondent's proctor prayed that his allegation might be taken *pro confesso*. The Appellant's proctor objected to give in the answers on oath of his party, and under protest alleged that inasmuch as the proceeding was a criminal one against the Appellant, he ought not by law to be called upon to give in his answers on oath; and he further alleged that the whole proceedings were null and void, and prayed that his party might be dismissed with costs. The protest as to nullity of proceedings was rejected, but the answers were waived. The Appellant's proctor still dissented and protested, but the protest was not followed up to the end of the cause. Witnesses were examined by the Respondent upon the allegation, but no plea was put in by the Appellant, nor were interrogatories exhibited on his behalf to the witnesses.

On the 1st of July 1844, the Judge of the Episcopal Consistory Court of Norwich, by his sentence, pro-[307]nounced the allegation to have been proved, and the Appellant to have forfeited one-third part of the annual value of his benefice at Walsoken, and condemned the Appellant in the payment thereof, such amount to be ascertained in the usual and accustomed manner by the Registrar of the Court.

From this sentence, the Appellant appealed to the Arches Court of Canterbury, which Court affirmed the sentence of the Judge of the Consistory Court of Norwich

* Present: Lord Langdale, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

(reported, 1 Robt. 268); and from this sentence of affirmance, the present Appeal was brought.

Dr. Curteis, and Mr. Bramwell, for the Appellant.—This is not a civil suit, but in substance and form it is a criminal proceeding. If so, the proceedings ought to have been according to the provisions of the Church Discipline Act, the 3rd and 4th Vict., c. 86. The twenty-third section of that Act, enacts, “that no criminal suit or proceeding against a clerk in holy orders, for any offence against the laws Ecclesiastical, shall be instituted, otherwise than in the manner thereinbefore enacted.” The object of the suit is punishment. *In the matter of The Dean of York* (2 Queen’s Bench Rep. 1, 31). The Appellant is charged with non-residence, which, it cannot be denied, is an Ecclesiastical offence, penal in its consequences, being punishable by forfeiture of one-third of the income of his benefice. A proceeding for a penalty is a criminal proceeding. *Middleton v. Croft* (2 Atk. 671, 3). A *qui tam* action for a penalty is a criminal proceeding. Comyn’s Dig., tit. *Information* (A. 3). The distinction between civil and criminal suits is this, that the object of the former [308] is private interest, whereas the latter is punishment for an offence. *Ray v. Sherwood* (1 Curt. 173, 184). Even if the suit was properly brought under the Statute, 1 and 2 Vict., c. 106, the case cannot stand. There are various errors in the proceedings. First, there is no proxy appointing the promoter’s proctor. The Statute expressly limits the right of proceeding to a party duly authorized by the Bishop.—[Dr. Lushington: If there was no proxy, why did you not object in the Court below?—Secondly, the offence charged and alleged is, that the Appellant absented himself from his benefice, and did not reside there, for a period exceeding three months. It does not allege the three months to be calendar months. [The Vice-Chancellor Knight Bruce: In common law, the word “month” means four weeks, but in the Ecclesiastical Courts, it means calendar month].—If so, then the next point is, that the allegation contains no averment, that there is a parsonage or house of residence in the parish, or that the Appellant had not a licence; moreover there is a failure of proof, for it is not proved that he did not reside on his benefice within the three months. It is laid down by Starkie (on Evidence, vol. i. p. 363), that where a negative involves a criminal omission by the party, and consequently where the law, by virtue of the general principle, presumes his innocence, the affirmation of the fact is also presumed. Lastly, as to the mode the Court below adopted to ascertain the amount of the penalty. The Court pronounced him to have forfeited one third of the living, but no value was found. It was referred to the Registrar to find the amount. The decree of the Court pronouncing for the forfeiture was a final and definitive [309] decree, and the reference to the Registrar was irregular, and contrary to practice. Any order founded on this adoption would be invalid. *Regina v. Long* (1 Gale and Davison, 367).

Dr. Addams, and Mr. Couch, for the Respondent.—This is a proceeding under the 114th section of the Statute, 1 and 2 Vict., c. 106. It is not a proceeding by the Bishop to punish a party criminally for an Ecclesiastical offence, under the Ecclesiastical Law, as provided by the Church Discipline Act, 3 and 4 Vict., c. 86; it is to recover a penalty imposed by the 32nd section of the Statute, 1 and 2 Vict., c. 106, and was properly brought in the civil form. A *qui tam* is not a criminal proceeding, it is in the nature of a civil action. *Wilson v. Rastall* (4 Term Rep. 753). If you proceed by way of action, it is a civil proceeding; on the contrary, if by information, it is criminal (4 Bla. Com. 308). This being so, the same strictness of pleading, as is required in a criminal proceeding, is not called for, and the objections of the Appellant, on that ground, cannot prevail. The word “month” in the Ecclesiastical Courts means calendar month.—[The Vice-Chancellor Knight Bruce: Does “three months,” as pleaded in the allegation, mean consecutive months?—Yes. Neither was the burthen thrown upon the promoter, to prove that the Appellant was not resident in the parish. It was for him to prove that he was. Finally, the objection to that part of the decree which referred the matter to the Registrar to ascertain the value of the benefice, is not tenable: such reference is conformable to the practice of the Court. The Registrar’s report was not final, and either side, if dissatisfied with it, could have objected to it.

[310] The Right Hon. Dr. Lushington (May 15).—This suit was originally instituted

in the Consistorial Court of Norwich, and was a proceeding against the Reverend John Bluck, as incumbent of Walsoken, to recover penalties imposed by the Statute, 1st and 2nd Vict., c. 106, for non-residence.

To the citation served upon Mr. Bluck, he appeared, after some delay, by his proctor. The proctor for Mr. Rackham, who brought the suit under the authority of the Bishop, then brought in an allegation, the substance of which was to charge Mr. Bluck with non-residence on his benefice of Walsoken. The proctor for Mr. Bluck prayed that this allegation should be rejected; the Judge, however, thought fit to admit it, and from that decree no appeal has been prosecuted.

It appears that, subsequently, Mr. Bluck's answers were called for; that Mr. Bluck's proctor alleged the suit to be a criminal one, and not only objected to giving in his client's answers, but appeared under protest, and alleged the whole proceedings to be null. The Judge overruled this protest, but made no express decree as to the answers. From this decree of the Judge there was no appeal; indeed it was wholly incompetent to the party to have given in any such protest of nullity at that period, and in that form. The question of nullity was an objection to the admissibility of the allegation. Witnesses were then examined, and the Court eventually made a decree pronouncing for the penalty sued for. From this decree an appeal was prosecuted to the Arches Court, and the Judge of that Court affirmed the sentence.

The cause is now brought up by appeal to this Court, and various objections have been taken to the legality of the proceedings; and it is contended that [311] the whole of the proceedings are illegal, and consequently that the sentence must be reversed, and the party proceeded against dismissed.

The leading objection is founded upon the construction which the Appellant's counsel contend ought to be put upon the provisions of the 3rd and 4th Vict., cap. 86, called the Clergy Discipline Act. It is said that the present proceeding is a criminal proceeding within the meaning of that Statute; and that by the twenty-third section of that Act no criminal proceeding can be prosecuted against a clergyman in any Consistorial Court, but that the proceedings must be in the form and manner prescribed by the Act. The words of the twenty-third section are, "No criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws Ecclesiastical shall be instituted in any Ecclesiastical Court, otherwise than is hereinbefore enacted or provided."

Now what is a criminal suit or proceeding against a clerk in an Ecclesiastical Court, for an Ecclesiastical offence? We apprehend that the meaning of this expression has been long universally settled, and that the presumption of law is, that the Legislature used it in its accustomed meaning.

A criminal suit is distinguished, in the Ecclesiastical Courts, from a civil proceeding, in its very commencement, and in most essential particulars.

First, A criminal suit commences by obtaining the permission of the Judge to promote his office, and the Prosecutor gives bond to the Judge to keep him harmless; secondly, The citation expressly calls upon the party cited, to answer to articles touching his soul's health, and the lawful correction of his manners; and [312] thirdly, The suit is by articles, and not by allegation or libel, and must be conducted with the strictness peculiar to this mode of proceeding.

This is a well-known proceeding: there is no other criminal suit or proceeding known to the Ecclesiastical Law; and this is the criminal suit intended by the twenty-third section.

Then, is the present proceeding under the 1st and 2nd Vict., c. 106, a criminal proceeding according to the usual acceptation of the term? It does not resemble a criminal proceeding, according to the acceptation of the term, in any one of the essential particulars which have been stated; on the contrary, the citation and the allegation, and all that has been done, are in the form well known in the Ecclesiastical Courts as the civil form.

If this be so, then, as the Clergy Discipline Act contemplates only criminal proceedings, known as such, the carrying on the present suit is not prohibited by that Act.

But the objection has been put into another form. It was argued, and most truly said, that the present suit was in the civil form, but that the object was to punish;

and that, therefore, the object being punishment, the only proper form of proceeding was the criminal form, and that the adoption of the civil form was contrary to law, and, therefore, the whole proceeding was a nullity.

If the criminal form was the only legal form of proceeding, then the inference would be true; but that question depends upon the construction to be put upon the 1st and 2nd Vict., c. 106, and the practice of the Ecclesiastical Courts.

It must be admitted that non-residence is an Eccle-[313]-siastical offence, and that, before the passing of any of the modern Statutes, a non-resident incumbent might be prosecuted in the criminal form, in any proper Ecclesiastical Court, and might have been punished by suspension or deprivation, but not by the imposition of any fine or penalty. In order more effectually to secure residence, the ancient remedy, by criminal proceedings in the Ecclesiastical Court, being found insufficient, the Legislature, following the example of former Acts, by the Act of 1st and 2nd Vict., c. 106, has imposed certain penalties. These penalties are imposed by the 32nd section of that Statute, and the mode of recovery is regulated by the 114th section, which enacts "That all penalties and forfeitures which shall be incurred under this Act, by any spiritual person holding a benefice, shall and may be sued for and recovered in the Court of the Bishop of the Diocese, in which such benefice is situate, and by some person duly authorised for that purpose by such Bishop, by writing under his hand and seal, and in no other Court, and by or at the instance of no other person whatever." Now do these words import a proceeding in the criminal form or in the civil? The words "suing and recovering" are wholly inapplicable to the well-known criminal form; had it been intended to require the criminal form, surely the expressions would have been wholly different; power would have been given to promote the office of the Judge, and power to the Judge to affix the penalty. Not only does not this section contain any words importing that the criminal form should be adopted, but the whole practice of the Ecclesiastical Courts has been to the contrary. There is no instance that their Lordships have been apprised of, in which penalties have been [314] sued for in the criminal form, or any pecuniary forfeiture decreed. On the other hand, though, from the limited jurisdiction of these Courts, there cannot be many classes of cases, yet we find the proceedings to recover tithes under the Statute, 2 and 3 of Edward VI., where double the value in addition is given by way of penalty, to be recovered before the Ecclesiastical Judge, have always been in the civil form.

For these reasons, their Lordships are of opinion that the civil form was properly adopted in this case.

Then, if the civil form was properly adopted, all the incidents to it must necessarily follow, and amongst those incidents is this, that the same strictness of procedure, as in a criminal suit, is not required. The other objections urged may be speedily disposed of. It is said that the proxy of the Respondent does not appear. To this there are many conclusive answers: first, that the objections come too late; and second, the answer given in the Arches Court showed that by the minutes of the Court it appeared that the proxy had been exhibited, and might, therefore, have been had by a monition to transmit *omissa*.

Their Lordships are further of opinion, that though the non-residence might have been laid in the allegation with greater precision, yet that, considering the period when the objection is taken, and the evidence, it is sufficiently established.

They also think that it was not necessary for the Respondent to prove in this suit, that the Appellant had not a license, or was resident on another benefice. These are facts clearly within his own knowledge, and within his power to prove, if any such facts had existed, for his defence.

With regard to the last objection, that the decree is [315] erroneous in not pronouncing for a specific sum, but referring the amount to the Registrar to report, we are of opinion that the course adopted was strictly correct. The Court did not devolve its authority upon the Registrar, for his report was open to objection by either party, and of no effect till confirmed by the Judge.

For these reasons we must pronounce against the Appeal, and remit the cause to the Consistorial Court of Norwich; and we condemn the Appellant in costs.

ON APPEAL FROM THE COLONY OF BRITISH GUIANA.

ALEXANDER MACRAE, Attorney for JOHN CAMPBELL, Senior, and Co.—*Appellant*; STEPHEN HENRY GOODMAN,—*Respondent* * [May 13 and 14, 1846].

A., resident in Amsterdam, being the owner in possession, of a plantation in British Guiana, by an instrument executed on her behalf, by her attorney in London, in the year 1817, sold the plantation, *cum annexis*, to B. for 100,000 guilders "Holland currency," and £30,000 sterling; taking, as part of the consideration-money, a first mortgage on the plantation for the 100,000 guilders. By the terms of this mortgage, it was stipulated that the 100,000 guilders were not to be paid during the lifetime of A.; but upon her death, to her lawful descendants (if she had any), and if not, to the nephews and nieces of J. B.; and it was specially provided that if at any time the interest, at the rate of 5 per cent., should not be punctually paid every year, at Amsterdam, and that if, by such default, A. should be obliged to appoint an attorney to demand the same in the colony, the interest in that case should be at the rate of 6 per cent., and a further charge of 10 per cent for commission. A. intermarried with E., and the interest on the mortgage not having been paid as stipulated, an attorney was appointed at British Guiana, to recover the arrears. In 1828 A. died without issue or lawful descendants, leaving E., her husband, surviving; at which time the interest on the mortgage was still in arrear. In the year 1836, C. and Co. purchased the first mortgage, and all the interest therein, which the parties claiming title under the limitation in the mortgage-deed to the nephews and nieces of J. B. had. The consideration-money paid by C. and Co. was considerably less than the amount of the first mortgage and interest thereon. Upon the passing of the Act for the abolition of slavery, C. and Co. received from the Compensation Commissioners, in respect of this mortgage, a sum more than sufficient to repay them what they had paid for the mortgage, but much less than was due upon the mortgage for principal and interest. The plantation was sold in 1838, at the suit of B., and all creditors having claims were summoned to render their claims, and upon C. and Co. claiming priority under the first mortgage, the Supreme Court of Demerara and Essequibo held, that the second mortgagee was preferent over the first, as under the Anastasian law, which they declared prevailed in British Guiana, an assignee for a valuable consideration of a debt or chose in action, secured by debt, could not recover more than the amount of the consideration-money, actually paid to the assignor, with legal interest from the time of payment, and that the sum received by C. and Co. from the Compensation Commissioners was more than sufficient to pay off, and must be held to extinguish the whole debt upon the first mortgage.

Upon Appeal, held by the Judicial Committee of the Privy Council, reversing the decree,—

- I. That in the absence of any fraud by C. and Co. in the purchase of the first mortgage, and of any authority to show that the *lex anastasiana* prevailed in British Guiana, or could be applied to a case so circumstanced, the amount of the consideration-money given by C. and Co. was not to enter into question between them and the second mortgagee [5 Moo. P.C. 336].
- II. That the term, in the mortgage-deed, "Holland currency," coupled with the fact of Amsterdam being the place mentioned for payment, meant Dutch currency, and not colonial currency [5 Moo. P.C. 337].
- III. That the clause for varying the interest from £5 to £6 was not confined in its operation to the lifetime of A.; but that circumstances might have rendered it inequitable to increase the rate of interest after A.'s death, or during some portion of the time, after that event [5 Moo. P.C. 337].

In this case, the Appeal was brought from a sentence of the Supreme Court of

* Present: Lord Langdale, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Civil Justice of Demerara and Essequibo, of the 17th of June 1813, in a claim of preference and concurrence, consequent [316] upon an execution sale of a plantation or estate, called Vrouw Anna, in Essequibo, by which the Court rejected the claim of the Appellant, as attorney in the Colony, for John Campbell, senior, and Co., for preference on the net proceeds of the sale, so far as the Respondent was concerned, and declared the Respondent preferent over the Appellant, to such proceeds, for the sum of £46,083 12s. 1d.

[317] The facts of the case were as follows:—

In the month of May 1817, Miss Catharina Rebecca Helmers Bonjes was the owner in possession of a plantation, called Vrouw Anna. By articles of agreement, dated the 30th of that month, and made and executed on her behalf, by her attorney in London, she contracted to sell the plantation, with the slaves and appurtenances, to John Bent, of the city of London, for the sums of 100,000 guilders, Holland currency, and £30,000 sterling.

By this contract, it was, among other things, stipulated that the sum of 100,000 guilders, Holland currency, should, on a transport of the estate being given, according to the established forms and usages of the colony, be simultaneously secured thereon, by a first mortgage from Bent to Miss Bonjes, which mortgage, it was agreed, should not be called up or foreclosed during the lifetime of the latter: but, in the event of her death, there should be paid for that sum, two years after due notice given to that effect, one moiety or 50,000 guilders, and, at the expiration of one year thereafter, the remaining moiety to the same amount. It provided also for the immediate payment of an instalment of £10,000, in part of the £30,000, the residue of the purchase-money, and for the execution of a second mortgage for the remaining £20,000, with interest, which interest both on the first and second mortgages, was to be paid at the rate of 5 per cent. per annum, under this special condition nevertheless, that the several payments, either of principal or interest, should be made punctually every year in London or Amsterdam; and that, if Miss Bonjes should at any time be under the necessity, by default of such payments being so made when due, of appointing one or [318] more attorneys to demand and recover the same in the colony, the interest in that case should be at the rate of 6 per cent. instead of 5 per cent., over and above which, the usual charge of 10 per cent. commission, allowed to attorneys and agents for collecting money, should then also be borne and paid by Bent, as purchaser, in addition to what might be due by him. It was also agreed that the interest on the first mortgage should be paid annually at Amsterdam, in the current money of Holland.

On the 20th of August 1818, (before the enrolment of this contract with Miss Bonjes in the colony,) Bent entered into a written contract at Demerara with Milliken Craig, for the sale of the Vrouw Anna estate, with the slaves and appurtenances, for the sum of £65,000 sterling: to be paid, first, by a sum of 100,000 guilders Holland currency, calculated at 12 guilders to the pound sterling, thus making the sum of £8333 6s. 8d. sterling, which was to be secured by a mortgage to be first passed on the estate, *cum annexis*, and on a further number of 170 slaves to be given to, and in favour of, Miss Bonjes, her heirs or representatives, which mortgage, the agreement proceeded to state, cannot be called up or foreclosed during the lifetime of the said Catharina Rebecca Helmers Bonjes; but in the event of her death there shall be paid of that sum, two years after due notice given to that effect, one moiety, or 50,000 guilders, and at the expiration of one year thereafter the remaining moiety to the same amount, and in the meantime the annual interest of the said sum of 100,000 guilders, at the rate of 6 per cent. per annum, shall be regularly paid each year in London.

Miss Bonjes was not a party to this contract between [319] Bent and Craig, and the contract between her and Bent proceeded to completion as if no such agreement had been made: and on the 28th of September 1819, a transport of the estate, with the slaves and appurtenances, was duly made and passed by the said Miss Bonjes to Bent. And on the same day Bent, by his attorney in the colony, mortgaged the same to Miss Bonjes.

By this mortgage the Appearer, as the attorney of Bent, declared him to be justly, truly, and lawfully indebted to Miss Bonjes, of Amsterdam, her heirs or successors, as thereafter mentioned, in a capital sum of 100,000 guilders Holland

currency, arising out of and being part of the purchase-money of plantation Vrouw Anna, *cum annexis*, agreeable to contract of sale and purchase, executed in London on the 30th of May 1817, between the appearer's constituent and the attorney of the said Miss Bonjes, a notarial copy of which was thereunto annexed, and to which reference was had. The Appearer, therefore, for his constituent, bound Bent, his heirs, executors, or representatives, to pay the sum of 100,000 guilders Holland currency, with interest at the rate of five per cent., per annum, to commence from the 1st of April 1817, to Miss Bonjes and her lawful descendants, if she had any, and if not, to the nephews and nieces of the deceased Jan Bonjes, children of Henrick Jurgan and Johan Bonjes (gradually or by representation), living in and about Oldenburg, in manner following (that is to say)—That the said capital sum of 100,000 guilders Holland currency should not be payable during the lifetime of Miss Bonjes; but in the event of her death, there should be paid to her lawful descendants (as before stated), after two years' due notice given to that effect, one moiety [320] or 50,000 guilders of Holland currency, and at the expiration of one year thereafter, the remaining moiety, to the same amount, with the interest due thereon since the death of Miss Bonjes; and during the life of Miss Bonjes, the interest on the capital sum of 100,000 guilders at the rate of 5 per cent., to commence as aforesaid, should be regularly paid to her in Amsterdam, in current money of Holland, on the 1st of October in each year, beginning with the first payment on the 1st of October 1818, and so on during the lifetime of Miss Bonjes; provision being made for the increase of such interest from 5 to 6 per cent., with 10 per cent. commission, in the events and according to the conditions as set forth and contained in the agreement of the 30th of May 1817.

Subsequently to the passing of this mortgage, Miss Bonjes intermarried with Henrick Coenraad Evertz.

The interest on the mortgage not having been paid as stipulated, either at London or in Amsterdam, Mr. and Mrs. Evertz appointed an attorney in British Guiana to recover the arrears thereof, and accordingly such attorney received from the curators of Milliken Craig (then deceased), under an order of the Court, the sum of 47,437. 10 guilders, Demerara currency, for interest on the first mortgage of the plantation Vrouw Anna from the 1st of January 1820 to the 1st of April 1826, after the rate of 6 per cent. per annum on the sum of 100,000 guilders Dutch currency, with 10 per cent. commission on such interest, and 15 per cent. exchange for the difference between Dutch and Demerara currency.

By a power of attorney, Mr. and Mrs. Evertz constituted Messrs. Revers and Koolhaas, both residing in the colony of Demerara, their attorneys in that co-[321]-lony, for general purposes, and specially, to receive from Bent, or from whomsoever it should be deemed necessary, the interests then already due or to become due on the said first mortgage. Under this power, Revers and Koolhaas obtained possession of the *grosse* copy of the mortgage of 28th of September 1819.

After November 1826 the interest on the first mortgage again fell into arrear, and no further payment, either for interest or for principal, in respect of that mortgage, was made.

On the 3rd of July 1828 Catharina Rebecca Helmers Evertz died, without issue or descendants, leaving her husband surviving; and Milliken Craig having died, his succession was adiated by his brother and heir, John Craig. An arrangement to which the Appellants' constituents were parties was then made between John Bent and John Craig, by three deeds, all of which bore date on the 16th of January 1828.

In pursuance of this arrangement the estate Vrouw Anna, with the slaves and appurtenances, was conveyed by Bent to Craig; and, on the 16th of March 1831, Craig, by Macturk and Macrae, his attorneys, passed to Bent a mortgage of that date, by which he bound himself to pay to Bent, his heirs, executors, administrators, or assigns, the principal sum of £38,250 sterling, with interest from the 1st of March 1828, until fully and finally paid, by seventeen equal instalments of £2250 sterling each, with the annual interest on the unpaid capital every year; and it was thereby declared, "that the Appearers Macturk and Macrae bound their constituent's person and property in general, and more especially they bound with right of third mortgage the said plantation Vrouw Anna, with [322] all the buildings.

cultivations, and further appurtenances, and a number of 176 slaves, being the remainder and issue and increase of the Vrouw Anna gang of slaves originally sold by Bent to Craig, in order that, in default of payment of any one or more of the instalments and interest, or any part thereof, Bent might levy on the property thereby mortgaged, and recover from the proceeds thereof, the full amount of capital and interest due to him under that mortgage in preference to all others, save only the holders of the first and second mortgages passed by James Robertson, as attorney of Bent, in favour of Miss Bonjes, both bearing date the 28th of September 1819."

Subsequently to the passing of this mortgage, the Appellants entered into a treaty with Henrick Coenraad Evertz, and the parties claiming title under the limitation in the deed of 1819, to "the nephews and nieces of Jan Bonjes, children of Henrick Jurgan and Johan Bonjes, gradually or by representation, living in or about Oldenburg," for the purchase of their interests under the first mortgage.

Pending this treaty, Mr. Evertz duly appointed Macrae (who was at the same time the attorney of the Appellants) his attorney in British Guiana, to recover the interest due at the death of Mrs. Evertz, under the deed of 1819, and for that purpose to obtain possession of the *grosse* or mortgage-deed; and, under an order of the then Chief Justice of British Guiana, dated the 12th of July 1824, Macrae was appointed to represent and protect the interests of the nephews and nieces of Jan Bonjes, children of Henrick Jurgan and Johan Bonjes, gradually or by representation, living in or about Oldenburg. In consequence of this order, and under the power of attorney from Mr. [323] Evertz, possession of the *grosse*, or mortgage-deed, of 1819, was delivered by Messrs. Revers and Hoolhaas to Macrae.

On the 15th of March 1836, articles of agreement were entered into between Messrs. Huth and Co., of London, acting on behalf of the heirs of Henrick Jurgan and Johan Bonjes of the first part, the Appellants of the second part, and James William Freshfield, junior, and Alexander George Milne, of London, of the third part, by which Huth and Co., as such agents, contracted to sell to the Appellants the sum of 100,000 guilders, and also the mortgage on the plantation Vrouw Anna, and all other securities for the same, and also the interest due since the death of Miss Bonjes, for the sum of £8333 6s. 8d. sterling, the vendors undertaking to have that agreement duly confirmed by the proper tribunal at Ovelgonne.

In pursuance of this stipulation, the heirs of Jurgan and Bonjes, by their attorney, Johan Henrick Wulff, applied to the Grand Ducal tribunal of the circle of Ovelgonne, in the Grand Duchy of Oldenburg, (being the court of competent jurisdiction for that purpose,) for a judicial confirmation of the foregoing agreement; where proceedings were taken according to the usual course of law, for ascertaining the descendants of Jurgan and Bonjes, and the representatives of such of them as were dead; and, by the decree of the Grand Ducal tribunal of Ovelgonne, dated the 1st of June 1836, in which the articles of agreement of the 15th of March 1836 were recited, it was declared that the persons therein named and represented by Wulff and Kuckens, as above stated, were the persons who alone were entitled to the sum of 100,000 guilders, as the descendants of Henrick Jurgan and Johan Bonjes; and all [324] other persons, with their rights and claims to the sum of 100,000 guilders, and also to the mortgage granted for securing that sum, together with the interest, were thereby declared to be legally excluded, and to have no title to the same; and it was thereby declared that the power of attorney, to be given according to the agreement therein mentioned, in favour of Alexander Macrae and Archibald Macqueen, of Demerara, for the purpose of transferring the claim of 100,000 guilders appertaining to the heirs of Bonjes, required no further confirmation by the heirs to make it valid, and that all other steps to be taken in future by Wulff and Kuckens would, according to the laws of that country, be binding upon their constituents, the heirs of Bonjes.

By a power of attorney, of the 4th of June 1836, Wulff, as representative, under the decree of the tribunal of Ovelgonne, of the heirs of Henrick Jurgan and Johan Bonjes, declared "that they, (Wulff and Kuckens,) and each of them, had irrevocably authorised, nominated, constituted and appointed Alexander Macrae and Archibald Macqueen, residing in the district of Demerara, their true and lawful attorneys, in order jointly and severally for them, in their names, and on their behalf, and for

and in the names and on behalf of all persons who, by the above-mentioned decree, had any interest or claim on the sum of 100,000 guilders, or any part thereof, to transfer, make over and assign to Messrs. Colin Campbell, Mungo Nutter Campbell, Thomas Campbell, and James Campbell, junior, all residing in Glasgow, in Scotland, merchants and copartners, trading under the firm of John Campbell, senior, and Co., their order, executors, administrators and assigns, all rights, claims, property, share and interest, which they, (Wulff and Kuckens,) and all and [325] every the above-mentioned persons likewise interested, possessed in respect to the capital sum of 100,000 guilders, which sum, by a mortgage-deed dated the 28th of September 1819, executed by John Bent, was invested for and on behalf of Miss Bonjes, on the plantation Vrouw Anna, *cum annexis*, and 225 slaves, (then apprenticed labourers,) therein named; and which sum of 100,000 guilders, by the will of Jan Bonjes, in case Miss Bonjes should die without issue, (which case had then occurred,) was bequeathed to the heirs of Henrick Jurgan and Johan Bonjes, as also the arrears of the interest on the mortgage from the 3rd day of July 1828, being the day of the death of Miss Bonjes, and all and every security of the mortgage and of the interest, and for that purpose to appear before the Counsellors Commissaries of the Honourable Court of Civil Justice for Demerara and Essequibo, in the colony of British Guiana, at the Court-house, or other usual place in the colony, and there to pass, sign and execute the necessary acts and deeds of cession and transport, with a complete renunciation of all claims, as well *in rem propriam suam* as otherwise; as also to acknowledge the payment of the equivalent and the receipt of the value for the renunciation, to the entire satisfaction of the constituents; and also to ask, demand and receive of and from the agent or agents of Wulff and Kuckens, in the said colony, or of and from any other person or persons whomsoever, in whose hands, care or custody it might be, the original *grosse* of the mortgage, and all other acts and instruments relating to the mortgage, and to deliver them to the purchasers, and to give receipts for the same; and generally, for affecting the premises to do and perform anything that might be necessary, and that could or might be done and effected, [326] agreeably to the local customs and existing laws of the colony of British Guiana, or either of the districts thereof, in as full and effectual manner as Wulff and Kuckens themselves, or the above-mentioned persons interested or empowered, could, might, or ought to do if they were personally present."

A similar power of attorney, in favour of the same parties, was executed by Kuckens on the 17th of June 1836, and both these powers, with the authentications and the judicial certificate, were duly recorded in British Guiana.

By a deed of transfer, dated the 1st of November 1836, executed at Demerara, Alexander Macrae and Archibald Macqueen, in their quality of representatives of the descendants of Henrick Jurgan and Johan Bonjes, agreeably with the above powers of attorney, acknowledged the heirs of Henrick Jurgan and Johan Bonjes to have been fully paid and satisfied for the transfer, and renounced from the exception *non numeratæ pecuniæ*, or no sufficient value received, and consequently declared not to have, or hold, any further claim, action or pretension in or to the thereinbefore recited mortgage deed, with the interest already due and owing, or thereafter to become due and owing, as well as the amount of interest accrued due thereon since the death of Miss Bonjes, but that the same from thenceforth was the true, lawful and *bona fide* property, with all the rights, privileges and immunities, of the Appellants.

The transfer made by this deed was accepted by Macrae, as the special attorney of the Appellants, by virtue of a deed or power of attorney, dated the 3rd of August 1836, executed at Edinburgh, by the Appellants, and recorded in the colony. From the [327] date of this transfer, Macrae held possession of the *grosse*, of the first mortgage, at attorney for the Appellants.

Pending the treaty for the sale of the mortgage of 100,000 guilders, from the heirs of Henrick Jurgan and Johan Bonjes, to the Appellants, proceedings were taken before the Compensation Commissioners, under the Act, 3rd and 4th Will. IV., c. 73, (for abolishing slavery) for the purpose of determining and awarding the compensation, in respect of the slaves upon the Vrouw Anna estate. Several claims and counter-claims were carried in: among others, a claim on behalf of the heirs of Henrick Jurgan and Johan Bonjes, and of Henrick Coenraad Evertz, by virtue of a

first mortgage, upon all the slaves on the estate, to the extent of £12,833 6s. 8d.; and a counter-claim by John Bent, the Respondent's assignor, (in which the priority of the mortgage of the 28th of September 1819 was admitted,) by virtue of the mortgage of the 16th of March 1831, now vested in the Respondent, to the extent of £38,250.

On the 18th of February 1837, notice was given to the Commissioners, that the first mortgage on the Vrouw Anna estate was vested in the Appellants; and at the same time, the claims originally entered on behalf of the parties from whom the Appellants derived their title, were withdrawn.

On the 7th of March 1837, the Commissioners awarded to John Campbell, senior, and Co., the sum of £9121 16s. 2d., and applied it in reduction of the amount then due, for principal and arrears of interest, upon the first mortgage.

The estate, Vrouw Anna, was sold at an execution sale, on the 24th of November 1838, under an order of [328] the Supreme Court of Demerara and Essequibo, at the suit of John Bent as mortgagee, under the deed of the 16th of March 1831, against the heirs or representatives of John Craig, deceased, heir of Milliken Craig, deceased, and all creditors having any claims upon the plantation, *cum annexis*, were summoned in the usual manner, to render in such claims. In obedience to this call the Appellants appeared, and filed their claim and demand of preference, exhibiting and stating the contents of the *grosse* mortgage of the 28th of September 1819, stating the marriage and subsequent death of Miss Bonjes, the devolution of the right of the mortgage upon the children and grandchildren and descendants of Henrick Jurgan and Johan Bonjes, and the transfer, by the deed of the 1st of November 1836, to the Appellants; with an account, showing a balance due to them of £5751 12s. 8d., and demanding in conclusion, that they might be declared to have, on the net proceeds of the plantation, sold at the execution sale, after satisfying the claims for supplies and salaries still preferent, a right for the said sum of £5751 12s. 8d. sterling, prior and preferent to all others, and, in case of contradiction, expressly claiming costs.

The Respondent filed his claim and demand, in case of debate, claiming under an assignment from John Bent, of 23rd November 1838, of the mortgage deed of 16th March 1831, and a cession of action and transfer, dated 2nd of February 1839, and demanding in conclusion, that by the definitive sentence of the Court, the claim and demand filed on the part of the Defendants, and *Debattees* (the Appellants), for preference on the net proceeds of the plantation Vrouw Anna, *cum annexis*, might be rejected, for as far, at least, [329] as the Plaintiff and *Debattant* (the Respondent) was concerned; and on the other hand, that the Plaintiff and *Debattant* might be declared preferent to the Defendants and *Debattees*, on the net proceeds of the plantation for the sum of £46,083 12s. 1d. sterling, being the balance of capital and interest on their mortgage, on the 24th of November 1838, and for the further sums of florins 1707. 10, costs of execution, and of florins 166 for costs incurred up to the sequestration, and for costs in appeal, with condemnation of the Defendants and *Debattees* in the costs of the proceedings.

The case made by the Respondent, upon the pleadings, consisted in a denial, first, that the Appellants were holders by legal transfer of the *grosse* or mortgage of the 28th of September 1819; and, secondly, that anything was due upon that mortgage, if held by the Appellants.

In proof of their title, the Appellants gave in evidence the original *grosse* of the 28th of September 1819; that the judicial certificate of the Grand Ducal tribunal of Ovelgonne; the transfer of the 1st of November 1836; and the several powers of attorney; certificates of authentication, and other instruments of title; of which the effect has been already stated.

In proof of the amount of their claim, the Appellants filed an account, stated by them, to the representatives of the mortgagor, on the 30th of April 1838, commencing with a balance of £5257 8s. 9d., due upon the first mortgage on the 29th of April 1837, and ending with a balance of £5572 17s. 8d., due on the same mortgage on the 30th of April 1838.

To these accounts, five objections were raised upon [330] the pleadings, by the Respondent: First. That the Appellants having claimed payment and preference in sterling money, which was not mentioned in their mortgage-deed, their claim

could not be entertained, and that this error was fatal to any claim which they might advance upon the net proceeds of the estate.—Second. That the amount of the first mortgage never was in Dutch currency, but in Holland currency, and that the change from Holland currency to British sterling, even if acquiesced in by John Bent, was, on the part of the Appellants, an usurious transaction, enabling them to convert the guilders at the exchange of 400 stivers per pound sterling instead of 480 stivers per pound sterling, and must therefore be fatal to the claim of the Appellants.—Third. That the right of charging interest at 6 per cent. instead of 5 per cent., reserved in case of default, by the deed of 28th of September 1819, to Miss Bonjes, was personal to her, and was not assignable, and that in the event, which had happened, the Appellants were not entitled to take credit for interest at that rate.—Fourth. That shipments of produce were made to the Appellants from the estate, which they were bound to have applied in extinction of their claim under the first mortgage, and that by such means they had received sufficient to pay off any balance due to them. And Fifth. That under the agreement of the 15th of March 1836, and the deed of transfer of the 1st of November 1836, the Appellants could not claim against the estate for more than the consideration which they had actually given to their vendors, their heirs of Henrick Jurgan and Johan Bonjes, viz., £8333 6s. 8d., with interest, from the 15th of March 1836: and that after debiting them [331] with the compensation-money received in April 1837, there was a balance overpaid to them, on the 24th of November 1838, of £328 19s.

The Appellants contested these objections, both upon the due construction of the several instruments relied on, and the law sought to be applied.

The Supreme Court held, that under the *Lex Anastasiana* (a constitution of the Emperor Anastasius, confirmed by another of Justinian, which formed part of the Roman Dutch law, and as such was held to be in force in the colony of British Guiana), an assignee for valuable consideration of a debt, or other chose in action, whether secured by mortgage or otherwise, could not recover against the debtor or his estate, for more than the consideration which he actually paid to the assignor, with legal interest from the time of payment; and by its decree, bearing date the 17th of June 1843, the Court rejected the Appellants' claim to priority, and allowed that of the Respondent. From this decree, the Appellants appealed to Her Majesty in Council, and submitted, that the decree was erroneous for the following reasons:—

First. Because the first mortgage on the *Vrouw Anna* estate, under which the Appellants claimed, was and ought to be declared prior to the mortgage alleged to be vested in the Respondent.

Second. Because the title of the Appellants to the first mortgage, under which they claimed, was made out by sufficient evidence in the cause, and was not disputed by the representatives of the mortgagor, or by any adverse claimant under the same mortgage.

Third. Because the sum of £5572 17s. 8d. (which with subsequent interest made up the amount claimed [332] by the Appellants) was admitted due to the Appellants, upon the first mortgage, on the 30th of April 1838, in the account then stated between the Appellants and the representatives of the mortgagor; and the Respondent was not entitled to open that account.

Fourth. Because the sum of £5572 17s. 8d. was in fact due to the Appellants on the 30th of April 1838, on the security of the first mortgage, and the accounts by which the same was then shown to be due were made out in conformity with the original agreements, and the subsequent dealings and acknowledgments of the parties from whom the Appellants and the Respondent respectively derived title.

Fifth. Because the *Anastasian* law (if the same was in force in British Guiana) did not apply to the assignment of the debt secured by the first mortgage on the *Vrouw Anna* estate, to the Appellants.

Sixth. Because, even if it were held that the Appellants were not entitled to the whole amount which they claim, and that the principle, on which the accounts filed by them were made out, was erroneous; the proper effect of such a decision, under the circumstances of the case, would be to reduce only, and not to extinguish, the amount due to the Appellants on the first mortgage, and there would still be a

balance in respect of which the Appellants, as holders of the mortgage, would be entitled to priority over the Respondent.

On the part of the Respondent, it was contended, that the decree was well founded, for the following reasons:—

First. Because the Appellants failed to prove that John Campbell, senior, and Co., had any right or title [333] to the mortgage of the 28th of September 1819, or to demand or receive what, if any thing, must be due or owing in respect of such mortgage.

Second. Because John Campbell, senior, and Co., having received the amount of the slave compensation-money, to an amount greater than the sum alleged to have been paid by them for the purchase of the mortgage of the 28th of September 1819, had thereby satisfied any claim or demand they might have had in respect thereof: and the plantation *Vrouw Anna*, *cum annexis*, was discharged and released from the mortgage of the 28th of September 1819.

Third. Because the sum or balance claimed by the Appellants to be due to John Campbell, senior, and Co., was the result of irregular and improper accounts, in which there were charges which could not be supported: and that in fact, if the accounts of the mortgage of the 28th of September 1819 were properly taken, and all improper items of charge struck out, no sum or balance would in any view of the case be due or owing on the foot thereof, to John Campbell, senior, and Co.

Mr. Wigram, Q.C., and Mr. R. Palmer, for the Appellants: and Mr. J. Parker, Q.C., and Mr. H. Clarke, for the Respondent.

The following authorities and cases were referred to in the course of the argument. Upon the question, whether the Anastasian law, as part of the Dutch Roman Law, was in force in British Guiana, and its application to the present case—*Sande, De actionem cessione*, cap. 11. and 13. *Voet. ad Pand.*, lib. 18. tit. 4. *De hereditate vel actione venditâ*. *Vanderkeessel, Theses Repetitio* [334] *selectae*, *Lex. Anastasiana*, Th. 663, 664. *Groenewegen, Trac. Inst.*, lib. 4. *Codex*, lib. 4. tit. 35; *Codex*, lib. 8. tit. 32. *Pothier (by Dupin), titts. Retrait. De la vent. des créances litigieuses*. 3 *Burge's Comm. on For. and Col. Law*, 549, 550; *Bentinck v. Willink* (2 Hare, 1), were cited.

And upon the question in what currency the guilders were to be paid—*Story's Comm. on the Conf. of Laws*, 272. *Huyenholtz v. Watson* (1 Knapp's P.C. Cases, 170); and *Stock v. Beaven* (2 B. and Adol. 78).

The Vice-Chancellor Knight Bruce (May 16).—This Appeal arose upon certain claims of preference and concurrence, consequent upon an execution sale of the *Vrouw Anna* estate, in *Essequibo*. The only parties, are the mercantile firm of John Campbell, senior, and Co., of Glasgow, Appellants, and Stephen Henry Goodman, Respondent. The mortgage, dated the 28th of September 1819, which is the subject of the first appeal, is, if unsatisfied, certainly the first incumbrance on the estate. The Appellants say that it is unsatisfied, that they are the holders of it, and that a considerable sum is due to them upon it. The Respondent wholly denies the Appellants' alleged title, and insists, that, if they are become the holders of the mortgage, it has been satisfied, and that nothing is due to them upon it. That is the contention which the first appeal involves. Now, their Lordships do not think that it is necessary, or that, merely upon the materials now before them, it would be right, to decide whether the Appellants became, or did not [335] become, entitled to such interest upon the mortgage, if any, as was due at the time of the decease of Madame Evertz, the original mortgagee, who has been some years dead. But, subject to the reservation of that point, which their Lordships leave unprejudiced, they are of opinion, that there is evidence in support of the proposition, that, after the death of Madame Evertz, the mortgage and the right to the money secured by it, became well vested in the Appellants.

Their Lordships are also of opinion, that this proposition is one of a probable kind, and not opposed by any evidence whatever: and, considering that no other claimant of the mortgage, or of any title to participate in the benefit of it, has come forward, and that the rights of Goodman, their single opponent, are those only of a subsequent mortgagee claiming under a transfer from Bent, made subsequently to the award of the Compensation Commissioners, before whom Bent was a party, their

Lordships are of opinion, that it would be a miscarriage upon this appeal, not to treat the Appellants as the rightful owners of the mortgage of the 28th of September 1819, subject only, as has been said, to the question whether they acquired a title to any interest that became due in Madame Evertz's lifetime (a point that they think, for any present purpose, not important), and to the question to be immediately mentioned; the question, namely, whether it can be safe or right, upon the existing materials, to determine, as between the Appellants and Respondent, that there is nothing due to the Appellants on the mortgage. Clearly, it cannot be so, without determining between these parties that the money or fund received by the Appellants under [336] the award of the Compensation Commissioners was sufficient to satisfy the whole amount then demandable by the Appellants upon the mortgage. The ground, or the main ground, upon which the Respondent contends that their Lordships ought so to determine, is, that, as the Respondent alleges, the Appellants were and are barred from claiming upon the mortgage, more than the amount of the consideration which they paid for the purchase of it, with interest upon that amount and costs, whatever may have been the sum in truth due upon the mortgage when they bought it.

This proposition the Respondent contends to be warranted by the Roman and the Dutch laws, and if not by the former, at least by the latter; and, in support of it, as well as against it, various authors of eminence have been referred to, but not one decision bearing upon the question has been cited.

The Anastasian law, however, or any rule analogous to it, cannot be applied to cases free from any taint of unfairness, consistently with the ordinary principles which regulate the administration of justice, and ought, if contended to be so applicable in any system of jurisprudence, to be clearly shown to be so by the person thus contending. Their Lordships are of opinion, that the Respondent has not done this in the present instance. He has failed to satisfy them; nor do they believe, that, in British Guiana, the Anastasian law, or any principle or rule analogous to it, or derived from it, whether capable or not capable of being applied in some cases, can be applied in such a case as the present. They are not of opinion, that, by the laws of the Colony, the Respondent, in such a litigation as this between him and Messrs. John Campbell [337] and Co., can be allowed to enter into the question of the amount of consideration paid by them for the purchase of the mortgage, that purchase having been made by them fairly, as in their Lordships' opinion it was, and having been recognized, as it was, by the award of the Compensation Commissioners, in the presence of Bent, and of the heirs of Messrs. Craig.

The sentence appealed from must, therefore, be reversed, and the case must go back to the Court below, with declarations to the effect already mentioned; to which may be added the expression of their Lordships' opinion, that the phrase "current money of Holland," contained in the mortgage, combined, as it is, with the mention of Amsterdam as the place of payment, and with an express reference to the agreement of 30th May 1817, which was signed in London, must be held to mean money of Dutch currency, and not of Colonial currency; and that the Appellants must be debited with the proceeds of the stock transferred to them under the award of the Commissioners, according to the rate of exchange between London and Holland on the day when the stock was sold. Those proceeds were of course applicable to the payment of the interest due at the time to the Appellants, and their costs, if any, properly chargeable against the estate, before being applicable to the reduction of principal. Their Lordships have also considered the causes for varying the rate of interest contained in the agreement and in the mortgage, and are of opinion that they were not intended to be confined in their operation to the lifetime of Madame Evertz, but were capable of operation after her death. It is possible, however, that there may have been circumstances rendering it inequitable to enforce the increase of interest after that event, or in [338] respect of some portion or portions of time after that event; and the existence of such circumstances it will be competent for the Respondent, if it shall be material to him to do so, and he can do so, to show in the court below. Whether the Appellants are entitled to charge, or claim, interest upon interest, their Lordships give no opinion.

The order that their Lordships will advise Her Majesty to make in this Appeal will be in substance thus—

Reverse the sentence of the 11th of June 1843. Declare, that, for all the purposes of the litigation in the Supreme Courts of Civil Justice, etc., between the Appellants and the Respondent, the mortgage of the 28th September 1819 ought to be considered as held by the Appellants, John Campbell, senior, and Co., and belonging to them, and to the extent of the amount, if any, due to them thereon, the first charge on the proceeds of the Vrouw Anna estate.

Let it be referred to the proper officer to take an account of the amount, if any, justly due to them upon such mortgage, with the usual directions.

Declare, that, in taking such accounts, no regard is to be had to the amount of the consideration paid by them, for the purchase or transfer of such mortgage.

Declare, that the provision contained in such mortgage, as to allowing contingently interest at the rate of £6 per cent. per annum, was not confined in its operation to the lifetime of Miss Bonjes, afterwards Evertz, and that regard is to be had thereto, in taking the said accounts, but not so as to entitle the Appellants to the £10 per cent. commission; and this declaration is to be without prejudice to the question, whether the circumstances which, from time to time, [339] existed after the death of Madame Evertz were, at any, and what, time or times, such as not to entitle the Appellants, or those under whom they claim, to demand or insist upon interest at £6 per cent. per annum.

Declare, that the expression "current money of Holland," contained in the mortgage, is to be understood as meaning, money of Dutch currency, and not money of Colonial currency.

Declare, that, in taking the account, the sum or fund received by the Appellants, or by James Campbell, on their behalf, from the Compensation Commissioners, or a sufficient part thereof, was properly applicable to the discharge, or towards the discharge, of the mortgage of 28th of September 1819; and declare, that, so far as the same was so applicable, it was to be applied, first, to the discharge of such costs as they were entitled to, and of such arrears of interest as were then due to them on such mortgage, before being applied towards the liquidation of principal money.

And declare, that the net money received by the Appellants from the sale of the stock transferred to them by the Compensation Commissioners, is to be in account considered as converted into Dutch guilders, according to the rate of exchange between London and Amsterdam on the day of the receipt thereof; and this order is to be without prejudice to the question, whether the Appellants became, or are entitled, to any interest that became due in the lifetime of Madame Evertz, or are entitled to interest upon interest; which two questions are remitted to the Court below.

[Mews' Dig. tit. MORTGAGE, B. 7. *Of Colonial Estates*, b. *British Guiana*; tit. PAYMENT, A. 1. S.C. 10 Jur. 555. On point as to directions by Judicial Committee to Court below (5 Moo. P.C. 337); cf. *Doe d. Devine v. Wilson*, 1855, 10 Moo. P.C. at p. 532; *Le Feuvre v. Sullivan*, 1855, 10 Moo. P.C. 16, 17.]

[340] ON APPEAL FROM THE COURT OF COMMON PLEAS OF THE ISLAND OF TOBAGO.

THE COLONIAL BANK.—*Appellants*: JAMES WARDEN,—*Respondent* [Feb. 14 and 18,* and May 16, 1846 †].

The Scotch Sequestration Act, 2nd and 3rd Vict. c. 41, sec. 78, enacts, "that the moveable estate and effects of the Bankrupt, wherever situate, so far

* Present: Lord Brougham, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

† Present: Mr. Baron Parke, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

as attachable for debt, should, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to and vested in him, or any succeeding trustee, for behoof of the Creditors, absolutely and irredeemably, as at the date of the sequestration."

- C. and Co carried on business in co-partnership, in Scotland, and also in the island of Tobago. A sequestration issued against them in Scotland. Held by the Judicial Committee, *First*, that the Statute 2 and 3 Vict., c. 41, extended to the Colonies; and, *secondly*, that the interim factor and trustee under such sequestration, had a right against a creditor in Tobago, to moveables seized by the Provost Marshal in Tobago, under an execution, in an action brought by him against C. and Co., in Tobago, subsequent to the date of the sequestration [5 Moo. P.C. 354, 355].

Quære? Whether the Interpleading Act (1 and 2 Wm. IV., c. 58) extends to the Colonies.

- By an Act of the Colonial Legislature of Tobago, passed in 1841, and confirmed by the Queen in Council, it was declared that such of the Common Law, and all Statutes and parts of the public and general Statute laws of England, as are or shall be or become applicable and suitable to the circumstances and population of the Colony, should be in force in the Island. *Quære?* Whether by this Colonial Act, the Interpleading Act could be held to extend to Tobago [5 Moo. P.C. 353]. And

Quære! Whether, If such Interpleading Act extended to the Colonies, an appeal from a Judgment, entered up on a feigned issue, would lie to the Queen in Council [5 Moo. P.C. 348].

In this case, there were two Appeals (which were consolidated), against certain orders and judgments [341] given by the Court of Common Pleas of Tobago, in two actions, whereby the Respondent was held entitled to two several sums of money, the proceeds of the sales of goods, forming part of the sequestered estates of a Company, carrying on business at Greenock, in Scotland, under the name and firm of John Campbell and Co., and in Tobago, under the firm of Angus Campbell and Co., which had come into the hands of the Provost Marshal of the Island of Tobago, under the following circumstances:—

The Appellants were the Colonial Bank, incorporated by Royal Charter, for carrying on the business of Bankers, in Her Majesty's possessions in the West Indies, and had a branch establishment in the Island of Tobago. The Respondent was the interim factor and trustee, under a sequestration by the Court of Session, in Scotland.

The Appellants had, before and up to the early part of the year 1842, various dealings with Angus Campbell, of Tobago, on behalf of the firm of Angus Campbell and Co., on which transactions a large sum of money was due from that firm, to the Bank.

On the 19th of April 1842, the estates of these two firms were sequestered by the Court of Session, in Scotland, in terms of the Act 2 and 3 Vict., c. 41. Sequestration was also issued against the separate individual estate of John Campbell, and the Respondent was, on the 28th of the same month, elected and confirmed interim factor; and, on the 19th of May following, trustee of the sequestered estates.

A large portion of the estates of these firms being in Tobago, the Respondent, on being elected interim factor, appointed, by a letter of attorney, James Fergusson [342], son Jamieson his attorney, factor, and commissioner there, in order that he might get in and recover the estates of the Company in Tobago: accordingly, Jamieson went to that Island, where he arrived on the 25th day of May 1842. On the following day he recorded his power of attorney, and commission, in the proper office in the Island, and also a copy of the act and warrant of the Respondent's confirmation as interim factor.

There had been dealings between the Colonial Bank, whose chief establishment is in London, with the above firms, prior to the sequestration.

On the 28th day of May 1842, two several actions were brought by the Colonial Bank against Angus Campbell and Co., in the Court of Common Pleas of Tobago.

By one of these actions, the Colonial Bank sought to recover payment of a bill of exchange for £2000, dated the 26th of August 1841, and purporting to be drawn by the Bankrupts, in their firm of Angus Campbell and Co., upon, and accepted by their firm of John Campbell and Co., payable six months after sight, to the order of the Colonial Bank. The other action was brought by the Colonial Bank, for the recovery of the amount of two bills of exchange, for £554 15s. 10d. and £200 respectively, dated the 17th of February and 1st of March 1842, purporting to be drawn by Angus Campbell and Co. upon John Campbell and Co., and payable ninety days after sight, to the order of the Colonial Bank, but acceptance of which, the Bank alleged, had been refused by John Campbell and Co.

In these actions, Judgments were entered up on the 9th of August 1842; in the former, for the sum of £2228 14s. 4d. damages, and £45 8s. 10d. costs, [343] and in the latter for £845 19s. 10d. damages, and £36 14s. 6d. costs.

On the 11th of the same month, writs of execution were issued at the suit of the Colonial Bank, under which the Provost Marshal of the island levied on certain goods and effects, as belonging to Angus Campbell and John Campbell; which he afterwards sold, and which realised the sums of £969 2s. 1d. and £952 6s. 8d. respectively.

Before the sale, Jamieson served on the Provost Marshal a notice, claiming the goods on behalf of the Respondent, as part of the sequestrated estates of the Bankrupts, to which he had right as trustee for the creditors. The Provost Marshal, however, refused to pay over the proceeds of the sale to either party, and thereupon two several actions were brought against him, by the Colonial Bank, to recover the amount of these levies; and two other actions were likewise brought for the same purpose, at the instance of the Respondent.

There being thus a double claim for the same subject, the Provost Marshal applied on affidavit, to the Court of Common Pleas, for liberty to pay the proceeds of the levies into Court, and for a rule on the parties to interplead; and on the 12th of April 1843, it was Ordered,—That the Plaintiffs, upon notice to be given to their attorney, and to Jamieson, upon like notice given to his attorney, should, upon the 9th of May next, show cause why, upon payment into Court, by the Provost Marshal General of the Island, of the money arising from the levies and sales under the writs of execution issued in these causes, all proceedings against the Provost Marshal General, should not be [344] stayed, until the further order of the Court; and why such order should not be made, touching the proceeds of the execution, as the Court should think fit, pursuant to the Statute 1 and 2 of His late Majesty King William IV., cap. 58; and that in the mean time proceedings be stayed.

On showing cause upon these motions, the following Order was made on the 20th and 22nd of June 1843, in each of the actions: "It is ordered,—That the Provost Marshal General do pay into Court the money arising from the executions in this cause issued, and that all further proceedings against the Provost Marshal should be stayed until the further Order of this Court; and that the money should remain in Court, until the further Order of the Court. And it was further ordered,—That the claim of James Warden the younger, trustee named in the affidavit of James Ferguson Jamieson, should be tried in the July Term then next ensuing, on one or more feigned issues, wherein the said James Warden the younger, trustee as aforesaid, should be the Plaintiff, and the Plaintiffs in this cause should be Defendants."

This course of proceeding was consented to by all parties; and accordingly, the Provost Marshal having paid the sum of £952 6s. 8d. into Court, a feigned issue was adjusted, wherein the Respondent was Plaintiff, and the Colonial Bank were Defendants.

The declaration (which was filed on the 5th July 1843) set out a full statement of the co-partnership of John and Angus Campbell, of the sequestration of the estates of the Company, by virtue of the Scotch Sequestration Act, 2 and 3 Vict., c. 41, and that the sequestration was gazetted in the London Gazette, [345] and the appointment of Warden, as interim factor and trustee, on the sequestrated estates, and of the appointment by him, of Jamieson. The declaration then proceeded to state an alleged seizure of the goods and effects of the Company, by the Provost Marshal General, on the 16th of June 1842, under a writ of execution against Angus Campbell alone; the claim and notice of Jamieson on the 18th of June on behalf of the

Plaintiff, as interim factor and trustee: the sale by the Provost Marshal of the undivided moiety of the goods, under the writ of execution, against Angus Campbell alone, for £140, to the said James Ferguson Jamieson, and payment of that sum, and delivery by the Provost Marshal of the goods to him thereupon. It then set forth the seizure of the same goods by the Marshal on the 10th of September, under one of the writs of execution against Angus and John Campbell; the claim of Jamieson, as attorney of the Plaintiff, as trustee as aforesaid; the sale of the goods by the Marshal for £952 6s. 8d. It also alleged, that on the 30th of November 1842, Jamieson received from the Plaintiff a duly attested copy of the act and warrant confirming his election as trustee, and that such copy was duly registered; and lastly that the sum of £952 6s. 8d. had been duly paid into Court by the Marshal, under and in virtue of the Order of the 22nd of June 1843. It then set forth a discourse on the several premises between the Plaintiff and the Defendant, and a wager upon the question whether the Plaintiff, as trustee as aforesaid, was entitled to the portion of the goods so sold and disposed of by the Marshal on the 20th of September 1842, and consequently [346] the sum of £952 6s. 8d., and concluded with an averment that the Plaintiff was so entitled.

To this declaration the Defendants filed a plea, wherein they admitted the statements in the declaration to be true; but insisted, nevertheless, that the sum of £952 6s. 8d. in the declaration in the cause mentioned, was levied and raised of the goods, wares, merchandise, chattels, and effects mentioned in the declaration, under and by virtue, and in execution and satisfaction, of the writ of execution; and that the Defendants were ready to verify; wherefore they prayed judgment, if the Plaintiff ought to maintain his aforesaid action thereof against them.

The Plaintiff demurred to this plea, for insufficiency, and the Defendants having joined in demurrer, the Court, on the 10th of August 1843, gave judgment for the Plaintiff, that the declaration aforesaid, and the matters therein contained, were sufficient in law; wherefore that James Warden the younger, ought to recover against the Colonial Bank, his damages on occasion of the premises.

And it was on the same day ordered,—“That the Colonial Bank should be barred of their claim to the proceeds of the execution, issued against Angus Campbell and John Campbell, at the suit of the Colonial Bank; and that the money paid into Court by the Provost Marshal General, in the cause of the Colonial Bank against Angus Campbell and John Campbell, in respect of the said execution, should be forthwith paid out of Court, to James Warden the younger, or his attorney; and that the Colonial Bank should also pay over, to the Provost Marshal General, the sum retained by him for [347] poundage in respect thereof: and it was referred to the Prothonotary to tax the costs of James Warden the younger, which costs, when taxed, should be paid by the said Colonial Bank to the said James Warden, or his attorney.”

Proceedings to the same effect were simultaneously had under the Provost Marshal's application in the other action, the result of which was, that the Respondent's right to the sum of £961 2s. 1d., the proceeds of the levy under the execution issued on the judgment in that action, was established, and the sum paid into Court by the Provost Marshal in respect of the execution was ordered to be paid out of Court to the Respondent.

The Appellants thereupon applied to the Court of Common Pleas, for leave to appeal, against the Judgment in these actions, but the application was refused.

On the 9th of May 1844 * the Appellants petitioned Her Majesty in Council for leave to appeal from the Judgments or Orders of the 10th of August 1843; which being granted, a further Order was made upon the petition of the Appellants, directing the two appeals to be consolidated, and heard as one case.

The Appeals now came on for hearing.

Mr. Kindersley, Q.C., and Mr. Wigram, Q.C., and Mr. Greenwood, for the Appellants.—The Interpleading Act, 1 and 2 Will. IV., c. 58, does not extend to the colonies. It does not apply to [348] Scotland or Ireland, being confined to the

* Present: Lord Brougham, the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Superior Courts at Westminster; and, even if it could be construed to apply to Tobago, the proceedings are altogether irregular, and cannot be maintained. [Mr. Baron Parke: The Judgment you complain of, proceeds upon a feigned issue, and an appeal here from such Judgment would be analogous to a writ of error, from a Court of Common Law. Does an appeal lie? In *King v. Simmonds* (7 Q.B. Reps. 289, 312), it was held by the Exchequer Chamber, that no writ of error would lie from a Judgment upon a feigned issue. This Court has no jurisdiction. *In re Muir* (3 Moore's P.C. Cases, 150); *In re the Assignees of Manning* (3 Moore's P.C. Cases, 151)]. In those cases, the application was in the nature of a mandamus, to compel the Courts below to do something, which they had not done. [Mr. Baron Parke: The principle of these decisions is, that this Court cannot interfere, except as a Court of Error.]—Though there may be no appeal from a Court of Common Pleas in the Island, direct to Her Majesty in Council, and no appeal, except from a Judgment pronounced in an action, begun upon writ, yet, in cases where counsel have been disbarred, where no writ of error lies, appeals have been allowed. *In re the Justices of Antigua* (1 Knapp's P.C. Cases, 267); *In re Monkton* (1 Moore's P.C. Cases, 455); *Magnus Smith v. The Justices of Sierra Leone* (3 Moore's P.C. Cases, 361). This could only have been done upon the ground that Her Majesty has the inherent power to set right whatever injustice may have been committed in the colonies. Thus, in *Shire v. Shire* (ante, 81), *Hulm v. Hulm* (4 Moore's P.C. Cases, 262), and *D'Orliac* [349] v. *D'Orliac* (4 Moore's P.C. Cases, 374), no provision was made by the Charter of Justice of the Mauritius, for appeals in matrimonial causes. There was clearly no appeal within the meaning of the Charter in these cases; yet the Appeals were allowed by your Lordships, upon the large ground of the Crown's jurisdiction. And, in a case lately decided, *Camilleri v. Fleri* (ante [5 Moo. P.C.], 161), an appeal was allowed from an Order of the Supreme Court at Malta, directing children to be removed from the custody and guardianship of their mother.—[Lord Brougham: If the general superintending power of this Court would be available to you, the same would have been extended *in re Muir* [3 Moo. P.C. 150], and many other cases in which we have felt great annoyance that we had not the power to allow an appeal.]—The Crown has jurisdiction over everything relating to the administration of justice in the colonies, unless parted with or delegated by special charter. Irrespective of any special charter, the right of the subject to appeal, and the right of the Crown to entertain the appeal, depends upon the inherent right of the Sovereign to do justice.—[Lord Brougham: If that principle applied, it would open the door to an appeal, from every interlocutory order of every Court in the colonies, and this without precedent.]—If, at the time when the Charter was granted, the Crown had a right to entertain an appeal from any definitive order, no part of the Crown's right has been curtailed by the Charter granted to the Island of Tobago (dated 7th October 1763, and proclamation dated the 9th of the same month. Smith's Laws of Grenada, 73). The Charter recites,—“We have [350] given power, under our great seal, to the Governors of our said colonies respectively, to erect and constitute, with the advice of our said Councils respectively, Courts of judicature and public justice within our said colonies, for the hearing and determining all causes, as well criminal, as civil, according to law and equity, and as near as may be agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentence of such Courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us in our Privy Council.” The term used is “sentence,” which means, the determination of a matter of right, decided in the Colonial Court. It does not mean only such sentences from which a writ of error would lie.—[Dr. Lushington: In *Pownall v. Mascall* (2 Knapp's P.C. Cases, 176), the case of *East v. Howell* (Grant's Jamaica Cases, 320) was cited, as an instance where the Board entertained an interlocutory appeal, from an order of the Supreme Court of Jamaica, quashing a writ of *venditione exponas*.]—The question does not arise, whether an appeal lies from an interlocutory order, but whether an appeal lies against an order in a Common-Law Court, in the nature of a definite and final sentence. [Mr. Baron Parke: The case of *Pownall v. Mascall* [2 Knapp, P.C. 176] is the only one in your favour.]—If we are wrong in our argument, then there is no mode of trying the question, as to whether the Interpleading Act applies to the Island of Tobago.

It might be, that the Courts there may make orders to interplead, as a Court of Equity may do here; and, if so, there would be a right to appeal from such an order, and no question would then [351] arise as to the writ of error. This would be a sufficient reason for entertaining the present appeal, without deciding upon the broad principles, as to a writ of error.

Mr. J. Stuart, Q.C., and Mr. J. Anderson, for the Respondent.—The only Orders appealed from, are those of the 10th of August. These are made under the Interpleading Act, entered up on a feigned issue; and such Judgments or Orders are final and conclusive. *King v. Simmonds* [7 Q.B. 289]. In the Courts in this country, such Orders could not be the subject of a writ of error; nor are they, when made by a Colonial Court, such as can be the subject of an appeal to the Queen in Council. *In re Nahon* and *Perienté* (2 Knapp's P.C. Cases, 66); *In re Stronach* (2 Moore's P.C. Cases, 311). The Appellants contend that the Interpleading Act does not apply to the Colonies. That, however, is not the case. It has been adopted by the Colonial Legislature of the Island of Tobago, by an Act passed by them in November 1841, and confirmed by Her Majesty in Council, on the 25th of April 1841. By this Act, it is declared, "That so much of the common law, and all such Statutes and parts of the public and general Statute-laws of England, and of the United Kingdom of Great Britain and Ireland, as are, or shall be or become, applicable and suitable to the circumstances, and population of the colony, shall be in force in this Island of Tobago, and the dependencies thereof." Even supposing the Judgments not to be final and conclusive under the Interpleading Act, the only mode [352] by which they could be reviewed, was by writs of error, issued by the Governor of the Island, returnable before himself and his Council, as a Court of Error. If the Court of Error affirmed the Judgments, the Appellants ought then to have applied for the Governor's permission to appeal to Her Majesty in Council. But no appeal lies from the Court of the first instance, to the Queen in Council.

Mr. Kindersley, in reply, was stopped by the Court.

Mr. Baron Parke.—The Petition for leave to appeal does not include the Orders of June 1843, which directed the parties to interplead, and the Petition raises the question at issue, whether the Interpleading Act is in force in Tobago.

Mr. Kindersley then applied for leave to amend the Petition of Appeal.

Mr. Baron Parke.—Their Lordships think that the Appellants ought to be allowed to appeal against the Orders of 10th of June, upon terms of paying the costs of the day. Leave will be granted you to present a Petition, which we shall allow. We cannot now go on with the case until the matter is again referred to us. No fresh cases need be lodged, as it is only a matter of form; but fresh security must be given.

The Petition was accordingly amended, and the Appeal now came on to be re-argued (16th May).

[353] Mr. Kindersley, Q.C., Mr. Wigram, Q.C., and Mr. Greenwood, for the Appellants.—There are two points: *First*, we submit that the Interpleading Act does not extend to the colonies; and *Secondly*, that the sequestration in Scotland did not deprive the Colonial Bank of the right to the property which they had attached. The preamble of the Interpleading Act expressly mentions His Majesty's Courts of Law, at Westminster, or the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham. The act never was imported into Scotland or Ireland. How then can it be applicable to the colonies!—[Mr. Baron Parke: It does not follow, that, because the British legislature has chosen to entrust such extensive powers to the Judges of Westminster Hall, the Judges of the Colonial Courts are also entrusted with the same powers.]—The legislature of this country never intended that any colony, by adopting that Act, should give to the Judges of their Courts the same extensive powers which are entrusted to the Judges of Westminster. The local legislature of Tobago only intended, by the Act of 1841, relied on by the Respondent, to import those general acts of the British Legislature that might be useful. The Island is only affected by such of the Statutes of the British Parliament as are expressly extended to Tobago (Clark's Col. Law, 229; 1 Rep. W.I.C. 124). The local Act of the 21st of February 1794, applies different principles to a Provost Marshal having monies in his hands, from those applied to Sheriffs similarly situated in this country.

This Act provides, that when the Act of the [354] British legislature is different from the local Act, the latter is to prevail. If, then, *rigore suo*, the Interpleading Act does not extend or apply to Tobago, and the local Act of 1841 does not make it do so, how has it been extended?

The next point is, what is the right of a party claiming under a Scotch sequestration, against a party who has had dealings with the bankrupt in Tobago, on the faith of the property there? It is too much to say that the sequestration is valid against anything the party may have done in Tobago. —[The Vice-Chancellor Knight Bruce: Then you admit that the partnership being dissolved by the act of sequestration, the property remained not the property of the firm, but the property of the firm and the trustee under the sequestration, the moment the sequestration issued?] —The trustee under the sequestration has only the same rights that the bankrupts had, and, consequently, when the Colonial Bank as creditors brought their action, and recovered a verdict, and seized the goods of the debtor before the trustee removed them, those are excepted from the rights under the sequestration. —[The Vice-Chancellor Knight Bruce: Then you contend that a sequestration does not pass moveables out of Scotland?] —[Mr. Baron Parke: The 78th section of the 2nd and 3rd Vict., c. 41, says, "all moveable estate and effects of the bankrupt, wherever situate,"—that would include the colonies.] —Common justice requires, that, where two firms carry on business in two different countries, the creditors in the one country should have a right to be paid out of the property in that country—the greatest injustice would be otherwise committed. —[355] [Mr. Pemberton Leigh: Could we reverse the first Order, in the absence of the Provost Marshal?] —We only ask that the money may be brought back into Court. We will undertake to take no steps against the Provost Marshal.

Mr. Stuart, and Mr. J. Anderson, for the Respondent, contended, first, that the local Act of 1841, adopted the Interpleading Act to Tobago; and, secondly, that, immediately upon the act of sequestration, the entire property of the bankrupts, both in Scotland and elsewhere, vested in the interim factor; and that, therefore, the Respondent was entitled to the proceeds of the sale, for the benefit of the general creditors. —[Mr. Baron Parke: We cannot enter into the question of the Interpleading Act, in the absence of the Provost Marshal; and I cannot but think that, upon the case stated upon the feigned issue, the Appellants have no case at all. Nothing has been shown by the Appellants to have been erroneous upon the feigned issue.]

Their Lordships, without calling upon the Appellant's counsel to reply, delivered judgment by

Mr. Baron Parke.—Their Lordships are of opinion that, assuming the Orders to interplead to be correct, the other Orders complained of, though they may be the subject of an appeal, are all right; but, as the Provost Marshal is not present, we cannot decide upon the validity of [356] those Orders. It must, therefore, for the purposes of this argument, be taken to be right; and, if so, the subsequent Orders are also right. The only question, then, is, upon the facts stated in the feigned issue, Has the Appellant any case? Their Lordships are of opinion that he has not, and that the Appeal must be dismissed, with costs.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 1. *English Law*. —*Introduction and Applicability*; tit. INTERPLEADER, B. IN OTHER CASES. S.C. 10 Jur. 745. On point (i.) as to application of Interpleader Act (1 and 2 Will. IV. c. 58) to the Colonies, see note to *Lyons (Mayor of) v. East India Coy.*, 1836, 1 Moo. P.C. 175; and Forsyth's *Cas. Const. Law*, p. 18; (ii.) as to consolidation of appeals (5 Moo. P.C. 347), cf. *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 93; *Campbell v. Dent*, 1838, 2 Moo. P.C. 299; *Prinsep and E. I. Co. v. Dyce Sombre*, 1856, 10 Moo. P.C. 233-234; (iii.) as to terms of allowance of appeal (5 Moo. P.C. 352), cf. *In re Minchin*, 1847, 6 Moo. P.C. 43; *In re Mushadee Cazum Sherazee*, 1852, 7 Moo. P.C. 391; *Rodger v. Comptoir d'Escompte de Paris*, 1871, 7 Moo. P.C. N.S. 320. The Scotch Sequestration Act (2 and 3 Vict., c. 41) was repealed by the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict., c. 79), amended by 20 and 21 Vict., c. 19; 23 and 24 Vict., c. 33; 38 and 39 Vict., c. 26; 43 and 44 Vict., c. 34; 44 and 45 Vict., c. 22; 45 and 46 Vict., c. 42; 47 and 48 Vict., c. 16; and 52 and 53 Vict., c. 39. See also *English*

Bankruptcy Act, 1883 (46 and 47 Vict., c. 52), ss. 32, 117, 118, 119. Proceedings by way of feigned issues were abolished by 8 and 9 Vict., c. 109, s. 19.]

[357] ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

GILBERT HENRY HARRISON, THOMAS RIDLEY, and JAMES HARRISON,—
Appellants: ALEXANDER REID SCOTT and JEREMIAH LEAYCRAFT, —
Respondents * [May 18 and 19, 1846].

H. and Co., of Newfoundland, by order of Messrs. D., of Jamaica, shipped a cargo of fish on board a vessel, chartered by Messrs. D., and consigned it, by Messrs. D.'s request, to S. and L., Messrs. D.'s factors, in Jamaica. Messrs. D. were, at that time, indebted to S. and L. for large advances made to them; and, after they had ordered the cargo, they applied to S. and L. for a further advance, informing them, that they might expect the cargo, and authorising them to sell it, on their account, and give them credit for the proceeds. S. and L. made the required advance. No agreement was reduced into writing as to the pledge of the cargo. Before the arrival of the vessel, Messrs. D., being in insolvent circumstances, informed S. and L. that, in the circumstances of the firm, they could not think of receiving the cargo; and, on the arrival of the vessel, Messrs. D., by letter to S. and L., repeated their determination not to receive the cargo, and desired them to sell it; to render the sales to them, and to remit the proceeds, after deducting freight, etc., to H. and Co. Messrs. D. also wrote, to the same effect, to Messrs. H. and Co., who, by letter, acquiesced in this repudiation (the letter did not arrive in Jamaica until some months after the sale). S. and L. offered no objection to Messrs. D.'s proposal, and sold the cargo; they did not then claim any lien on the cargo, but they afterwards refused to account for the proceeds to H. and Co., claiming a lien on the goods as the factors, and creditors, of Messrs. D. Held, by the Judicial Committee, upon a Bill of Exceptions to the Judge's directions, in an action of assumpsit, brought by H. and Co., against S. and L., that S. and L., having sold the cargo, under the direction of Messrs. D., must be considered as the agents of H. and Co., and that, if they had originally any lien on the cargo, they had, by their conduct, waived it.

Where there are questions of law, raised by the proceedings, in the inferior Courts in the colonies, this Court will favour an application for leave to appeal, direct to the Queen in Council, under the 7 and 8 Vict., c. 69, without resorting to the intermediate Court of Appeal in the Colony [5 Moo. P.C. 370].

This was an action of assumpsit brought by the Appellants, who carried on business as merchants at Harbour Grace, in Newfoundland, under the firm of [358] Ridley, Harrison and Co.; and at Liverpool, under the firm of Harrison, Ridley and Harrison, against the Respondents, Messrs. Scott and Leaycraft, who were merchants and commission-agents at Kingston, in Jamaica. The declaration contained counts, against the Defendants, for not accounting for the proceeds of a cargo consigned to them, on behalf of the Plaintiffs, and also for money had and received. The Defendants pleaded the general issue. The Plaintiffs, by their action, sought to recover the sum of £677 15s. 8d., with interest arising from the sale, being the net proceeds of a cargo of fish, sold by the Defendants, after deducting the sum of £753 8s. 11d., the Defendants' charges, from the gross amount of such sale.

On the 24th of April 1841, Messrs. Plummer, William, and Robert Dewar, merchants, carrying on business at Montego Bay, in Jamaica, chartered a vessel, called the *William Wright*, from Mr. George Cragg, for a voyage from Jamaica to Cuba, and thence to Hamburg, from which place, having discharged her cargo, she was

* Present: Lord Langdale, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

to proceed to Newfoundland. By the terms of the charter-party, the vessel, on her arrival at Newfoundland [359] land, was to receive a full and complete load, as was there customary, and, being so laden, was to proceed to Kingston; and Messrs. Dewar were to have the privilege of landing part, or all, of the cargo there, or at another port in the island, and so end the voyage; and Cragg was to be entitled to receive freight as follows:—On the true delivery of the cargo in Hamburg, and on the delivery of the cargo in Jamaica, £350, less disbursements, etc., in Cuba and Newfoundland. Messrs. Dewar, on the 14th of July, in the same year, wrote to the Appellants, at Newfoundland, a letter, advising them of the departure of the *William Wright* from Cuba, and of her destination to Newfoundland, and requesting that they would load her with a cargo of fish for Kingston, consigning it to the Respondents, where the cargo would be sold, if that market were better than the one at Montego Bay; and they added, “for this cargo we shall make you a remittance by a shipment, provided we get the vessel; failing which, we shall remit your Liverpool house.”

The *William Wright* arrived at Newfoundland in November 1841, and, having been loaded with the required cargo, she sailed for Jamaica; the Appellants advised Messrs. Dewar, and also the Respondents, of the shipment. In their letter to the former, bearing date the 25th of November 1841, they stated, “According to your instructions, we have forwarded, by this opportunity, the bill of lading and invoice of this shipment, amounting to £1942 17s. 1d. Newfoundland currency; rate of exchange in London at 60 days, 15c., to Messrs. Scott and Leaycraft, of Jamaica, to whom we presume you have given the necessary instructions.” Their letter to the Respondents bore date the previous [360] day, and in it they said, “Our respected friends, Messrs. W. and R. Dewar, of Jamaica, under date of the 14th July last, directed us to consign to you the cargo of the *William Wright*, loaded by ourselves, consisting of dry cod-fish, in casks and boxes, and twenty tierces of salmon; herewith we beg to hand you invoice and bill of lading of the same amount, £1942 17s. 2d., and have no doubt they will have given you the necessary instructions for the sale and remittance; you will find the quality of the fish, on inspection, to be exceedingly good; and, we doubt not, will give satisfaction.”

The Respondents had been, for some time past, in the habit of making advances for Messrs. Dewar; to secure which, the latter were accustomed to cause their cargoes to be consigned to the house of the Respondents, at Kingston, for sale. In the month of September 1841, Messrs. Dewar owed the Respondents a balance of between two and three thousand pounds; and, wishing to obtain from them a further advance, it was agreed that Messrs. Dewar should give acceptances and pay a sum of £1000, and that the Respondents should be at liberty to sell the cargo of the *William Wright*, when she arrived at Kingston, on their account, giving them credit for the proceeds of sale, after deducting the balance due from them to the Respondents.

Plummer Dewar wrote, on the 6th of December 1841, to Scott, one of the Respondents, a letter, which contained the following passage:—“Cragg wants his vessel, the *William Wright*, to go to Norfolk, and wishes you to load her with him on joint-account; he desired me to ask you; that vessel is now over due, [361] and, on her arrival, you must do the best with her for us. You can open our letters and sell any part of our cargo with you. Pay the port charges on account of Mr. Cragg, which will secure the freight to you, provided the said cargo does not come to us.”

The *William Wright* arrived at Kingston on the 25th of December 1841, when the Respondents, by letter of that date, addressed to Messrs. Dewar, advised them of the vessel's arrival. The Respondents receive the bill of lading and invoice, and took possession of the cargo; but, prior to the vessel's arrival, and on the 10th of December 1841, Messrs. Dewar had become insolvent, and stopped business, and had sent round circulars to their creditors, informing them of that fact. At the time of the insolvency, they were indebted to the Respondents in the amount of between £2000 and £3000. In a conversation with the Respondent Scott, a day or two after the arrival of the vessel, Plummer Dewar said, that it appeared, from the books of the firm of Dewar and Co., that they were barely able to meet their engagements, and expressed a wish that the Respondents would sell the cargo of the *William Wright*, and remit the proceeds to the Appellants. No arrangement of

any kind was however come to, and, on the 4th of January 1841, Messrs. Dewar wrote the following letter to the Respondents:—

“Dear Sirs,—You have enclosed, a letter for Ridley, Harrison and Co., which please forward; we find that we shall owe these gentlemen a balance, and, therefore, in our present situation, do not think ourselves warranted in receiving the *William Wright's* cargo. You will, therefore, please sell the same, and render us sales, remitting the proceeds, after deducting freight, etc., to Harrison, Ridley and Co., Liverpool.”

[362] The enclosed letter was as follows:—

“Montego Bay, 4th January 1842.

“Dear Sirs,—We have your favour by the *William Wright*, which arrived at Kingston, after rather a long voyage. We have handed the cargo to our mutual friends, Messrs. Scott and Leaycraft, to sell on your account, and remit the proceeds, as early as possible, to your Liverpool house, as, from many heavy losses, by shipments and bad debts made here, we have been compelled to suspend our operations, but trust soon to be able to commence again; should this, however, not be the case, you may rest assured the best shall be done for your interest. In the present state of our affairs, we leave you to do the best for us concerning the *Fanny's* freight, and remain, yours truly, W. and R. Dewar and Co.”

To this letter, the Respondents returned the following answer:—

“Kingston, 8th January 1842.

“Dear Sirs,—We are in receipt of your favour of the 4th inst., with the enclosures alluded to, and which will be duly attended to.”

The Respondents also addressed the following letters to the Appellants:—

“Per *Clifford*, Kingston, Jamaica, 22nd Jan. 1842.

“Gentlemen,—On the 27th ult. we received, per brig *William Wright*, your favours of the 24th and 25th of November; we regret to say that vessel arrived to a miserable market, but landed her cargo in good order. Having now received the amount of bottomry bond, we shall remit it, as you direct, to your friends in Liverpool. We have only time, by this conveyance, to refer to the annexed review of our market, which will show you its deplorable state for your exports.”

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“Per *Pearl*, Kingston, Jamaica, 12th Feb. 1842.

“Gentlemen,—We hand you herein duplicate of what we addressed to you on the 22nd ult., and annexed account current, showing our having remitted to your Liverpool friends £145 3s. currency, on account of your bottomry claim on the brig *William Wright*. We beg reference to the accompanying review of this date, as correctly representing the state of our market, and from which you will see how very low our prices rule for your exports, and we see little prospect of improvement soon, as several cargoes are now due from Halifax.”

Messrs. Dewar, on the 17th of February 1842, delivered up their assets, for the benefit of their creditors, and provisional assignees of the estate and effects were appointed, but the cargo of the *William Wright* was not included therein.

The Respondents sold the cargo of the *William Wright* for the sum of £1131 4s. 7d. The costs and charges of the sale amounted to £753 8s. 11d., leaving £677 15s. 8d. as the net proceeds.

On the 15th of September 1842, the Appellants' firm at Liverpool wrote to the Respondents as follows:—

“Gentlemen,—The cargo of the *William Wright* having been placed in your hands by Messrs. Dewar and Co., for sale, on our account, the proceeds to be remitted, we have been long waiting advices respecting it. On receipt we will thank you to hand us account sales (for we presume the cargo must have been quitted) and remit the amount in good bills. We shall feel obliged by your advising us, the state of your market for fish, and the most probable assortment calculated to make the best return.”

[364] To this letter the Respondents returned the following answer:

“ Kingston, Jamaica, 2nd November 1842.

“ Gentlemen,—We are in receipt of your favour of the 15th of September, in reply to which we beg to state that, having been directed by Messrs. Dewar and Co. to receive and sell the cargo of the *William Wright*, on their account, prior to her arrival, which was confirmed by letter of your Newfoundland firm, accompanying the cargo, and, on effecting sales, we accordingly placed net proceeds to their account. The annexed review will fully inform you of the state of our market, etc.”

The Appellants applied again to the Respondents, for the proceeds of the sale, and, as the Respondents refused to pay over the money to them, they commenced an action of assumpsit against them, in the Supreme Court of Judicature in Jamaica. The declaration contained three counts; the first was, for not accounting for the proceeds of the cargo consigned to them on behalf of the Plaintiffs. The second and third were for money had and received, by the Defendants, to the use of the Plaintiffs. The Defendants pleaded the general issue to the whole declaration.

The cause was tried at the *Nisi Prius* sittings of the Surrey Assize Court, in Jamaica, in April 1843, before Mr. Justice McDougall, and the jury found a verdict for the Plaintiffs, contrary to the opinion and direction of the learned Judge. A new trial was afterwards granted by the Supreme Court, and the cause was again tried before Mr. Justice McDougall.

The evidence given upon the second trial, consisted of the letters from Messrs. Scott and Leaycraft, to [365] Messrs. Dewar, dated the 25th December 1841; the letter from Messrs. Dewar and Co. to Appellants, of the 4th of January 1842; the letters of the same date from Messrs. Dewar to the Appellants; the letters from Messrs. Scott and Leaycraft to Messrs. W. and R. Dewar, bearing date, respectively, the 8th and 22nd of January 1842, and the 12th of February 1842; the letter from the Appellants to Messrs. Scott and Leaycraft, dated the 15th of September 1842; and the letter from Messrs. Scott and Leaycraft to the Appellants, dated the 2nd November. The charter-party, and bill of lading, was also given in evidence.

Plummer Dewar was examined as a witness, on the part of the Plaintiffs: he deposed as follows: “ We ordered a cargo from the Plaintiffs. The cargo arrived in the *William Wright*, about the 26th of December 1841. Leaycraft, our agent at the time, told me of the arrival of the cargo.” On the arrival of the cargo being mentioned, the witness could not recollect what he said at that particular time in reply, but he recollected stating, on or about the 28th of December, to Leaycraft, “ that on account of our having sent round circulars, dated the 10th of December, when it appeared by our books, that we were barely able to meet our engagements, but rather considered ourselves in insolvent circumstances, that he could not think of receiving the *William Wright's* cargo, but wished Scott and Leaycraft to sell the same, and remit the proceeds to Messrs. Ridley, Harrison and Co., at Liverpool, and that he would write him when he got down to Montego Bay: he could not recollect what Leaycraft said in reply, but he did not object.” Upon his cross-examination he said “ that he had a conversation in September 1841, in company with his brother Robert Dewar, with [366] Scott, respecting the *William Wright's* cargo. At that time Messrs. Dewar owed Scott and Leaycraft a balance of £2000 or £3000. About that time we got further cash advances from Scott and Leaycraft. The advances of Scott and Leaycraft to us, generally, were to be provided for by consignments of island produce, cash and bills, and sometimes by foreign cargoes and parts of cargoes consigned to Kingston, to them, for sale. On account of the large advances, and for the further advance to be made by Scott and Leaycraft, to be remitted to Cuba, and then considering ourselves perfectly solvent, we told Scott, that, as the *William Wright's* cargo was to call at Kingston, he could sell the cargo on our account, and give us credit for it. The proceeds of that cargo were to be taken by Scott and Leaycraft, as a payment. The arrangement of giving the *William Wright's* cargo was clearly understood between us and Scott. When he saw Leaycraft in Kingston, in December 1841, Leaycraft had received the bill of lading and invoice for the *William Wright's* cargo.” On his re-examination he said, “ At the time of the conversation with Scott, at Montego Bay, we expected the *William Wright*. Between that conversation and the arrival of the *William Wright*,

we made them payments of upwards of £1000. No payment was made specifically on account of the advances for Cuba, to the best of his recollection: when the conversation took place in September, nothing was reduced to writing. No specific advance was made by Scott and Leayercraft to us, on the pledge of the *William Wright's* cargo: but Scott and Leayercraft had advanced, or were going to advance, us cash, and we promised them the *William Wright's* cargo. I will explain under what circumstances the *William Wright's* [367] cargo was promised to Scott, in the conversation referred to. There was a large balance due to Scott and Leayercraft, and, having certain produce in Cuba to ship, which required means to pay duties, etc. over there, we asked Scott to advance certain sums over to Cuba: those sums, and the balance already stated, we proposed to pay, by £1000, the *William Wright's* cargo, and some small acceptances, that would still leave a balance due. No agreement was reduced to writing. Did not recollect that Leayercraft said anything about the pledge of the *William Wright*, in our conversation at Kingston, in December 1841."

Upon this evidence, the learned Judge gave his opinion, and directed the jury as follows:—"First, that, although Messrs. W. and R. Dewar and Co. did repudiate the contract, so made to them by the Plaintiffs, as aforesaid, yet there was no assent, on the part of the Plaintiffs, to such repudiation, until they wrote the letter bearing date the 15th day of September 1842, and that, notwithstanding the said repudiation, the property in the said goods and merchandize, or in the proceeds thereof, remained in Messrs. W. and R. Dewar, until, and at the time of their insolvency, and passed to the provisional assignees of the estate and effects of Messrs. W. and R. Dewar, upon the appointment of such assignees. Secondly, that, immediately on the arrival of the said vessel at Kingston, her port of destination, and on receipt of the said bill of lading and invoice of the said cargo, by the said Defendants, a lien attached on the said cargo, in favour of the said Defendants, in respect of the debt due from the said Messrs. W. and R. Dewar and Co. to the said Defendants, under the contract of September 1841, and justified the said Defendants in refusing to account to the [368] Plaintiffs, for the said cargo, or the proceeds thereof. Thirdly, that the said Messrs. W. and R. Dewar and Co. exercised an act of ownership over the said cargo, by directing the said Defendants to take the same, and sell it for the Plaintiffs, and directing the balance of what was due on the charter-party to be paid to Cragg. Fourthly, that by the said charter-party, the said vessel, called the *William Wright*, became the private vessel of the charterers, that is to say, of the said Messrs. W. and R. Dewar and Co., and that the shipment of the said cargo on board of the said vessel, by the Plaintiffs, was an absolute and complete delivery of the said cargo into the possession of the said charterers."

To each of these directions, the Counsel for the Appellants objected; and excepted. First, that the property in the said goods and merchandize, or the proceeds thereof, did not remain in the said Messrs. W. and R. Dewar and Co., until and at the time of their insolvency, and did not pass to the provisional assignee of their estate and effects. Secondly, that a lien did not attach to the said cargo, in respect to any debt from the said Messrs. W. and R. Dewar and Co., in favour of the Defendants immediately on that arrival and that receipt, and that there was evidence from the correspondence, and other matters given in evidence for the jury, that such supposed lien would not justify the Defendants refusing to account to the Plaintiffs. Thirdly, that the said Messrs. W. and R. Dewar and Co. had not exercised an act of ownership in so directing as aforesaid. Fourthly, that the said vessel did not become, by virtue of the said charter-party, the private vessel of the said charterers, and also that the shipment of the said cargo on board the said vessel was not such a delivery as prevented the said Messrs. Dewar and Co. from after-[369]-wards repudiating the contract, or rendering such repudiation inoperative: and the Counsel for the Plaintiffs required the Judge to direct and give his opinion to the jury, that, if the jury should be of opinion that the said Defendants had expressly agreed with the Plaintiffs, with the assent of Messrs. Dewar, to account to Plaintiffs for the proceeds of the sale, the Plaintiffs were entitled to have the verdict on the issue found for them. And, further, that if there were no express agreement on the Defendants' part with the Plaintiffs, to account to the Plaintiffs, yet if the jury should be of opinion that the Plaintiffs assented to and adopted the repudia-

tion of the said cargo, by the said W. and R. Dewar and Co., with the knowledge of the Defendants, the Plaintiffs were entitled to a verdict.

The Judge refused so to direct the jury, and told them, that the only evidence of agency between the Plaintiffs and the Defendants, was the letter of Dewar and Co. to the latter, dated the 4th of January 1842, enclosing their letter to the Plaintiffs, of the same date, and the disingenuousness of the answer thereto of the Defendant Leavercraft, to the said Messrs. W. and R. Dewar, of the date of the 8th January 1842.

To this summing up, and the above directions, the Counsel of the Defendants tendered a Bill of Exceptions, containing the exceptions before set forth. The jury found a verdict for the Defendants.

The Appellants then presented a petition to Her Majesty in Council, praying that the Bill of Exceptions, when sealed by the Judge who tried the cause, might be referred to the Judicial Committee of the Privy Council, and be heard and disposed of by them, without the intermediate appeal to the Court of Appeal, in Jamaica.

[370] Mr. Cowling (13th June 1845 *), in support of the petition, cited *Re Barnett* (4 Moore's P.C. Cases, 453), and the 7th and 8th Viet., c. 69.

Lord Brougham.—Are any points of law raised by the Bill of Exceptions?—[Yes, very important questions are raised.]—If so, then leave will be granted, as it was clearly the meaning of the Legislature, in passing the 7th and 8th Viet., c. 69, to favour appeals of this nature. Leave granted on giving security.

By an Order in Council, dated the 30th of June 1845, it was ordered, that the Appellants should be permitted to enter and prosecute their appeal, or Bill of Exceptions (when sealed), to the charge and opinion of Mr. Justice McDougall, before Her Majesty in Council, without the intermediate appeal, to the Court of Appeal, in Jamaica.

The Bill of Exceptions, having been signed and sealed by the Judge, who tried the cause, was referred to the Judicial Committee, in the ordinary way, and the appeal now came on for hearing.

Mr. Cowling, and Mr. M. Smith, for the Appellants.—The fourth exception clearly shows a misdirection on the part of the learned Judge. By the terms of the charter-party, it appears, that Cragg, the owner of the vessel, [371] contracted to receive the goods and to deliver them: from these terms, it is clear that the captain and crew were really the servants of the owner. The shipment of the goods, therefore, did not operate as a complete delivery, and the shipper could stop the goods. *Bohtlingk v. Inglis* (3 East, 380). Abbott "On Shipping," p. 458 (6th Edit.). The consignees had, therefore, power to repudiate the cargo. In *Atkin v. Barwick* (1 Strange, 165), the goods actually came into the hands of the consignees, but their affairs being in a declining condition, they sent them to a third party, for the consignor, and the Court held, in an action of trover, by the assignees of the consignee, against the consignor, that the property was in the consignor. The principle of this decision has been recognised and acted upon, by Lord Kenyon, in *Salte v. Field* (5 Term Rep. 211), and by Lord Abinger, in *Sadler v. Belcher* (2 Moody and Rob. 487). The Judge's direction, as a proposition of law, that the *transitus* was complete upon the shipment, was wrong. It is clear that the consignee repudiated the cargo, and that repudiation had the effect of re-investing it in the consignor. The Judge said that there was no evidence of the assent of the consignors, until eight months after the repudiation. No assent by the consignors was required, for it is a settled principle, that, where an act is done manifestly for the benefit of a party, and notice of that act is given to that party, and he does not dissent, his assent will be presumed. *James v. Griffin* (2 Mee. and Wel. 623). *Atkin v. Barwick* (1 Strange, 165). Story "On Agency," p. 216. The third exception is also a misdirection of the Judge. The letter of Messrs. Dewar, of [372] the 4th of January, and the evidence of P. Dewar, show a repudiation by the consignees. Can it be contended that, this being a perishable cargo, a direction by the consignees to the Respondents, to sell for the consignors, was an act of ownership? In *Atkin v. Barwick* [1 Stra. 165], and *James v. Griffin* [2 M. and W. 623], there was no communication with the consignor, yet the sending of the goods to a third party was held to have been an

* Present: The Lord President (Lord Wharncliffe), Lord Brougham, the Right Hon. Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

act done for the consignor. The second exception also shows a misdirection. The Judge directed the jury, that immediately the vessel arrived at her destination, and the bill of lading was delivered to the Defendants, a lien attached on the cargo in favour of the Defendants in respect of Messrs. Dewar's debt due to them. We submit that no such lien attached. The conversations and letters had no greater effect to create a lien upon this cargo, than any other cargo belonging to Messrs. Dewar; to sell which they were agents. Even if a lien was created, it must be subject to the right of the consignors. It was a question which ought to have been left to the jury, to say what was the effect of these conversations and the letters; but supposing a lien was created, then arises the question, did the Respondents receive the cargo by virtue of their lien, or did not their acts amount to a waiver of their lien? The Respondents, in their letter of the 8th of January 1842, in answer to Messrs. Dewar's, in effect, agree to sell the cargo for the Appellants. If they intended to have claimed a lien, they ought to have done so on Messrs. Dewar directing them to sell for the Appellants. Did they act as if they had a lien? No. They assented to Messrs. Dewar's directions to sell. The first exception assumes a repudiation by Messrs. Dewar; but the Judge told the jury that there was no assent by the [373] Appellants. Such assent ought to have been presumed, as it was manifestly for the benefit of the consignor. *Atkin v. Barwick* [1 Stra. 165], *Salte v. Field* [5 T.R. 211], and *James v. Griffin* [2 M. and W. 623]. But there was sufficient evidence of assent, even if such was requisite, and the observations of the Judge were misdirections in law, as well as fact.

Mr. Watson, Q.C., and Mr. Forsyth, for the Respondents.—In all the material parts of the Judge's summing up, he was right in law. In order to make a Bill of Exceptions valid, so as to induce the Court to grant a *venire de novo*, the direction must be clearly bad in law, and the misdirection must have been upon a material issue, and not upon something collateral. In the first place, this action was an action of assumpsit, and the declaration contained three counts, the first, for not accounting for the proceeds of a cargo, consigned by the Appellants to the Respondents, and the second and third for money had and received. The Respondents pleaded the general issue, to the whole of the declaration. To prove the first count, the Appellants must have established a contract, creating the relationship of principal and agent, between them and the Respondents. Where is there proof of such a contract? The other counts, it is impossible to sustain, unless there is privity between the Appellants and Respondents, established in the first instance. *Williams v. Everett* (14 East. 581). *Stephens v. Badcock* (3 B. and Ad. 354). *Wedlake v. Hurley* (1 Crom. and Jer. 83). *Bamford v. Shuttleworth* (11 Ad. and El. 926). Anything in the Judge's summing up, not relating to [374] one or other of these issues, was wholly immaterial. As to the fourth exception: When the goods were shipped, by order of Messrs. Dewar, the property became vested in them; then did that which took place, before the cargo arrived in Jamaica, divest the property out of Messrs. Dewar? The Respondents were the factors of Messrs. Dewar, who were largely indebted to them for advances: the moment, therefore, the Respondents received goods belonging to them, their lien existed. *Hudson v. Granger* (5 B. and Ald. 27). Here was a specific appropriation of this cargo in payment of their debt, and the moment the bill of lading came into the Respondents' hands, their right of lien arose. The transfer to their dominion was a conversion. The right to stop *in transitu*, is gone, if the consignee assign the bill of lading to a third person, and the right of the consignor, against the assignee, is divested. *Lickbarrow v. Mason* (2 Term Reps. 63). The bill of lading having come into the Respondents' hands, how could anything afterwards be done by Messrs. Dewar, to divest the Respondents' right of lien? It is said by the Appellants, that the letter of the 4th of January, made the Respondents the factors of the Appellants: this however is not so; the Respondents, in their answer, of the 2nd of November, 1842, to the letter of the Appellants, of the 15th of September, in the same year, treated the cargo as belonging to Messrs. Dewar, and claimed their lien on the proceeds. It is also urged, that the assent of the Appellants to the repudiation of the cargo, and the arrangement, proposed by Messrs. Dewar, must be presumed, because it was for their benefit. The Court will only presume assent in the case of infants. Suppose the Appellants had refused to accede to Messrs. Dewar's repudiation, they could [375] then have brought

an action of assumpsit against them, for not accepting the cargo. *Phillpotts v. Evans* (5 Mee. and Will. 175). The Appellants took months before they even signified any interest in the cargo, and even then, they did not, in express terms, assent to the repudiation by Messrs. Dewar. No reliance can be placed on the case of *Atkin v. Barwick*. Lord Kenyon, in *Neate v. Ball* (2 East. 125), questions its authority. Two things must concur to terminate a contract: repudiation by the vendor, and assent thereto by the vendee. *Smith v. Field* (5 Term Rep. 402). *Neate v. Ball*. The case of *James v. Griffin* [2 M. and W. 623], relied on by the Appellants, is not entitled to much weight, as Lord Abinger dissented from the rest of the Court. Second exception: Messrs. Dewar could not, by repudiating their contract, get rid of the Respondents' lien. The Respondents were not bound to account, unless the Appellants proved a contract. Any observation, therefore, of the Judge, on the matter of lien, was merely surplusage. As to the third exception: The subject of this exception was wholly immaterial to the issue, but the Judge's direction was right, for Messrs. Dewar exercised an act of ownership over the cargo, by giving it in pledge to the Respondents. Upon the first exception: No question arises here, of the Appellants' right to stop the cargo *in transitu*.—[The Vice-Chancellor Knight Bruce: I cannot understand the Judge's charge, except that he meant, that there could be no stoppage *in transitu*, after the goods had been shipped. He seems to think that there was a difference between delivery to a common carrier, and a delivery to a chartered ship.]—There was a complete delivery upon the shipment of the goods. *Wentworth v. Outhwaite* (10 Mee. and Wel. 436). The only question [376] is, whether the contract between the Appellants and Messrs. Dewar was rescinded, and we submit that Messrs. Dewar had no power to rescind it, after they had created a lien, in favour of the Respondents; the authority they gave the Respondents to sell, being coupled with an interest, could not be revoked. *Gausson v. Morton* (10 Barn. and Cr. 731). It could not be revoked by the subsequent countermand of the cargo. *Fisher v. Miller* (1 Bing. 150). The only important part of the Judge's charge, was, where he told the jury, that the only evidence of agency was contained in the letters of the 4th and 8th of January, and we submit that the Judge was correct. It is precisely the case of *Williams v. Everett* [14 East. 581]. All the other letters are silent on the subject of agency.

Mr. Cowling, in reply.—The Appellants never lost their right to stoppage *in transitu*. In *Bohtlingk v. Inglis* [3 East. 380], the bill of lading was delivered, as in this case, but the Court held that the right to stop *in transitu*, remained. Messrs. Dewar undertook to act for the Appellants, and the law will imply their assent.—[The Vice-Chancellor Knight Bruce: Your argument assumes that the goods, at the time of the sale, were the property of the Appellants.]—Messrs. Dewar having repudiated the goods, and desired a sale on behalf of the consignors, the law would imply their assent, and the promise of the Respondents to account to the consignors would also be implied. Thus, in *Salte v. Field* [5 T.R. 211], trover was held to lie by the consignor against the agent of the consignee. The Respondents contend, that there must be actual privity, and relied upon *Williams v. Everett* [14 East. 581], and other [377] cases. None of these cases apply. The circumstances of this case are wholly different from those. The Judge was wrong upon the question of agency; there was the conversation between Plummer Dewar and the Respondents, which, coupled with the letters of the Respondents of the 22nd of January and 12th of February, 1842, was evidence of agency.

The Vice-Chancellor Knight Bruce.—In this case, their Lordships have fully considered the arguments on both sides. They are of opinion, that it is not material, nor do they consider it necessary, to decide, whether the Appellants are right in contending that the Respondents had no right of lien on the cargo.—[His Lordship then, after reading the evidence of Mr. Plummer Dewar, the letters from Messrs. Dewar to Messrs. Scott and Leaycraft and to Messrs. Ridley, Harrison and Co., bearing date the 4th of January, 1842, the letters from Messrs. Scott and Leaycraft, dated the 8th and 22nd of January and the 12th of February, 1842, proceeded as follows:—]It appears to us, to be the unavoidable inference from the letters of the 8th and 22nd of January, coupled with the evidence of Plummer Dewar, that the Respondents agreed to sell the cargo, on the Appellants' account. The Respondents

sold the cargo, without even expressing any intention, on their part, not to apply the proceeds of the cargo, in conformity with the directions of Messrs. Dewar, contained in the letter of the 4th of January. They did not then claim any lien. It appears to their Lordships, that, after such conduct, it is impossible to allow them now to say, that they did not sell the goods in conformity with the directions of Messrs. Dewar. [378] Their Lordships are, therefore, of opinion, that it becomes unnecessary to decide, whether, by lien or otherwise, the Respondents could have claimed to hold the cargo against the Appellants. Either they were conscious that there was no right of lien, or they did not wish to avail themselves of it. There is no evidence, oral or documentary, that they, at that time, claimed a lien. If the Appellants had declined to agree to the repudiation of the cargo, or to refuse to recognise the Respondents, as their agents, the case would be very different; but it is in evidence, that they did adopt the transaction, and we are of opinion that it stands upon the same footing, as if the direction of Messrs. Dewar, to the Respondents, to sell and remit to the Appellants, had been the direction of the Appellants. The Judge of the Court below thought that the only evidence of agency, between the Appellants and Respondents, was the letters of the 4th and 8th of January, and that that was insufficient. This might have weight, if there had been any evidence of dissent; but there is none. Their Lordships are of opinion, that the Respondents sold the cargo, and received the proceeds, under the express authority of Messrs. Dewar to do so, and to remit to the Appellants the proceeds, after deducting the freight, and that they did sell the cargo, as the agents of the Appellants. Consequently, the Judge was wrong in directing the jury as he did, and the Appellants are entitled to a *venire de novo*.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL, I. S.C. 10 Jur. 443. As to appeals from Jamaica, see O. in C. of 14th April, 1851 (Stat. R. and O. Rev. iv. 334), made under the Judicial Committee Act, 1844 (7 and 8 Vict. c. 69); and cf. also *A-G. of Jamaica v. Manderson*, 1848, 6 Moo. P.C. 250; *Hitchings v. Hollingsworth*, 1850-52, 7 Moo. P.C. 228. As to new trial for misdirection (5 Moo. P.C. 378), cf. *Doe d. Devine v. Wilson*, 1855, 10 Moo. c. 502.]

[379]

ON APPEAL FROM NEW SOUTH WALES.

JOHN WALPOLE WILLIS.—*Appellant*; SIR GEORGE GIPPS, Knt.,—*Respondent* *
[June 24 and 25, July 8, 1846].

The Statute, 22 Geo. III., c. 75, empowering the Governor and Council, of a colony or plantation, to amove persons holding patent offices, for neglect or misbehaviour, includes judicial offences. But the Governor and Council of New South Wales, having amoved a Judge, without giving him notice, or affording him an opportunity of answering the charges brought against him, and upon which the order of amotion was founded, such order was held illegal, and reversed.

This was an appeal, against an order of amotion from the office of one of Her Majesty's Judges, of the Supreme Court of New South Wales, and Resident Judge at Port Philip, in the same colony, made by Sir George Gipps, the Governor, and the Executive Council of that colony, presented by John Walpole Willis, Esq., the Judge so removed. The appeal was referred, by Her Majesty, to the Judicial Committee of the Privy Council, and arose, under the following circumstances:—

By the Statute, 9 Geo. IV., c. 83, "for providing for the administration of justice, in New South Wales and Van Dieman's Land, and for the more effectual

* Present: The Lord President (the Duke of Buccleuch), the Lord Chancellor [Lord Lyndhurst], Lord Brougham, Chief Justice Tindal, Mr. Baron Parke, the Right Hon. T. Pemberton Leigh, and the Right Hon. W. E. Gladstone.

government thereof, and for other purposes relating thereto," [380] His Majesty was empowered to erect and establish Courts of Judicature in New South Wales, and Van Dieman's Land, respectively, which should be styled "the Supreme Court of New South Wales," and "the Supreme Court of Van Dieman's Land;" and it was enacted, that each of such Courts should be holden by one or more Judge, or Judges, not exceeding three; and that the said Judges should, from time to time, be appointed by His Majesty, his heirs and successors, and that it should be lawful for his Majesty, his heirs and successors, from time to time, as occasion might require, to remove and displace any such Judge, and in his place and stead, to appoint another fit and proper person, provided that, in case of the absence, resignation, or death of any such Judge, or in case of any such disease or infirmity as should render any such Judge incapable of discharging the duties of his office, it should be lawful for the Governor of the said colony to appoint some fit and proper person to act in the place and stead of any Judge so being absent, resigning, dying, or becoming incapable, until such Judge should return to the execution of his office, or until a successor should be appointed by His Majesty, as the case might require. And, by sect. 3, it was enacted, that the said Courts should be Courts of Record, and should have cognizance of all pleas, civil, criminal, or mixed, and jurisdiction in all cases whatsoever, as fully and effectually to all intents and purposes in New South Wales, and Van Dieman's Land, respectively, as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, at Westminster, or either of them, lawfully have, or hath, in England; and that the said Judges, so appointed, should have and exercise such and the like jurisdiction and authority in New South [381] Wales, and Van Dieman's Land, respectively, as the Judges of the Courts of King's Bench, Common Pleas, and Exchequer in England, or any of them, lawfully have and exercise, and as should be necessary for carrying into effect the several jurisdictions, powers, and authorities, committed to the said Courts respectively; and, by sect. 24, it was enacted, that all laws and Statutes, in force within the realm of England, at the time of the passing of that Act (not being inconsistent with the Act, or with any charter or letters patent, or order in Council, which might be issued in pursuance thereof), should be applied in the administration of justice in the Courts of New South Wales, and Van Dieman's Land, respectively, so far as the same could be applied within the said colonies.

The Appellant was appointed by Her Majesty, under this Act, to be one of the Judges of the Supreme Court of New South Wales, by warrant under Privy Seal and Sign Manual, and he thereupon repaired to the colony, and received his patent, under the seal of the colony, appointing him to be such Judge.

By an act of the local legislature of New South Wales, passed in the 4th of Victoria (No. 22), it was enacted, that it should be lawful for the Governor of that colony, for the time being, to appoint, from time to time, one of the Judges of the Supreme Court, not being the Chief Justice, to reside in the district of Port Philip, and that the said Judge, whilst so resident, should have, exercise, and enjoy, within the limits of that district, all such, and the like powers, jurisdiction, and authority as was or could be legally exercised by the Supreme Court, and that such resident Judge should not, whilst so resident at Port Philip, have any jurisdiction or authority, in or over any cause or matter in-[382]-stituted or pending in the Supreme Court, before the Judges sitting in Sydney.

By patent, under the seal of the colony of New South Wales, bearing date the 8th of February, 1841, the Appellant was appointed resident Judge, for the district of Port Philip, and the Appellant, in virtue of such patent, repaired to Melbourne, in that district, and officiated as resident Judge there until the motion appealed against.

On the 21st of December, 1842, the Governor brought before the Executive Council of the colony, certain complaints against the Appellant, for alleged misbehaviour, in his office of resident Judge of Port Philip, and the matter of such complaints was proceeded upon in Council on that day, and on the 16th, 17th, and 20th of January, 1843.

No notice was given to the Appellant of the accusations preferred against him, nor of the proceedings of the Governor and Council thereon.

On the 24th of June 1843, during the Appellant's sitting in Court, at Melbourne, he received a sealed packet, containing a letter from Mr. Superintendent La Trobe,

dated the same 24th of June, stating, that he (the Superintendent) had that day received a dispatch, written by the Colonial Secretary, by direction of the Governor, announcing that it had been deemed expedient to submit to the Executive Council of the colony, representations which had been addressed to the Government, respecting the Appellant, and that, after mature deliberation, the Council had advised that, in conformity with the provisions of the Act of Parliament, 22 Geo. III., c. 75, the Appellant should be forthwith removed from the office, not only of resident Judge of Port Philip, but as Judge of the Supreme [383] Court of New South Wales. The packet contained, in addition to the Superintendent's letter, a copy of a writ, issued by order of the Governor and Council of the colony, and tested the 17th of June, 1843, whereby, after setting forth that it had been sufficiently made to appear, to the Governor and Council, that the Appellant had misbehaved himself in his office, the Governor and Council did revoke the appointment of the Appellant, as resident Judge as aforesaid, and did also remove the Appellant from the office of Judge of the Supreme Court of New South Wales. The packet also contained a writ, under the seal of the colony, issued by order of the Governor and Council, and tested the same 17th day of June, superseding and inhibiting the Appellant, from the exercise of all power and authority as a Judge of the said Supreme Court.

On the 26th of the same month, the Governor, by a despatch addressed to Her Majesty's Secretary of State for the Colonies, duly reported the removal of the Appellant, from his office of a Judge of the Supreme Court. On the 27th, the Appellant also addressed a despatch to the Secretary of State, complaining of his amotion, and seeking redress. He immediately afterwards quitted the colony for this country.

By the 2nd section of the Act, 22 Geo. III., c. 75, under which the Appellant was removed, it is enacted, "that in case any person or persons so (as therein provided) removed shall think himself aggrieved thereby, it shall and may be lawful, to and for the person or persons so aggrieved, to appeal therefrom, as in other cases of appeal from such colony or plantation wherein such amotion shall be finally judged of and determined by His Majesty in Council."

The Appellant, availing himself of the right of appeal [384] thus given, on the 15th of February, 1844, presented his petition of appeal to Her Majesty in Council, against his amotion, praying Her Majesty to reverse the order and proceedings of the Governor and Council, in such amotion, and to grant to the Appellant, such redress and relief in the premises, as to Her Majesty might seem meet.

The petition of appeal, being addressed to Her Majesty in Council, was, pursuant to the provisions of the Statute 3 and 4 Will. IV., c. 41, referred, on the 4th of March, 1844, to the Judicial Committee of the Privy Council. No notice of this appeal was given by the Appellant, to Sir George Gipps, who was still Governor, and resident in the colony, nor was any notice served on the members of the Executive Council; the fact of the presentation of such appeal, and of its having been referred to the Judicial Committee, being first communicated to the Governor, in a despatch from the Colonial Secretary, of the 18th of March 1844.

The Appellant took none of the usual steps to procure the appearance of Sir George Gipps, or the members of the Executive Council, by personal service of the appeal, or notice thereof; but the time having expired for an appearance, in the ordinary course, the Appellant procured a final summons, from the Council Office, against Sir George Gipps, only, and affixed the same, according to the usual practice, at the Royal Exchange. In consequence of this proceeding, and to prevent the hearing of the appeal, *ex parte*, Sir George Gipps, on the 4th of February, 1846,* appeared by counsel, and [385] applied for time to answer the Appellant's case. The application was opposed, but their Lordships, under the circumstances, ordered that the Respondent should have ten weeks' time to prepare and put in his case, on the terms of his paying the costs of the application.

Both parties lodged cases. The Appellant, in his case, submitted that the order revoking his appointments, and the writs of amotion and supersedeas, consequent thereon, were null and void, by reason—

* Present: The Lord President (the Duke of Buccleuch), Lord Brougham, Lord Cottenham, Lord Campbell, and the Vice-Chancellor Knight Bruce.

I. That there was no power in the Governor and Council, to remove him from the office of Judge of the Supreme Court; and

II. That even if such power existed in the Governor and Council, their exercise thereof, without notice to, and in the absence of, the Appellant, and without affording him an opportunity of answering, before the Council, the charges made against him, was illegal.

The Respondent, on the other hand, submitted, that the Governor and Council had power to remove the Appellant from the office which he filled at the time of his removal; and that the circumstances of the case justified the exercise of such power.

The appeal now came on for hearing.

Mr. Dundas, Q.C., and Mr. C. Buller, for the Appellant.—First. The Governor and Council of New South Wales had no power to remove the Appellant from his office. He was appointed by the Crown, by warrant, under Privy Seal and Sign Manual, under the Statute, 9 Geo. IV., c. 83, to be a Judge of the Supreme Court, at New South Wales, during the pleasure of the Crown. [386] His appointment of resident Judge, at Port Philip, was by patent, under the seal of the colony, pursuant to the Act of Local Legislation, 4 Vict., c. 22, during the pleasure of the Governor of the colony. The Statute, 22 Geo. III., c. 75, relied on by the Governor and Council, as their authority for the Appellant's removal, confers no such power as that claimed. That Statute was passed under peculiar circumstances, arising from the relations of this country, at that period, with America and the West India Islands. The Statute is intituled, "An Act to prevent the granting, in future, of any patent office, to be exercised in any colony or plantation, now or at any time hereafter, belonging to the Crown of Great Britain, for any longer term than during such time as the grantee thereof, or the person appointed thereto, shall discharge the duty thereof in person, and behave well therein." And after reciting, that the practice of granting offices in His Majesty's colonies and plantations in the West Indies, to persons resident and intending to reside in Great Britain (in consequence whereof such offices were exercised by deputy, and have been frequently farmed out to the best bidder), had long been complained of, as a grievance, etc., it is enacted, "That, from thenceforth, no office to be exercised in any colony or plantation then, or at any time thereafter, belonging to the Crown, should be granted or grantable, by patent, for any longer term than during such time as the grantee thereof, or persons appointed thereto, should discharge the duty thereof in person, and behave well therein;" and, by the second section, it is enacted, "that if any person or persons holding such office, shall be wilfully absent from the colony, or neglect the duty of such office, or otherwise misbehave therein, it should be [387] lawful for the Governor and Council to remove such person or persons from every or any such office." Now we submit that this Statute has no application to a judicial office. The office of Judge is never once mentioned in the Statute, or even in the Statute, 64 Geo. III., c. 61, which was passed to amend the 22 Geo. III., c. 75. The words of a Statute must be plain and unequivocal to embrace an object not named in the Act itself. *Rex v. Gregory* (Note, 4 Term Reps. 240). Here they are not large enough to include a judicial office. The Statute was evidently not intended to apply to the office of Judge, for a judicial office cannot be executed by a deputy. Com. Dig., tit. Officer, D. 2. Neither can this Statute have any application to the office of a Judge, as constituted by the subsequent Act of Parliament (the 9th Geo. IV., c. 83), for that Act expressly vests the power of appointment and removal, in the Crown, and gives to the Governor no other power than to appoint a substitute, in the case of the absence, resignation, death, or incapacity to act, of the Judge, until the return of such Judge to the execution of his duties, or until a successor be appointed by the Crown. The Governor of a colony has no greater powers, than such as are vested in him, either expressly by Act of Parliament, or delegated to him, by the terms of his Commission from the Crown. *Cameron v. Kyte* (3 Knapp's P.C. Cases, 332; *Hill v. Bigge* (3 Moore's P.C. Cases, 465). Here the 9th Geo. IV., c. 83, and the Charter of Justice of Van Dieman's Land (4th March 1831; Clark's Col. Law, 653), constituting the Supreme Court, confer no power on the Governor to remove the Judges, nor does the Governor's commission from the Crown convey to him any such power. It is simi-[388]-lar to the power given to other Colonial Governors. The Commission to the Governor of British Guiana, only empowers the

Governor to suspend any person from the exercise of his office, not to remove (Clark's Col. Law, 275); and the same restriction is provided by the Royal Instructions, to the Governor of Newfoundland (*ibid.* 422), and by the Charter of Justice, of the Cape of Good Hope (*ibid.* 476).—[The Lord Chancellor [Lord Lyndhurst].—I should doubt, whether the Governor could remove a Judge, under the powers of his Commission, but he could under the Statute, 22 Geo. III., c. 75. We have made inquiries, and have been furnished, by the Colonial Office, with a form of an appointment of a Judge, in the colonies, and observe, that it follows the words of the Statute, namely, not to suffer the office to be held by deputy. It did not require an enactment, in that Statute, expressly to mention judicial offices, for a judicial office cannot be held by deputy. The only case of amotion, under this Statute, was of the Appellant himself, from the Bench, in Canada, in the year 1829, and the very same point, namely, whether the office was within the Statute, was expressly raised in that case.—The order of amotion then appealed from, was set aside, because the Appellant was not heard in Canada.]

Secondly. It is essential to the validity of every removal from office, for misbehaviour, by a functionary having the power of summary removal, that the removal should be preceded by some inquiry, in which the accused person has an opportunity of bearing a part. We submit, that it was the plain duty of the Governor, in this case, to have given the Appellant [389] notice of the accusations made against him, by Mr. Le Trobe, and of the Governor's intention to submit the same to the Council, with the view to the Appellant's amotion from office, and then to have submitted the accusations and the Appellant's answers to the Council. The order of amotion, having proceeded without the observance of this first rule of justice, and *ex parte*, is wholly void. *Bagge's Case* (11 Co. 99 a); *The King v. Gaskin* (8 Term. Rep. 209); *The Queen v. Smith* (5 Q.B. Rep. 614). No question can arise as to the law in force in New South Wales: the Statute, 9 Geo. IV., c. 83, provides, that the law of England is to apply, until altered. Had the Appellant been furnished with notice, he would have laid his answers and proofs before the Council, and have shown the groundlessness of the complaints made against him.—[The Lord Chancellor [Lord Lyndhurst].—If the removal was illegal, the Appellant would be entitled to his salary from the time of his removal.]

Mr. Bethell, Q.C., and Mr. Follett, for Sir George Gipps.—The order of amoval is treated by the Appellant, as illegal and void, on two grounds. First, that the Governor and Council had no power vested in them, to remove him, under any circumstances; and secondly, that, even if they had such power, the order could not be sustained, because no notice or opportunity was given him, to answer the charges brought against him. Neither of these grounds constitute a valid objection to the order.

First. The Governor and Council had power to remove the Appellant, under the provisions of the [390] Statute, 22 Geo. III., c. 75. It is enacted by Sec. 2, of that Statute, "that it shall be lawful for the Governor and Council, in the case of neglect or misbehaviour, to amove any person or persons from any office." That this Statute embraces judicial offices, was decided by this Court, in the year 1829, on the Appellant's appeal, from an order of amotion from the Bench, in Canada. That Act is in no degree repealed or altered by the Statute, 9 Geo. IV., c. 83, creating the Supreme Court in the colony. They had also power to remove under the Colonial Act, 4 Vict., c. 22. The commission of the Appellant, to be the resident Judge at Port Philip, was derived from the Governor, and during his pleasure, not from the Crown. But independently of the above Statutes, the Governor and Council, as the executive Government of the colony, had power to remove a Judge, or any other officer, for misbehaviour in his office, if the misbehaviour was of such a nature as to endanger the peace and tranquillity of the colony. Here the conduct of the Appellant was of such a nature, that the Governor and Council, who were actuated solely by the unhesitating conclusion, which they were compelled to come to, thought it their bounden duty to the Crown and to the colony, to remove the Appellant, as the only means of restoring peace and tranquillity to the district over which he presided as Judge, and to infuse a just and proper confidence in the administration of justice, and in Her Majesty's Government, in the colony. His occupation of the judgment-seat was, in the opinion of the Governor and Council, incompatible with

the peace and good government of the colony. Since the Appellant's removal, another Judge has been appointed for the district of Port Philip, by the Governor, under [391] the provisions of the Colonial Act, and that appointment has been confirmed by Her Majesty. [Lord Brougham. The appointment of a successor to an office held during pleasure, vacates the prior appointment.]

Secondly, the objection is, that the Appellant was not heard. In a case of this nature, where the Government removes an officer, from motives of expediency, notice was not necessary to be given to the Appellant, of the proceedings which were taken by the Executive Government.—[Mr. Baron Parke.—It is a principle of the common law, that a party cannot be removed from office, in which he has a freehold, but for misconduct, and that he is entitled to be heard, upon the charges made against him. If he held the office at the will of the Crown, the authority which appointed him may remove him.]—Although the Appellant now urges, that if he had been afforded an opportunity, he would have shown the groundlessness of the accusations brought against him, yet he has always refused to admit the power of the Executive Council over him; neither does he deny any of the material facts, on which the accusations, made against him, are founded: therefore, the opportunity, which he now insists ought to have been afforded him, would, in truth, have been altogether useless; in fact, a mere formal matter. Where there appears a good ground for amotion, the Court will not award a peremptory mandamus, the only effect of which would be, to compel the corporation to restore an officer, whom they would be bound immediately to remove, in a more formal manner. *The King v. Griffiths* (5 Barn. and Ald. 731); *Re v. The Mayor of Arbridge* (Cowp. 523); *The* [392] *Queen v. Smith* (5 Q.B. Rep. 614). The circumstances of the case justified the exercise of the power of amoval.

No judgment was delivered in this appeal, but the report of their Lordships, bearing date the 8th day of July 1846, which was confirmed by Her Majesty, was as follows:—

“The Lords of the Committee, in obedience to your Majesty's said Order of reference, have taken the said Petition into consideration, and having heard Counsel on behalf of the said Petitioner, and likewise on behalf of Sir George Gipps, late Governor of New South Wales, their Lordships agree humbly to report to your Majesty, as their opinion, that the Governor in Council had power in law, to amove Mr. Willis from his office of Judge, under the authority of the 23 Geo. III., and upon the facts appearing before the Governor in Council, and established before their Lordships, in this case, there were sufficient grounds for the amotion of Mr. Willis; but their Lordships are of opinion, that the Governor and Council ought to have given him some opportunity of being previously heard, against the amotion, and that the order, of the 17th of June, 1843, ought, therefore, to be reversed.

“Her Majesty having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said order of the Governor and Council of the colony of New South Wales, of the 17th of June, 1843, be, and the same is [393] hereby reversed, for the reason in the said report stated, and the Right Honourable Earl Grey, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.”

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. *Judges, e. Amotion*. S.C. 6 St. Tr. (N.S.) 311. The Statute 22 Geo. III., c. 75, was formerly known as Burke's Act. Under the Short Titles Act, 1896 (59 and 60 Vict. c. 14), its short title is the Colonial Leave of Absence Act, 1782. As to (i.) its construction, see *Montagu v. Van Dieman's Land (Lieutenant-Governor of)*, 1849, 6 Moo. P.C. 489; *In re Cloete*, 1854, 8 Moo. P.C. 484; *Ex parte Robertson*, 1857-58, 11 Moo. P.C. 295. (ii.) As to powers of Privy Council in regard to removal of Colonial judges, see *Representatives of the Island of Grenada v. Sanderson*, 1847, 6 Moo. P.C. 38; and “Memorandum of the Lords of the Council on Removal of Colonial Judges,” 6 Moo. P.C. (N.S.) Appendix. (iii.) As to necessity of notice, see *Dickson v. Combermere (Viscount)*, 1863, 3 F. and F. 549 n.; and cf. *Fisher v. Keane*, 1879, 11 Ch.D. 353; *Labouchere v. Wharnccliffe (Lord)*, 1879, 13 Ch.D. 346.]

ON APPEAL FROM THE COURT OF CHANCERY IN JAMAICA.

ANN CARR GORDON,—*Appellant*; CHARLES HORSFALL and Others,—*Respondents* * [Dec. 4, 5, and 8, 1846].

A judgment creditor cannot sustain a bill, for a general administration and account, against a prior incumbrancer, unless the bill contains an offer to redeem; as redemption is the only relief, in equity, to which a subsequent incumbrancer is entitled, as against a prior mortgagee [5 Moo. P.C. 426].

Semble. If the bill is not for redemption, but for a totally different object, and is quite incapable of being used as a bill of redemption, an offer at the bar, to redeem, will not sustain it as such.

The practice of the Chancery Courts, in Jamaica, is to decree a sale, instead of a foreclosure [5 Moo. P.C. 426].

Bill by A., the mortgagee of real estates, in Jamaica, against the executors of B., the mortgagor, and other persons claiming under B.'s will. The bill stated that there were judgments to a large amount against the mortgaged estate, but did not make the judgment creditors parties, and prayed for an account, and payment of what should be found due, upon the mortgage, or, in default, that a competent part of the estate might be sold, and payment made thereout. C., a judgment creditor, subsequent to A.'s mortgage, then filed a bill against the executors of B., and those claiming under his Will, and also against A., the prior mortgagee, on behalf of herself and all other creditors of B. By the bill, she insisted that her judgment gave her a prior lien to A., as against part of the mortgaged estate, alleging, that the judgment was given in respect of the purchase-money of such part of the estate, still remaining unpaid; she charged collusion between A. and the executors of B. in respect of their management of the mortgaged estates and in the accounts, and prayed for a declaration of the priority of her lien over A.'s mortgage, as to part of the estate, and a due administration of the personal estate; and that, if the personal estate should prove inefficient, she should be first paid out of the proceeds of the estate, on which she claimed a lien, and that in case A. should consent to join in the sale of the other real estates, he should be paid what, on taking the accounts, should be found due to him. A. filed a general demurrer for want of equity, on the ground, that there was no offer to redeem; which the Court overruled. A.'s suit being set down for hearing, C. filed a petition, entitled in both causes, praying that the hearing of A.'s suit might be postponed until her cause was ready for hearing, and that they might be both heard together, or that she might be at liberty to intervene in A.'s suit. The Court made an order, granting her leave to intervene, and to object to the mortgagee's accounts. By the decree, made in A.'s suit, it was referred to the master to take the accounts, and further directions were reserved. C. opposed the accounts, and afterwards took exception to the master's report. The Court, upon the argument upon the exceptions, refused to make an order, until it should be determined, at the hearing of C.'s suit, whether she had a valid claim on the mortgaged premises. At the hearing of C.'s suit, she failed to establish her priority over A.'s mortgage, or to prove collusion between him and the executors of B., and the bill was dismissed, as against A., with costs, but a decree was made in that suit, directing certain general administration accounts. A.'s suit was subsequently heard upon further directions, in the absence of C., and the master's report was confirmed, and a decree was made for payment of what was thereby found due to A. Held on appeal:

1st. That as C. had proved her judgment debt, she was entitled to a decree for relief against B., the obligors, executors; but that, as she had not offered to

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

redeem, the bill was properly dismissed, as against A., the prior incumbrancer. But,

2ndly. That the dismissal of the bill, as against A., because she had not asked for proper relief, did not necessarily draw after it the disallowance of C.'s exceptions; that having established her debt, and the order for leave to intervene, being in existence, she had a right to have her exceptions disposed of, and the orders confirming the master's report, and on further directions, made in her absence, were reversed [5 Moo. P.C. 433].

Quere! Whether a judgment creditor is a necessary party to a bill filed by a mortgagee, where the practice of the Court is to decree a sale instead of a foreclosure? [5 Moo. P.C. 427].

The executors of B., parties to the suit below, had not been served with the appeal: the Court, before giving judgment, directed the appeal to stand over for six months, with liberty for them to attend, and be heard on the appeal [5 Moo. P.C. 429].

In this case, there were two appeals, brought by the Appellant, Ann Carr Gordon. The first, against a [394] decree of the Court of Chancery in Jamaica, bearing date the 31st day of January 1844, so far as it dismissed the bill filed by the Appellant against the Respondent, Horsfall, in the cause of Gordon against Dunstone, the surviving executor of William Fairclough, of Jamaica, deceased, Horsfall and others. The second appeal was against an order and decree of the same Court, bearing date respectively the 2nd of December, 1844, and the 27th of January, 1845, made in a cause wherein Horsfall was Plaintiff, and Dunstone was Defendant, in which suit the Appellant was admitted an intervening party.

In the first and principal appeal, the bill was filed in [395] the Court of Chancery, in Jamaica, on the 13th of April, 1837, by the Appellant, on behalf of herself and the other creditors of William Fairclough (who should come in and contribute to the expenses of the suit); against James Dunstone, which bill, as afterwards amended, by an order of the court, was against James Dunstone and Thomas Phillpotts, as the personal representatives of Fairclough, and the Respondent, Horsfall, and his partner, Hodgson, and also the legatees named in the Will of Fairclough, or their representatives.

The bill stated, that Fairclough was, at the time of making his Will, and until his death, seised and possessed, *inter alia*, of a large sugar plantation situate in the parish of St. James, in the island, called Dumfries, with a mountain, called Dumfries Mountain, contiguous thereunto, and of a dwelling-house and settlement in the parish of Trelawney, called The Cottage, with a freehold property therein described, and the slaves, cattle, stock, and effects thereon, together with considerable personal estate; that being so seised and possessed, he duly made and published his last Will and Testament, whereof he appointed executors, and (*inter alia*) devised and bequeathed to them the estate called The Cottage, upon trust, to sell the same; and the Testator directed that the proceeds arising from the sale should be deemed part of his personal estate. That after leaving certain legacies, he devised and bequeathed [396] the plantation, or estate, situate in the parish of St. James, called Dumfries, with the slaves, cattle, and stock thereupon, and all other his plantations, estates, lands, hereditaments, and all the residue of his real and personal estate, (subject to certain legacies and annuities therein specified,) to his executors, in trust for his nephew, John Barrow, at that time a minor. And the Testator directed, that when his nephew attained the age of twenty-one years, the trustees were to convey to him and his heirs, the legal estate and interest in the plantation, and other real and personal estate; and in case his nephew, John Barrow, died under the age of twenty-one years, and without leaving lawful issue, all his estate and interest under the Will was to go to John Barrow's brother, David Barrow, junior, and his heirs; and if both nephews died before attaining the age of twenty-one years, then all the residue of the Testator's estate was to go to his niece, Ann Jane Barrow, and her heirs. That Fairclough died in the year 1823, or early in the year 1824, without having altered or revoked his Will. That three only of the executors proved the Will, and that they, or some one of them, possessed themselves, or himself, of the personal estate and effects of the Testator, to a very large amount, and, as devisees and trustees, that they, some or one of them, entered upon and took possession of the

plantation or estate, called Dumfries and Dumfries Mountain, and the settlement called The Cottage, and other real estate of the said Testator, and of the rents, issues, and profits thereof respectively; and they, some or one of them, have or had ever since continued, and then were or was in the perception and receipts of the rents, issues, and profits of such parts of the said Testator's real [397] estate as remain unsold. The bill then alleged, that Fairclough became, on and previous to the 18th of March, 1822, indebted to the Appellant, in the sum of £2445 17s. 5½d., current money of Jamaica; the balance of an account, for the purchase of Dumfries Mountain, and twenty-seven slaves attached thereto, which said Dumfries Mountain and slaves, were sold to Fairclough, in the year 1822, by the Appellant; and stated the execution of a bond by Fairclough, in favour of Francis Gordon (since deceased), for such principal sum of £2445 17s. 5½d., upon which judgment had been recovered against Fairclough's executors, and a writ of execution lodged; and after stating and setting forth the Appellant's title to the bond, the bill alleged, that no part of her debt had been paid, and that it then amounted to the sum of £4600, Jamaica currency, and detailed various applications for payment made by the Appellant to the executors of Fairclough. It next stated the death of Campbell, (one of the executors of Fairclough, who proved the Will,) in 1828, and charged him with having in his lifetime possessed himself of part of the assets of the Testator, without duly accounting for the same; and that Phillpotts had left the Island, and was unrepresented there, as trustee and executor of Fairclough. The bill further insisted, that the money then due to the Appellant, in respect of the purchase of the Dumfries Mountain and slaves, from her, by Fairclough, was a prior lien and charge upon that property, including the compensation-money, in respect of the slaves thereon; and went on to charge, that the executors, Dunstone and Phillpotts, had colluded with the Respondent Horsfall, and his partner Hodgson, and improperly allowed a large sum of money, alleged to be due from [398] the estate of the Testator, and secured by the mortgage of the Testator's real estate, and particularly the estate called Dumfries, to remain outstanding and unpaid; and next denied, that anything was due to the Respondent and his partner in respect of such then alleged mortgage, (and for which they had filed a bill, to procure a sale of Testator's real estate,) as would appear if the Respondent Horsfall, and Hodgson, would set forth a just account of the monies received by them, on account of the produce of the Dumfries estate, from time to time, consigned to them, and of the proceeds thereof, and of the appropriation thereof. The bill charged, that the Defendants had fraudulently colluded together, to keep the above-mentioned mortgage on foot, and after briefly reciting the mortgage deed and indenture of defeazance, as entered of record, in the secretary's office of Jamaica, alleged, that certain blanks for the principal sums of money thereby secured, were left in the records of those deeds, and stated that it did not appear that the sum of £7000 sterling, for which the bill of exchange was alleged by the Defendants to have been drawn, was ever paid to, or on account of, Fairclough, and denied that he had received the amount at the time when the deeds were executed by him; and submitted whether, having regard to the fact that the principal sum intended to be secured by the said indentures, was left blank, and unspecified in the operative part of the said indentures, respectively, the said mortgage security was a subsisting, valid, or available security, as against the Complainant's said judgment debt. The bill then alleged, that Fairclough did not receive from the Respondent and his partner any payment on account of the annual sum of £800, agreed to be paid to him (as therein mentioned), and that no [399] sums of money had been advanced by them to Fairclough, or with his sanction, during his lifetime for Island contingencies or supplies, or otherwise in respect of the management and culture of the said plantation called Dumfries; and that at the decease of Fairclough, the principal monies due on the security of the mortgage, if any, did not exceed the sum of £7000 sterling. The Appellant then proceeded to charge various acts, of which she complained, as to the mode in which the Respondent and his partner had dealt with the consignments of the produce of the mortgaged premises, and that the supplies and stores furnished by them had been excessive and exorbitant, and that the Testator's estate was improperly debited with them; and prayed that it might be referred to one of the masters of the Court, to take and state an account of the money due and owing

to the Appellant, for principal and interest on the judgment debt and costs : and that the same might be declared, the prior lien and charge upon the Dumfries Mountain, and the compensation-money payable in respect of the slaves thereon, or attached thereto, or the increase thereof : and also an account of all other the debts, owing by Fairclough at the time of his decease, and remaining unpaid : and that all such debts or sums of money might be paid out of the Testator's personal estate and effects, or the proceeds and produce thereof, in case the same should be sufficient for that purpose : and if Phillpotts and Dunstone, or either of them, should not admit assets of the Testator sufficient to satisfy such debts, then that the master should be directed to take and state an account of the personal estate and effects of the Testator, and of the produce, interest, and income thereof, which had been possessed or received by, [460] or by the order, or for the use of the Defendants Phillpotts and Dunstone, or either of them, or had come to their, or either of their, hands, or to the hands of any other person or persons, by their or either of their order, or for their or either of their use, and of the application thereof : and that the unadministered personal estate and effects, and the produce thereof, might be applied in or towards payment or satisfaction of the Appellant's judgment debt, and debts, in equal degree, according to their respective priorities, as far as the same would extend in due course of administration ; and in case the personal estate and effects of the Testator should be found insufficient for the purposes aforesaid, then that the Appellant's judgment debt might be decreed to be paid out of Dumfries Mountain, and other the Testator's real estates, if necessary, and the rents and profits, and produce thereof, become due since his decease, and possessed or received by Phillpotts and Dunstone, or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use. That a sale might be had of Testator's real estate, and the proceeds thereof applied in the first instance, in satisfaction of the Appellant's claim : that inquiries might be had respecting the estate and effects of the Testator, purchased by Phillpotts and Dunstone, and in respect of the £7000, alleged to have been advanced to and due from the Testator, and respecting also the management and control of the several estates belonging to him, with directions thereon, and for further relief.

Not long after the commencement of the suit, Hodgson, the Respondent's partner, died.

[401] The Respondent Horsfall filed a general demurrer to the bill, but the demurrer was overruled, and he afterwards put in his answer, in which he stated, that he was informed, and believed, that the Appellant had no title to a great part of the slaves sold by her, with the Dumfries Mountain, to Fairclough, and that the latter in his lifetime paid to the Appellant the sum of £1000, Jamaica currency, on account of her debt, which had not been deducted by her from her judgment, and that he, Horsfall, claimed a right of being paid the full amount of his demand against the estate of Fairclough, prior to the alleged debt of the Appellant : and he denied any collusion with the executors, or knowledge of improper conduct on their part, in the management of their Testator's estate. He then asserted and claimed, as at that time due to him, as the survivor of his partner, Hodgson, the sum of £12,000 and upwards, on the security of the mortgage before mentioned, for the recovery of which debt he stated that he had filed a bill in that Court : and he admitted that he and his late partner Hodgson, had, in the year 1835, preferred a counter-claim, under their mortgage, for the sum of £12,826 12s. 5½d. sterling, for the compensation-money payable for the survivors and increase of the slaves therein included, and asserted that that sum was at the time of their counter-claim justly due to them from the estate of the Testator, on account of *bona fide* advances which had been made by them. He then recited very fully the mortgage deed and deed of defeazance before referred to, bearing date respectively the 19th and 20th days of May, 1823, and stated that the sum of £7000, for which the bill of exchange was drawn, [402] had been paid and advanced by him and his partner, for, and on account of Fairclough, in his lifetime, for that the bill became due and was paid in favour of Fairclough previously to his decease, and Fairclough used the bill as a cash payment by passing it to Messrs. Milligan, Robertson and Co., in satisfaction of the debt due from him, to them. He also stated, that previous to the filing of the Appellant's bill, he and Hodgson exhibited their bill, in the same Court, against

James Dunstone and others, which bill was afterwards amended, and that in that suit, the Appellant had been permitted to intervene as a party, and come in, and set up her rights therein, and lay before the master, a statement of facts, with such objections to the Respondent's accounts, in that suit, as she might be advised; and that by a subsequent decree in that suit, it was ordered, that it should be referred to one of the masters of the Court, to state an account of what was due and owing to him, Horsfall, under, and by virtue of his mortgage, and that the Appellant should be permitted to come in and attend the master on the taking the account, and lay before him her objections. And he further stated, that the master was, at that time, proceeding with his report, on those mortgage accounts, and he craved leave to refer to that report, and prayed that the same, when prepared and filed, might be taken as part of his answer. He admitted that Fairclough had not in his lifetime received from him and his partner any payment expressly on account of the annual sum of £800, agreed to be paid to him, but alleged that, between the date of the mortgage-deed and the decease of Fairclough, they had paid and advanced several [403] sums of money, and furnished and sent out to Jamaica, supplies for his use, and the use of the Dumfries estate, besides, and independent of, the payment of the bill of exchange, for £7000, and that the sums so further advanced, with the supplies, amounted together to the sum of £8473 3s. 5d. sterling. And he stated, that his mortgage accounts, in the suit of *Horsfall v. Dunstone*, would show more particularly, to whom, and for what objects, such advances were made, and he referred to those accounts as evidence thereof, and also as evidence of the mode in which he and his late partner had dealt with the consignments of the produce of the mortgaged premises, and of other pecuniary transactions relating to the same. The answer then proceeded to state, that in the deed of the 8th of January, 1822, by which the Appellant conveyed the Dumfries Mountain and slaves to Fairclough, the whole of the purchase-money was therein expressed to be paid, and a receipt given for the same; and submitted, that this, coupled with the fact of the Appellant having taken a bond from Fairclough, for the payment of the balance of the purchase-money, would bar her from claiming any lien on the estate, or the compensation-money payable in respect of the slaves, for her judgment, prior and preferable to the claim, and lien thereon, of the Respondent Horsfall. He further stated, that the Appellant had improperly pretended and represented herself to be seised in fee, of the entirety of twenty-seven slaves, conveyed by the indenture of the 8th of January, 1822, to Fairclough, whereas she was only entitled to one moiety of those slaves, and that one moiety was afterwards recovered in an action of ejectment from the executors of Fair-[404]-clough, who in consequence were obliged to purchase the slaves again; and that the money which the executors paid for them, together with the costs of litigation arising out of the disputed claim to them, fully equalled the balance then due on the Appellant's judgment.

No evidence was given by the Appellant establishing the collusion, alleged by the bill. The cause came before the Vice-Chancellor in the month of September, 1843, and he then dismissed the bill of the Appellant, with costs.

The Appellant afterwards petitioned the Court for a re-hearing, and by an order dated the 28th day of November, 1843, her prayer was granted, and the cause came again before the Vice-Chancellor in the month of January, 1844.

The Appellant then tendered as evidence, against the Respondent Horsfall, the answer which had been put in by the Defendant Dunstone, in the suit of *Horsfall v. Dunstone*, and the exceptions filed by her to the report of the master in that suit, both of which the Vice-Chancellor refused to admit, as evidence against Horsfall, except of the fact of their having been filed. The Appellant also tendered, as against Horsfall, the records of the several crop and appropriation accounts, of the executors and trustees of Fairclough, relating to the Dumfries plantation, so far as the same were recorded previous to the filing of the bill in the suit, in pursuance of the Act of the Colonial Legislature; but His Honour refused to receive them, and would not allow them to be read, as against Horsfall, but admitted them, as against him, only as evidence of the fact, that such crop and appropriation accounts had been recorded.

[405] By his final decree, bearing date the 31st of January, 1844, and entered the

25th of March, in the same year, the Vice-Chancellor decreed, that the Appellant's bill should stand dismissed, as against the Respondent, Horsfall, with costs.

The Appellant being dissatisfied with so much of the decree of the 31st of January, 1844, in the suit of *Gordon v. Dunstone and others*, as dismissed her bill, as against the Respondent, Horsfall, appealed to Her Majesty in Council.

On the 2nd of December, 1844, it was ordered, in the cause of *Horsfall v. Dunstone* (in which the Appellant had been admitted an intervening party, as before stated, and had been permitted to file exceptions to the Master's report made thereon), upon the petition of the Respondent, Horsfall, that the Master's report made in the cause, of the 4th of August, 1840, and filed in the office of the Register-General on the 26th of August, 1840, be confirmed absolute, and that the cause be set down to be heard, on further directions, and on the costs reserved, for the next hearing day; and his Honour the Vice-Chancellor further ordered and directed that the monies to arise from the sale of the plantation, hereditaments and premises in that cause, be paid into the office of the Receiver-General, to abide the result of the appeal of the Appellant, from the decree in the cause of *Gordon v. Dunstone*, of the 31st January, 1844, and the further orders of the Court; and his Honour reserved the question of costs.

From this order, the Appellant lodged her petition of appeal, to Her Majesty in Council; pending which, and on the 27th of January, 1845, the cause came on, to be heard on the Master's report, [406] when his Honour, the Vice-Chancellor, declared and decreed, that the Respondent, Horsfall, was well entitled to receive and be paid the sum of £15,619 3s. 2d., late current money of the island, equal to the sum of £9371 9s. 10d. of then lawful money, reported by the Master, to be due and owing to him, under and by virtue of the indenture of mortgage, in the pleadings mentioned, of the 19th of May, 1823, and interest thereon, from the date of the Master's report; and his Honour further ordered, adjudged, and decreed, that the several Defendants in the cause should, on or before the 1st of May, then next, pay and satisfy unto the Respondent, Horsfall, his full costs out of the purse, incurred in that suit, as taxed by the Register of the Court, and also the sum of £15,619 3s. 2d., late currency, equal to £9371 9s. 10d. of then lawful money, reported due to him, under and by virtue of the indenture of mortgage, in the pleadings mentioned, of the 19th of May, 1823, together with interest thereon, from the date of the Master's report; and in default thereof, that the plantation or sugar-work, called Dumfries, the mountain settlement called The Cottage, the lot of land, with the dwelling-house thereon, in the town of Falmouth, and all the stock upon and belonging thereto, and other the hereditaments and premises comprised and included in the therein-before stated indenture of mortgage, might be put up to sale and actually sold, by and before the Master, to the highest and best bidder or bidders, and for the most monies that could be had, or gotten, for the same, and that the monies to arise from such sale should be by the Master paid into the hands of the Receiver-General of the island, and remain, together with the compensation-money for the slaves, [407] upon the plantation called Dumfries, then in his hands, to the credit of this cause, until the result of the appeal of the Appellant, from the decree, in the cause of *Gordon v. Dunstone*, should be ascertained, and until the further order of the Court; and in case the Appellate Court should confirm the decree of the Court, and dismiss the appeal, then that the Master should immediately, upon such Order in Council being received, and filed in the cause, out of the sale monies and the compensation then to the credit of the cause, in the first place pay and satisfy the Respondents' full costs out of purse expended in the suit, and in the next place pay unto the Complainant the sum of £15,619 3s. 2d., late currency, equal to £9371 9s. 10d. of then lawful money, so reported to be due to him as aforesaid, together with interest thereon, from the date of the Master's report; and pay and apply the residue of such sale monies, if any, as the Court should direct, with liberty to any of the Respondents in the cause, in case the Appellate Court should make any other order than thereinbefore stated, to apply to the Court for further directions; and his Honour the Vice-Chancellor further ordered, adjudged, and decreed, that all proper and necessary parties should join in such sale, and execute to the purchaser or purchasers of the premises all such deeds, conveyances, and assurances as should be approved of by the Master, in case the parties disagreed about the same.

The Appellant feeling herself aggrieved by the above decree of the 27th of January, 1845, made in the suit of *Horsfall v. Dunstone*, applied to the Court for liberty to appeal to Her Majesty in Council, against that decree, which was granted.

[408] Both the principal appeals, as well as the incidental appeal, from the order of the 2nd of December, 1844, now came on for hearing.

Mr. Wigram, Q.C., and Mr. Rennalls, for the Appellant, in both appeals.—The bill filed by Horsfall and Hodgson against Dunstone was for the exclusive benefit of the Plaintiffs, the object being to obtain a sale of the premises, comprised in the mortgage security, executed to them by Fairclough: it was not a suit, on behalf of themselves and the other creditors of Fairclough. Now the Appellant's judgment debt was an existing liability, at that time, and the holder of it ought to have been made a party to that suit; but no judgment creditors were parties, nor were they included in the relief sought by that suit. The bill was also defective, for want of the personal representatives of the mortgagor: they were necessary parties. *Christophers v. Sparke* (2 Jac. and Wal. 223). *Daniel v. Skipwith* (2 Bro. C.C. 155). *M'Donough v. Shewbridge* (Ball and Bea. 555). And the sale, therefore, which was prayed for, could not be effected, for a good title could not be made to a purchaser, nor a fair value for the property obtained. The Appellant was not bound by the proceedings in that suit, and being a judgment creditor, she was entitled to file a bill, on behalf of herself and the other creditors, to have the real estate sold in the regular manner. As a judgment creditor, she was moreover entitled to have that part of the Testator's estate sold, which was covered by her lien, for the purchase-money, remaining unpaid, subject to any [409] prior incumbrance. *Daniel v. Skipwith* [2 Bro. C.C. 155]. *Brocklehurst v. Jessop* (7 Sim. 438). By the Jamaica Statute, 5 Geo. II., c. 7, s. 5, lands are made liable to the payment of debts. By the Jamaica Statute, 38 Geo. III., c. 23, sec. 3, slaves are made liable to judgments; and by 50 Geo. III., c. 21, slaves are declared legal assets for payment of debts or legacies. That being so, the compensation-money given by the Statute, 3 and 4 Will. IV., c. 73, on the abolition of slavery, was legal assets for the payment of creditors. *Lyon v. Colville* (1 Coll. 449). So in *Pope v. Gwyn* (Dick, 683), the Court held, the real estates of a Testator, to be equitable assets, for the payment of debts and legacies, charged thereon, and directed them to be sold. The Appellant's bill ought to have been sustained against Horsfall, with the proper directions as to taking the accounts: in taking which, he ought to have been charged, not only with the sums received by him, but for such sums as, but for his wilful default, he might have received. It is no objection to the Appellant obtaining relief, to say, that she did not offer, or pray by her bill, to redeem a prior incumbrance. The prayer of the bill is framed upon the usual practice in Jamaica, namely, for a sale, instead of a foreclosure; and under the prayer for general relief, she would be entitled to redeem: it is, in effect, an offer to redeem. A party in asking relief, in equity, is liable to be put on terms to do equity, and it was not too late, even at the hearing, to offer to redeem the prior incumbrances. *Parker v. Alcock* (1 Young, 372). *Clarke v. Tipping* (4 Beav. 588). She has not been awarded the relief she is entitled to in the circumstances of her case.

[410] The decree made by the Court, in the cause of *Gordon v. Dunstone*, was clearly erroneous. It ought to have established the claim of the Appellant, on the estate included in the mortgage to Horsfall. Although the Appellant was not made a party to the suit of *Horsfall v. Dunstone*, yet having obtained leave to intervene, and attend the proceedings, in the Master's office, she could except to the report. *Taylor v. D'Egville* (7 Sim. 445). *White v. Hall* (1 Russ. and M. 332); and having taken exceptions to the Master's report, it was irregular and unjust of the Court to confirm the Master's report, without, in the first place, disposing of her exceptions.

Mr. Turner, Q.C., and Mr. Forsyth, for the Respondent, Horsfall, in both appeals.—The Appellant's bill was filed to establish a prior lien, on part of the Testator's estate, in respect of the purchase-money for such estate, which remained unpaid. The bill was for an account of the receipts and payments by Horsfall, in his character of mortgagee. It admits the existence of the Respondent's mortgage, and prays for a sale of the estate, but it does not offer to redeem the mortgage. The decree of the Court below, dismissing the bill against the Respondent, was proper, for it is a settled principle, that a mortgagee cannot be brought before the Court,

for any other purpose than redemption. *McDonough v. Shewbridge* (2 Ball and Bea. 555). *Drea v. O'Hara* (2 Ball and Bea. 562, Note).—[Lord Langdale: The common form of the decree, is, that if the mortgagee consent to a sale, decree a sale; but if not, [411] he must pay his mortgage money. The only peculiarity in the present case, is, that the Respondent, the mortgagee, has a bill on the file himself, in which he prays for a sale.]—We do not contend that it was necessary that the Appellant's bill should have prayed to be let in to redeem, it would have been sufficient, if it had been framed for redemption; but the Appellant's bill is framed for a totally different object, and it is quite incapable of being used as a redemption bill; there is a want of proper allegations in the bill: therefore, under the general prayer for relief, this bill cannot be sustained as a redemption bill. *Martinez v. Cooper* (2 Russ. 198). *Troughton v. Binkes* (6 Ves. 573). The Appellant contends, that not having been made a party to Horsfall's suit, she had a right to file a bill herself. If it was necessary to make her a party to that suit, she might have filed a proper bill for redemption; the mere circumstance of not making her a party to that suit, would not give her a right to file a bill of a different species, unless, indeed, she could bring in that circumstance, as evidence of collusion. Supposing, however, that there was collusion, that fact could not alter the character of her bill.—[Mr. Pemberton Leigh: Assuming that the Appellant ought to have been a party to Horsfall's suit, had she not a right to file a bill, for the purpose of putting herself in the same position as if she had been a party? She would have had a right to see the accounts taken, and to have participated in any surplus.]—There is no allegation in the Appellant's bill, to warrant such proceedings. The right of a judgment creditor to file a bill for redemption, arises, not from any charge [412] which the judgment creditor has on the equity of redemption, that, he can only get through the interference of a Court of Equity; but a judgment creditor, having a legal right against the estate, which the debtor has mortgaged, a Court of Equity treats the alienation, which the debtor has made, though at law absolute, as in equity, only a security for the mortgage debt; therefore, a judgment creditor is allowed to come to a Court of Equity, and, by paying off the mortgage debt, to procure the removal of the legal impediment. By the common law, landed estates were not liable to a mere judgment, for money. This, however, has been altered. The Statute of Westminster, 13 Edw. I., c. 18, first gave the writ of elegit, against the legal estate; and by the Statute of Frauds, 29 Car. II., c. 3, execution is given against a trust estate. It was a question, at one time, whether there could be an execution against an equity of redemption, and it was urged, that as an equity of redemption was, in effect, a trust, therefore, execution should be given against it: the contrary has been decided. *Lyster v. Dolland* (1 Ves. Jun. 431). *Plunket v. Penson* (2 Atk. 290). *Neate v. The Duke of Marlborough* (3 Myl. and Cr. 407, 415). It is clear, therefore, that the right of a judgment creditor, to come into equity, is not founded on any lien he may have upon the equity of redemption. The Appellant's counsel argue as if it was a case of legal assets. It is not so: the mortgage is prior to the judgment. The Local Statutes, referred to by the Appellant's counsel, do not make a judgment debt, a charge upon the equity of redemption, but only upon the slaves remaining in the possession [413] of the debtor, and unmortgaged. It is not the practice to make judgment creditors of a mortgagor, parties to a bill of foreclosure. A difference may now arise upon the 1st and 2nd Viet., c. 110, which gives judgment creditors equitable charges upon real estate, but the present case is not affected by that Act. The Appellant was not, therefore, a necessary party to the suit by the Respondent. Supposing that point to be doubtful, is it to be said, that, in the absence of any evidence to prove collusion, she is at liberty to file such a bill as this, instead of one for redemption? The case made by the Appellant's bill, is one of prior equity and lien; there was no evidence of either; neither was it established, in evidence, that any portion of the purchase-money of the estate and slaves, bought by Fairclough, remained unpaid; and even if it was so, and the Appellant had an equitable lien, in respect of the same, such lien was not available against the Respondents' mortgage. The bill was, therefore, properly dismissed, as against the Respondent.—[Lord Langdale: Could the Appellant have filed a bill, praying that the executors might redeem the mortgage, for her benefit, without offering to make up any deficiency?—In *Pearse v. Hewitt* (7 Sim. 471), it was held, that you could

only bring a mortgagee into Court, for the purpose of redeeming him; and, having been made a party to the bill, which did not pray for redemption, a demurrer by him for multifariousness was allowed. The order for leave to intervene, was made, solely upon the ground of the Appellant having a suit pending, upon which she might ultimately establish some right, or equity, on the Testator's estate; this was the ground upon which her petition for leave to intervene was founded, and [414] her right to maintain the exceptions, by her taken to the Master's report in that suit, depended upon the issue of her own suit; and such suit having been dismissed, as against the Respondent, the Appellant's right to maintain the exceptions, in the former suit, failed, and, as a matter of course, the order giving leave to intervene was gone also. If the order in *Gordon v. Dunstone*, be reversed, then the exceptions would be revived, and it would be a matter of course, to dismiss the order of the 2nd of December, 1844; but if the order dismissing the bill in *Gordon v. Dunstone*, be allowed to stand, the other must stand also. The accounts would have been taken in quite a different manner, had the Appellant established her claim in her own suit.

Mr. Wigram, in reply.—This is not the case of a mortgagee simply foreclosing: the suit of *Horsfall v. Dunstone* is for the extraordinary remedy of a sale, and a judgment creditor is not made a party to the suit. It was, therefore, defective for the want of proper parties, as such creditor was a necessary party. The cases cited on the other side, only show that judgment creditors were not necessary parties to a bill of foreclosure. This bill prays a sale, which is essentially different from a foreclosure; as the Appellant was not a party to that suit, she had a right to intervene and watch the accounts.—[Mr. Pemberton Leigh.—What is the effect of a judgment against executors?—It is analogous to the case of an intestacy, and the intestate leaving a bond debt. The 3rd and 4th Wm. and M., c. 14, and the 47th Geo. III., c. 74, s. 2, do not charge the real assets, descended or devised, with the ancestor's debt, [415] but only make the heir or devisee, personally liable to the value of the assets. *Spackman v. Timbrell* (8 Sim. 253). *Mathews v. Jones* (Anst. 506). The same was the course in Jamaica, in judgments against executors. *Townsend v. Price* (Grant's Jamaica Cases, p. 325). The 33rd Geo. III., c. 16, was passed for the purpose of giving effect to a judgment before execution. The Respondent does not deny that we have a right to file a bill, as a judgment creditor, but she says that the Appellant's right, as against him, is confined to a mere right to redeem, and for that, *McDonough v. Shrewbridge* [2 Ball and B. 555], and *Drew v. O'Hara* [2 Ball and B. 562, n.], are cited. These cases are distinguishable from the present; the prior mortgagee had not come to the Court for a sale, as in the present case. It was next contended, that the Statute of Frauds gave execution against trust estates, but not against an equity of redemption. *Lyster v. Dolland* [1 Ves. Jun. 431], and *Plunket v. Penon* [2 Atk. 290], which were cited in support of this position, only decide, that an equity of redemption, of a term, could not be taken in execution; they are no authority, that a judgment creditor has not a lien of some description, on the estate: if not, how can he come to redeem? Neither does the case of *Neate v. The Duke of Marlborough* [3 My. and Cr. 407] apply; for the sole question held there, was, that a judgment creditor who sought relief in equity against his debtors' equitable interest in freehold property, ought previously to sue out an elegit. We are in the position of a party who has taken out execution, as the Jamaica Act, 38 Geo. III., c. 23, s. 3, makes an execution lodged, equivalent to a writ of execution levied. In *Sharpe v. The Earl of Scarborough* (4 Ves. 538), it was held that an equity of redemption of a mortgage in fee, was not equitable assets, as against [416] judgment creditors, and that a judgment creditor, was entitled to priority over a simple contract creditor, as against the equity of redemption.—[Lord Brougham.—You contend that, when there is a mortgage, a judgment creditor, and a second mortgage, and then a sale, that upon a question arising, whether the produce of the equity of redemption is to be treated as equitable assets or not, it gives the judgment creditor a lien upon the equitable assets?—Yes; but the Respondent, Horsfall, says, that if that be so, yet that a judgment creditor of the mortgagor is not a necessary party, to a suit of this kind, where a mortgagee prays for a sale. The practice in England is to make a judgment creditor a party to a bill of foreclosure.—[Lord Langdale.—A judgment creditor

may be a proper party, but is he a necessary party? do you put him in the same position as a second mortgagee? If a judgment creditor has taken out an *elegit*, is he to be considered in the same position as a second mortgagee?—He is a necessary party, since the Statute, 3 and 4 Vict., c. 105. *Rolleston v. Morton* (1 Con. and Law, 252). An *elegit* is never sued out, unless the party is about to take proceedings upon it. The Respondent, Horsfall, says, why is the circumstance of his bill, praying a sale, to alter the rights of the Appellant? Our answer is, that since he seeks an extraordinary remedy, we are also entitled to an extraordinary remedy. Sir Edward Sugden, in the case of *Rolleston v. Morton* (1 Con. and Law, 252), held, that a mortgagee could make a judgment creditor of the mortgagor, subsequent to the mortgage, a party to a foreclosure suit; if so, surely a judgment creditor has a right to be present, when a sale is prayed. [417] Secondly; the order giving the Appellant liberty to intervene in the suit of *Gordon v. Dunstone*, has not been discharged; under that order we have taken exceptions to the report. It is against all practice to confirm a report, until the exceptions to the report have been disposed of.

The Right Hon. T. Pemberton Leigh (16th Dec. 1846).—This case comes before the Court, upon two appeals from the Court of Chancery, in Jamaica, brought by the same Appellant, Miss Gordon: the one, against a decree, in a cause of *Gordon v. Dunstone*; the other against an order, in a cause of *Horsfall v. Dunstone*. It is on the first only of these appeals, that we are able, at present, to pronounce an opinion. The case, in substance, is as follows:—In 1823, William Fairclough was the owner of several estates in Jamaica, with slaves and stock upon them; on the 19th of May, 1823, he mortgaged these estates, with the slaves and stock, to Messrs. Horsfall and Hodgson, of whom, Mr. Horsfall, the Respondent, is the survivor. In the same year, Fairclough died, having made a Will, by which he appointed Dunstone and several other persons, executors. He devised his real estates to his executors, upon certain trusts, not necessary to be stated. Fairclough, at his death, was indebted to Miss Gordon, the Appellant, in a considerable sum of money, secured by his bond, to a trustee, for her; and in October, 1824, judgment was recovered in Jamaica, upon this bond, against the qualified executor of the Testator, and a writ of execution issued on the judgment. The judgment was afterwards assigned to the Appellant; and it is alleged by the Appellant, that, by the local laws of Jamaica she became entitled to the [418] same rights against the estate of the obligor, as if the judgment had been recovered against the obligor, in his lifetime, by the Appellant personally. This has not been disputed by the Respondent, and we assume it to be so. In December, 1836, Messrs. Horsfall and Hodgson, the mortgagees, filed their bill in the Court of Chancery, in Jamaica, against Dunstone, as the only executor and trustee of Fairclough, in the Island, and against some other persons claiming charges under his Will, upon his real estate. The bill prayed an account of what was due upon the Plaintiff's mortgage, and that the amount, together with their costs, might be paid, by a day to be appointed, or, in default thereof, that the estates, stock, and slaves, or a competent part thereof, might be sold: that, out of the monies, the Plaintiffs might be paid their debt and costs; and that the residue of such sale monies, if any, might be applied as the Court should direct; and that all proper and necessary parties might be ordered to join in such sale, and execute to the purchaser or purchasers of the said premises all such deeds, conveyances, and assurances, as should be approved of by the Master, in case the parties should disagree about the same; and for a receiver and manager to be appointed over the said estate. The bill stated, that there were judgments against the estate of Fairclough, to a large amount; but none of the judgment creditors were made parties. This bill did not pray any general administration of the estate of Fairclough, nor payment of the mortgage debt, out of any other assets, than the mortgage property. The Appellant, not being made a party to this bill, was left at liberty to take such proceedings at law, or in equity, as her title was sufficient to maintain. Against the mortgaged property she [419] could take no proceedings at law, under her judgment; for an equity of redemption was not subject to a writ of execution, but, in equity, she was entitled against the mortgagees to redeem, and as against the executors and trustees, to have a general account of assets, and to maintain a suit for these purposes. The Appellant, how-

ever, conceived herself to be entitled to obtain much more extensive relief, than this, against both the mortgagees, and the representatives of Fairclough. As to a portion of the property included in the mortgage, viz., the Dumfries estate, with the stock and slaves upon it, she alleged, that it had been sold by her to Fairclough, and that the debt secured by her judgment, consisted of purchase-money, for that property, remaining unpaid; and she insisted, that, in respect of that property, she had a vendor's lien, and was entitled, in equity, to be preferred to the mortgagees. She alleged further, that, by collusion between the mortgagees and executors, the mortgage had been improperly kept on foot, and items fraudulently introduced into the mortgage accounts, partly on the part of the executors, and partly on that of the mortgagees, to increase the apparent amount of the mortgage debt, beyond the sum really due; and she insisted, that the executors had, in other respects, committed a devastavit, for which they were personally liable. Under these circumstances, on the 12th of April, 1837, she filed her bill in the Court of Chancery, in Jamaica, the dismissal of which, as against Horsfall, the Respondent, is the ground of the first appeal. It is necessary to examine, with some minuteness, the frame of this bill, as far as it affects the Respondent. It professes to be filed by the Appellant, on behalf of herself, and all other the creditors of Fairclough. It is filed against Dunstone, [420] the surviving executor of Fairclough, resident in the Island, and against Horsfall and Hodgson, and several other parties. It insists on the Plaintiff's right to priority over the mortgagees, in respect of the Dumfries estate, and that, if the Testator's personal estate should, on a fair account thereof being taken, prove to be deficient to satisfy her lien, with the interest accrued thereon, such deficiency ought to be made good out of the Dumfries Mountain estate, and the compensation-money, in respect of the slaves sold therewith, and the rents and profits thereof, and that the same, or a sufficient part thereof, ought to be sold for that purpose: it disputes the fact of payment of £7000, part of the consideration for the mortgage; it charges collusion between the mortgagees and executors, in the management of the mortgaged estates, and alleges the introduction into the mortgage accounts, of various improper items, so as fraudulently to increase the amount appearing due on the mortgage; and it charges other acts of misconduct by the executors. It then prays a declaration that the plaintiff has a prior lien on the Dumfries Mountain estate and slaves; an account of what is due to the Plaintiff, and the other creditors of Fairclough; an account of the personal estate of Fairclough, and an application of it, in payment of the Plaintiff's judgment debt, and debts, in equal degree, according to their priorities; and, if the personal estate should be insufficient, then that the Appellant's judgment debt might be paid out of the Dumfries Mountain, and other real estates; that for this purpose, the real estates, or a competent part, might be sold, and that all proper parties might be ordered to join in the sale, and that, out of the proceeds of the sale, the Plaintiff might, in the first place, be paid her full costs [421] of suit; in the next place, that the money to arise from the Dumfries Mountain estate might be applied, as far as it would extend, in payment of what was due to the Plaintiff; and, as to the money to arise by sale of the other real estates of the Testator, in paying to Horsfall and Hodgson such sum as might (on taking the account therein prayed to be taken), and should be found to be due, and owing to them, *bona fide*, on their said mortgage security, in case they should consent to join in the sale, lastly therebefore prayed; and, in the next place, in payment of what might be found due to the Plaintiff, and the other creditors, who should come in, and contribute to the expenses of the suit. It then prayed relief against the executors, in respect of certain specific acts of misconduct alleged against them, and various accounts and inquiries, for the purpose of ascertaining what was due on the mortgage, and the disallowance of various charges and items, alleged to have been fraudulently introduced into the mortgage accounts, by collusion between the mortgagees and executors. It prayed also specific relief against the executors, in respect of alleged misconduct on their parts, and the appointment of a manager, consignee, and receiver.

No judgment creditor was made a Defendant to this bill.

The bill did not seek to redeem the mortgage, but, on the contrary, as to a portion of the property, disputed the mortgagees' title; it did not seek a sale against the mortgagees, but merely prayed such sale if the mortgagees consented; if not,

any sale was to be subject to the mortgage. There could be no right to take the mortgage accounts in the suit, unless, either by redemption or sale, the mortgage debt was to be [422] paid; but, as this bill was framed, no payment could be had by the mortgagee unless they thought fit to join in the sale.

On the 18th of October, 1837, Horsfall, who had survived Hodgson, his partner, filed a general demurrer to this bill, for want of equity. The demurrer came on for argument on the 31st of January, 1838, and, as appears from the order made on that occasion, the objection "that the Plaintiff had not, by her bill, offered to redeem the mortgage to Horsfall, in the pleadings stated, or to pay whatever might be due thereon, when the amount thereof prayed by her bill was taken, as she ought to have done," was distinctly taken at the bar. Whatever might be the value of that objection, in ordinary cases, it was clear that it could not sustain a general demurrer to the bill, in this case, for facts were stated, entitling the Plaintiff to priority over the mortgage as to a portion of the property included in it. The demurrer was, therefore, most properly overruled. The Plaintiff, however, had distinct notice of the objection, which the Defendant insisted on, with respect to the omission of any offer to redeem. The Defendant obtained leave to appeal against the order overruling the demurrer, a proceeding, however, which he afterwards abandoned.

On the 28th of July, 1838, the Respondent, Horsfall, procured an order for setting down the suit of *Horsfall v. Dunstone*, for hearing. On the 28th of August, 1838, the Appellant presented her petition in the two causes of *Gordon v. Dunstone*, and *Horsfall v. Dunstone*, alleging that improper delays were interposed by the Defendants to the progress of the suit of *Gordon v. Dunstone*, and praying, that "either the two causes of *Gordon v. Dunstone*, and *Horsfall v. Dunstone*, [423] might be heard together, as soon as the Appellant should be able to surmount the difficulties and delays thrown in her way, by the complainant, in the cause of *Horsfall v. Dunstone*, or that the Appellant might be at liberty to intervene, as a party to the suit of *Horsfall v. Dunstone*, and to come in and set up her right therein, and lay before the Master a statement of facts, with such objections to Horsfall's accounts as she might be advised."

This petition was heard on the 28th and 29th of September, 1838, when the following order was made:—"That the petitioner, the Appellant, be permitted to intervene, as a party to the suit of *Horsfall v. Dunstone*, and to come in and set up her rights therein, and lay before the Master a statement of facts, with such objections to the complainant's accounts as she might be advised." This order has not been appealed from: and it was afterwards embodied in the decree, made on the hearing of the cause of *Horsfall v. Dunstone*, on the 30th of January, 1839. That decree was as follows:—"That it should be referred to the Master, to take an account of what was due to the complainant, Horsfall, under the indenture of mortgage, of the 19th of May, 1823, for principal and interest on the mortgage-debt thereby secured," etc.; and it was further ordered, that Ann Carr Gordon, the Appellant, "should be permitted to come in and attend the Master, in the taking of the aforesaid account, and lay before him such objections as she might be advised, as directed by the order of the 28th and 29th days of September, 1838, subject to all objections and arguments which may be urged against the same, by Ann Carr Gordon;" and the further consideration was reserved.

Under these orders, the Appellant was at liberty to [424] attend the proceedings in the suit of *Horsfall v. Dunstone*, as if she had been made a party. It appears, that she did carry in objections to the Master's report, of the amount due to Horsfall, which objections were overruled; and on the 5th of August, 1840, the Master made his report, finding a very large sum, exceeding £15,000, to be due to the Respondent, Horsfall. To this report, the Appellant filed sixteen exceptions, on the 21st of September, 1840, under leave given by the Court, on her petition for that purpose. In the meantime, on the 8th of August, 1840, the Respondent put in his answer to the Appellant's bill. By that answer, he disputed the priority claimed by the Appellant; he denied the collusion and fraud imputed by the bill, and he stated the proceedings which had taken place in the suit of *Horsfall v. Dunstone*.

On the 2nd and 3rd of February, 1841, the Appellant's exception in the suit of *Horsfall v. Dunstone* were heard, when the following order was made:—"His Excellency the Chancellor, declared, that he could not issue any order on the excep-

tions, until it should be determined, at the hearing of the cause of *Gordon v. Dunstone*, whether or not the exceptions, in respect of her judgment demand, in the pleadings mentioned, had a valid claim on the mortgaged premises, in the pleadings mentioned: but the Chancellor was pleased further to declare, that if such judgment demand should, at such hearing, be established, as a just claim on the mortgaged premises, and if there should be no other funds from which the claim could be satisfied, he would then refer back the report of the Master, for further consideration and inquiry, with such directions as should appear proper; and the Chancellor postponed all order on the exceptions, until after the suit [425] of *Gordon v. Dunstone* should have been heard, and ordered, that the costs of all parties on the argument thereof should abide the further order of the Court." The effect of which we shall have presently to consider.

On the 30th of November, 1843, the Appellant's suit, of *Gordon v. Dunstone*, came on for hearing, before the Vice-Chancellor of Jamaica. The Appellant failed in establishing her claim of priority over Horsfall, as to any portion of the property, and she also failed in proving any collusion between the mortgagees and executors, and the bill against all the Defendants was dismissed with costs. The only circumstance which could have justified the dismissal of the bill against the representatives of Fairclough, was the failure of the Plaintiff to prove her debt; whether there was any such failure does not very distinctly appear. However, the cause was reheard on the 31st of January, 1844, when the plaintiff's debt being proved, the bill was still dismissed with costs against Horsfall; but as to the other Defendants, a decree was made, directing an account of the Testator's debts, and various accounts and inquiries with respect to the Testator's estate, as to which no complaint is made by either party.

It is against this decree, as far as it dismissed the bill against Horsfall, that the first appeal is brought. The dismissal appears to have proceeded on the ground, that the bill did not offer to redeem the mortgage, and that the Plaintiff could not be entitled to take the accounts against the mortgagee upon any other terms. It was urged, on the part of the Appellant, that it was not necessary for the Plaintiff to offer to redeem the mortgage, but that, if it were necessary, it was sufficient to make the offer at the bar, without [426] making it by the bill. In support of this latter proposition, *Parker v. Alcock* [1 You. 372] and *Clarke v. Tipping* [4 Beav. 588], were referred to, in which it was held, that, when a party was entitled to relief upon the terms, the Court might impose those terms as the condition of granting relief, and that it was not necessary that the Plaintiff should offer them by his bill. But, in a bill to redeem a mortgage, redemption is the substance of the relief to which the Plaintiff is entitled, and the accounts are merely ancillary to it, and the Plaintiff must both state and prove a case, to entitle him to redeem. With respect to the necessity of praying redemption by the bill, where, as in Ireland and Jamaica, the practice of the Court is to decree a sale, instead of a foreclosure, several cases are to be found in the books. The cases of *M'Donough v. Shewbridge* (2 Ball and Bea. 555), and *Drew v. O'Hara* (2 Ball and Bea. 562), support the doctrine, that the bill must offer to redeem, where a prior incumbrancer is brought before the Court. The case of *Bulfe v. Lord*, as it is reported (1 Con. and Law. 519), might, at first, seem to support the contrary proposition. There, a mortgagee, entitled to a first and third mortgage, brought an intervening incumbrancer before the Court. The Plaintiff prayed a sale and application of the proceeds in payment of the charges, but did not by his bill offer to redeem the second mortgage; and it might appear that the Chancellor, Sir Edward Sugden, thought, that, in Ireland, where, as in Jamaica, the Court decrees a sale instead of a foreclosure, such an offer might be dispensed with. But the report of the same case (2 Dru. and War. 408) is fuller, and seems more accurate; and by that report, it is clear, that the Chancellor thought that redemption was the only relief to which the Plaintiff was [427] entitled, that there ought to have been in the bill an offer to redeem, and he only disallowed the objection, because, not being raised by the answer, it came by surprise upon the Plaintiff at the hearing. However, he imposed upon the Plaintiff the necessity of redeeming the second mortgage. This case, therefore, so far from supporting the present bill, is rather an authority against it. It shows, that redemption is the only relief to which a subsequent incumbrancer is entitled against a prior incumbrance, even

where the Court decrees a sale, instead of a foreclosure, and it leads, by inference, to the conclusion, that the objection, if taken in proper time, must be allowed. Here the Plaintiff, by the demurrer, had notice of the objection; it does not appear, that, at the bar, she offered, or was willing, to redeem, and, if she had offered to do so, her bill was filed for a wholly different and inconsistent purpose: it sought relief of an entirely different kind, and was quite incapable of being used as a bill for redemption. Upon this point, the cases referred to by the Respondent, of *Troughton v. Binkes* [6 Ves. 573], and *Martinez v. Cooper* [2 Russ. 198], are very material and decisive. It is then said, that, at all events, the Plaintiff, as a judgment creditor with a writ of execution, had an equitable lien on the mortgaged estates, in respect of which she was entitled to be present at taking the mortgage accounts, and that she ought to have been made a party to Horsfall's suit; and that her bill may be considered as a cross-bill for that purpose, inasmuch as the proceedings in that suit, although not mentioned in her bill, are stated in the Defendant's answer. The Respondent, on the other hand, insists, that the Plaintiff, as a judgment creditor, had no lien upon the mortgaged property, but merely a right to come into equity, and remove the [428] legal impediment to the execution of her judgment by redeeming the legal mortgage. In support of this view of the case, *Neate v. The Duke of Marlborough* [3 My. and Cr. 407, 415], and other cases, are referred to; and it was stated at the bar, that the practice in England is now to make the judgment creditor a party to a bill of foreclosure. If it were necessary, in this case, to decide these points, there might, perhaps, be found to be considerable difficulty in the case cited by the Appellants, of *Rolleston v. Morton* (1 Con. and Law. 252), and which is more fully reported in 1 Dru. and War. 171. The Court was of opinion, that, even before the recent Statute, all judgment creditors were necessary parties in such cases; and Sir Edward Sugden stated, that it was, in England, the invariable practice to bring them before the Court. But it appears to us, that, supposing the Plaintiff ought to have been a party to Horsfall's suit, for the purpose of watching the mortgage accounts, she had already obtained, in substance, that relief; for she had procured an order, under which she was entitled to be treated as a party in that cause, and to attend the passing the accounts; and this appeared at the hearing of her suit. The special case, therefore, attempted to be made against Horsfall, having entirely failed, and no offer to redeem being made, the bill appears to us to have been properly dismissed against him, and we think that the decree appealed from must be affirmed, with costs.

The question, then, remains upon the second appeal, whether we are to alter the order in *Horsfall v. Dunstone*, overruling, in substance, the Appellant's exceptions. If we were to reverse this order, the effect would be to open the accounts, at present closed between the executors and the mortgagees, and the effect [429] of some of them might be injuriously to affect the interests of the executors. Now, those parties have not been served with this appeal, and we think that we cannot dispose of this question without hearing those parties, if they wish to be heard. This appeal, therefore, must stand over, and intimation must be given to the executors, that if they wish to be heard upon it, we will hear them, before expressing any opinion; but if they do not wish, as probably they may not, to appear, we shall then be ready to dispose of this appeal without any further argument.

The appeal stood over for six months, and the executors of Fairclough not having appeared or expressed any wish to be heard upon the second appeal, judgment was delivered, as follows, by

The Right Hon. T. Pemberton Leigh (June 28, 1847).—This appeal is brought from two orders of the Court of Chancery in Jamaica, made in a cause of *Horsfall v. Dunstone*. The case was argued before us some months ago, together with another appeal, by the same Appellant, against a decree of the same Court, in a cause of *Gordon v. Horsfall*, relating to the same subject-matter. The latter appeal was disposed of soon after the argument; in the present case, judgment was reserved, in order to give certain parties who might possibly be interested, and who had not been regularly served with process, an opportunity of appearing, and arguing the case, if they should think fit so to do. They have not, however, thought it necessary to appear, and we, therefore, proceed to deliver our judgment. The case, as far

as it is necessary to state it for the present purpose, was this—[His Lordship then [430] shortly recapitulated the several proceedings in the two suits of *Horsfall v. Dunstone*, and *Gordon v. Dunstone*, and the orders and decrees therein, down to the decree of the 31st of January, 1844, on the rehearing of the suit of *Gordon v. Dunstone*, when the bill was dismissed as against Horsfall (ante, [5 Moo. P.C.] p. 405)—and continued as follows:—]The principle of this decree was, that, as the Appellant had proved her judgment debt, she was entitled to a decree for relief against the estate of Fairclough; but as she had not made out her special case alleged against Horsfall, and had not offered to redeem him, the suit against him could not be maintained. Against this decree, so far as it dismissed the bill against Horsfall, Miss Gordon obtained leave to appeal. Her appeal was heard before us at the same time with that in which we are now delivering judgment, and the decree complained of was affirmed. On the 20th of September, 1844, the Respondent, Horsfall, presented his petition in the cause of *Horsfall v. Dunstone*, praying, that the Master's report, dated the 5th of August, 1840, might be confirmed absolute, and that the cause of *Horsfall v. Dunstone* might be set down to be heard, on further directions and on the costs reserved; and that all costs incurred in the said cause by the unnecessary intervention of the Appellant might be ordered and directed to be borne by her. On the 2nd of December, 1844, that petition was heard, and one of the orders now complained of was made, which was to this effect: that the Master's report should be confirmed absolute, and that the cause of *Horsfall v. Dunstone* should be set down to be heard on further directions the next hearing day. On the 18th of January, 1845, Miss Gordon obtained leave to appeal against [431] this order, and she has appealed accordingly. On the 27th of January, 1845, the cause of *Horsfall v. Dunstone* was heard upon further directions, when the following order was made:—"that the several Defendants in the cause of *Horsfall v. Dunstone*, on or before the 1st day of May next, should pay unto the complainant his taxed costs, and also the sum of £15,619 3s. 2d., with interest from the date of the Master's report; and in default thereof, the said plantation, etc., and all the stock upon and belonging thereto, and all other the premises comprised in the said indenture of mortgage, should be put up to sale, and actually sold, etc., and that the monies to be derived from such sale shall be paid in to the hands of the receiver-general of the island, and remain to the credit of the said cause of *Horsfall v. Dunstone* until the result of the appeal of the Appellant, Ann Carr Gordon, from the decree in *Gordon v. Dunstone*, shall be ascertained, and until the further order of the Court; and in case the Appellate Court shall confirm the decree of the Court, then that the Master do, out of the said sale monies, etc., in the first place, pay complainant, Horsfall, his costs, and, in the next place, the sum found due to him on said mortgage, and pay the residue as the Court should direct, with liberty to complainant, if the Appellate Court should make any other order, to apply to the Court for further directions." Against this order, also, the Appellant has appealed.

The propriety of both orders appears to us to depend upon the same question, viz., whether, either from the nature of the case or the terms of the order of the 2nd and 3rd of February, 1841, the dismissal of the Plaintiff's bill, in *Gordon v. Dunstone*, necessarily drew after it, the disallowance of the exceptions in the case [432] of *Horsfall v. Dunstone*. Looking at the cases on their merits, it appears to be free from doubt. If the Appellant had established such a case as entitled her to attend the passing the accounts in *Horsfall v. Dunstone*, and to take the judgment of the Master upon objections to the accounts, (and the order giving this liberty is not in dispute,) how could she be debarred from the right to have the judgment of the Vice-Chancellor upon them? If she was to come in under the decree as a party, why was she not entitled, like any other party, to the benefit of appealing from the Master to the Court? It is said, however, that the order of the 3rd of February, 1841, excludes her. That order provides, that, if the judgment demand should, at the hearing, be established as a just claim against the mortgaged premises, and if there should be no other funds from which the claim could be satisfied, the Court would direct a further reference; and it is contended, that the necessary inference is, that, unless these facts appeared, the exceptions would be overruled. This does not appear to us to be a necessary inference; but, if it was so, the judgment debt was established as a just claim on the mortgaged premises—not, indeed,

in priority to the mortgagees, which, as to the principal part of the property, was never claimed, but in subordination to it. The right to attend the Master could not be intended to depend on the priority of claim, for in that respect the Plaintiff had nothing to do with the accounts, nor could it depend upon the Plaintiff's success in impeaching the mortgage, or proving collusion or fraud, for in that case she would have been entitled to a very different account in her own suit. She had established the only right which made her a proper party to attend the taking the ac[433]counts in *Horsfall v. Dunstone*. The bill, as against Horsfall, failed, not because she had not made out her title specifically against the mortgaged estate, but because she had not asked the proper relief.

It appears to us, therefore, that she was entitled to have her exceptions heard and disposed of, and that the order of the 2nd of December, 1844, must, therefore, be reversed, and that the Court must be directed to proceed to hear the Appellant's exceptions. The order on further directions must, of course, also be reversed; but if any sale has taken place under it, probably it may be for the interest of all parties that it should not be disturbed, and, if so, some words may be necessary to be introduced into our order.

Declare that the Appellant was entitled to have her exceptions heard and disposed of, and with this declaration:—Reverse the two orders complained of.—Direct the Court to proceed accordingly; but this order is to be without prejudice to any sale which may have taken place under the order on further directions, which is to stand as if this order had not been made

[Mews' Dig. tit. COLONY, III. APPEAL TO PRIVY COUNCIL, 6 *Practice*, b.; tit. MORTGAGE, B. 7 of *Colonial Estate*, a. *West Indies*, L. REDEMPTION, 5. b. *Offer to redeem*, R. PARTIES, 1. c., *Judgment creditor*. S.C. 11 Jur. 569. On point as to necessity for offer to redeem, commented on and distinguished in *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Coy.*, 1879, 4 A.C. at p. 400.]

[434] ON APPEAL FROM THE CHANCERY COURT AT YORK.

FRANCIS HART DYKE.—Appellant; THOMAS WALFORD,—Respondent *
[Dec. 8, 9, 10, and 11, 1846].

Origin of the jurisdiction of the Church, in cases of Testament and Intestacy: not distinctly traceable.

The Church never had, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession, for the latter purposes [5 Moo. P.C. 488].

The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as *bona vacantia*, has, from the earliest times, been vested in the King, in right of His Crown [5 Moo. P.C. 494].

In 1377, Edward III., by charter, granted to his son, John of Gaunt, Duke of Lancaster, the county of Lancaster, as a County Palatine, within the Duchy of Lancaster, "*et quaecumque alia libertates et Jura Regalia ad Comitem Palatinum pertinentia, adeo integrè et libere sicut Comes Cestriae infra eundem Comitatum Cestriae dinoscitur obtinere*." By subsequent Charters, and Acts of Parliament, the Duchy, and such rights as were originally granted with it, became vested in Her Majesty, by a title distinct from Her Crown. Held, that the words of the Charter carried the right to *bona vacantia*, as *Jura Regalia*, to the County Palatine; and that the Queen, being entitled to the Duchy of Lancaster, separate from the Crown of England, was entitled to the goods of a bastard

* Present: Lord Brougham, Lord Langdale, Mr. Baron Parke, Sir Herbert Jenner Fust, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

intestate, dying without next of kin, in right of her Duchy of Lancaster, and administration granted to the nominee of Her Majesty, in right of Her Duchy [5 Moo. P.C. 496].

Held also, that it was not necessary for the Duke of Lancaster to show an enjoyment of such right, by the Earl of Chester, as, in the absence of evidence to the contrary, the Court would presume the enjoyment of the right, by the Earl of Chester [5 Moo. P.C. 498].

The question arising upon this appeal, respected the title of Her Majesty to the personal property of an intestate bastard, who died domiciled in the County Palatine of the Duchy of Lancaster; whether, in virtue of Her prerogative, as Queen of England, or whether it [435] devolved on Her Majesty in right of Her Duchy of Lancaster.

The proceedings originated in the Consistorial and Episcopal Court of Chester, in a cause of granting letters of administration of the goods, chattels, and credits of Ann Rothwell Wignall, otherwise Ann Rothwell, late of Preston, in the county of Lancaster, who died in that county in 1840, a minor, a bastard, spinster, and intestate, leaving personal property, within the county, of the value of £3500. The deceased was born within the County Palatine, and died domiciled there. In the Court, at Chester, a Proctor, duly authorized, having alleged that the deceased's personal estate and effects had devolved to Her Majesty, in right of Her royal prerogative, and that Her Majesty, by warrant, dated the 7th of April, 1842, had appointed George Maule, the Solicitor for the Treasury, Her nominee, for procuring letters of administration of the effects of the deceased for her use, prayed that letters of administration might be granted to George Maule. This application was opposed by a Proctor, who alleged, that Her Majesty had, by a warrant, bearing date the 28th of May, 1842, appointed John Teesdale, then Her Solicitor for the Duchy of Lancaster, Her nominee, and denied that the estate and effects of the deceased had devolved upon Her Majesty, in right of Her royal prerogative, but, on the contrary, alleged that such estate and effects devolved upon Her Majesty, in right of the Duchy of Lancaster, and prayed that letters of administration [436] might issue to John Teesdale, as the nominee of Her Majesty, in right of Her Duchy and County Palatine of Lancaster.

The interest of Her Majesty, in right of Her Duchy and County Palatine, being denied, an Act on Petition was brought in, wherein the Proctor for the Crown alleged, that the estate and effects of the deceased had devolved on Her Majesty, in right of Her royal prerogative.

By the answer on behalf of the Duchy, the interest of Her Majesty, in right of Her Prerogative, was denied; and it was alleged, that the deceased died domiciled within the County Palatine of Lancaster; that at the several times of the making and granting of the Charters and Letters Patent of the 51 Edw. III. and 13 Rich. II. the Earl of Chester possessed and enjoyed, within the county of Chester, the right to take and have, to his own use and profit, the goods, chattels, credits, and all personal estate and effects whatsoever, within the said county of Chester, of, and belonging to, every person who should die domiciled therein, intestate, and without next of kin; that King Edward the Third, by his Charter and Letters Patent of 28th of February, in the 51st year of his reign, did, in consideration, among other things, of the earnest probity and excellent wisdom of his son, John, Duke of Lancaster, in the said Charter and Letters Patent, called King of Castile and Leon, and Duke of Lancaster, of his, the said king's, certain knowledge and cheerful heart, with the assent of the prelates and nobles being in his, the said king's, then present Parliament, called together at Westminster, grant (among other things), in the words following: "*Concessimus pro nobis et haereditibus nostris, praefato filio nostro quod ipse ad totam vitam suam habeat* [437] *infra Comitatum Lancastriae Cancellariam suam ac brevia sua sub sigillo suo pro officio Cancellariae deputando consignanda justitiosarios suos tam ad placita Coronae quam ad quaecumque alia placita communem legem tangentia tenenda ac cognitiones eorumdem et quaecumque executiones per brevia sua et ministros suos ibidem faciendas et quaecumque alia libertates et jura regalia ad Comitem Palatinum pertinentia adeo integre et libere sicut Comes Cestriae infra eundem Comitatum Cestriae dinoscitur obtinere (deci-*

mus quintisdecimis et aliis quotis et subsidis nobis et haeredibus nostris per communitatem regni nostri et decimis et aliis quotis per clerum ejusdem regni nobis concessis et imposterum concedendis aut eidem clero per Sedem Apostolicam impositis et imponendis ac pardonationibus vitae et membrorum in casu quo aliquis ejusdem comitatus aut alius in eodem comitatu pro aliquo delicto vitam vel membrum amittere debeat ac etiam superioritate et potestate corrigendi ea quae in Curia ejusdem filii nostri ibidem erronee facta fuerint vel si idem filius noster aut ministri sui in justitia in Curia ejusdem filii nostri inibi facienda defecerint semper salvis)." That afterwards, and during the life of the said John, by another Charter, in the 13th year of the reign of King Richard the Second, after reciting that the said John, by petition to King Richard the Second, exhibited in the King's Parliament, holden at Gloucester, had suggested that, by pretext of the general words in the said Charter and Letters Patent of Edward the Third, he, the said John, had exercised and held, from the time of the grant of the said King (among other things), his, the said John's, Exchequer in the County of Lancaster, and all things to such Exchequer pertaining: and reciting also, that he, King Richard the Second, with the assent of the Prelates, Dukes, [438] Earls, Barons, and Commons, of the realm of England, in the same Parliament assembled, by his Letters Patent, had declared that he, the said John, should and might, by virtue of the said general words, use all and every the premises by him theretofore used, by pretext of the same general words, as is premised: and, further, that the said King Richard, of his special grace, had granted, for him and his heirs, to the said John, that he might have his Exchequer in the said County of Lancaster, and Barons and other Ministers necessary to the same Exchequer, and also all jurisdictions, executions, and customs whatsoever, in the same, his Exchequer, which were reasonably used in the King's Exchequer of England, and might fully and reasonably use and enjoy them there: the said King Richard the Second, with the assent of his then present Parliament, did grant unto the said John (among other things), in the words following, that is to say: "*Laeto corde et ex certa scientia nostra concessimus pro nobis et haeredibus nostris praefato avunculo nostro quod ipse et haeredes sui masculi de corpore suo legitime procreati habeant infra Comitatum Lancastriae Cancellariam suam ac breviam sua sub sigillo suo pro officio Cancellariae deputando conservanda Justitiarios suos tam ad placita Coronae quam ad quaecumque alia placita communem legem tangentia tenenda ac cognitiones eorundem et quascumque executiones per brevia sua et ministros suos ibidem faciendas et quaecumque alia libertates et jura regalia ad Comitum Palatinum pertinentia adeo libere et integre sicut Comes Cestriae dinoscitur obtinere. Et quod habeant Scaccarium suum in dicto Comitatu Lancastriae ac Barones et alios Ministros in eodem Scaccario necessarios, necnon jurisdictiones executiones et consuetudines quascumque in Scaccario nostro Angliae rationabiliter usitatas et eis ibidem plene qua-[439]-deant et rationabiliter utantur. Et quod habeant jurisdictionem et potestatem faciendi ac constituendi Justitiarios suos itinerantes ad placita forestae et alios Justitiarios ad quaecumque alia placita assisam forestae tangentia infra dictum Comitatum Lancastriae tenenda imperpetuum (placitis tamen et querelis quibuscumque ubi nos vel haeredes nostri in dicto Scaccario vel coram praefatis Justitiariis partes fuerimus vel fieri contingat emergentibus ac decimis quintisdecimis et aliis quotis et subsidiis nobis et haeredibus nostris per communitatem regni nostri et decimis et aliis quotis per clerum ejusdem regni concessis et ex nunc concedendis aut eidem clero per Sedem Apostolicam impositis et imponendis ac pardonationibus vitae et membrorum in casu quo aliquis ejusdem Comitatus aut alius in eodem Comitatu pro delicto aliquo vitam vel membrum amittere debeat ac etiam superioritate et potestate corrigendi ea quae in Curia ejusdem avunculi nostri vel dictorum haeredum suorum ibidem erronee facta fuerint vel (si) idem avunculus noster seu dicti haeredes sui aut eorum ministri in justitia in curia sua facienda defecerint, semper salvis)."* That the said John, by virtue of the said Charters and Letters Patent, held and enjoyed, before, and at the time of his death, in tail male, the rights, franchises, privileges, and profits to the said County Palatine, and the grant thereof appertaining, as part and parcel of the Duchy of Lancaster, and that after the death of the said John, his, the said John's, son, Henry (thereafter King of England, by the title of King Henry IV.) became seised, and up to and at the time of his, the said Henry's, becoming King of England, held in tail male, the said rights, franchises, privileges, and profits, as

heir male of the body of the said John, by virtue of the said grants. That the said King Henry IV., by his Charter [440] and Letters Patent, of the 14th day of October, in the first year of his reign, of his certain knowledge, and with the assent of his then present Parliament, did, for himself and his heirs grant, declare, decree, and ordain (among other things), in the words following:—" *Quod tam Ducatus noster Lancastrie quam universa et singula alia commitatus honores castra maneria feoda advocaciones possessiones annuitates et dominia quaecumque nobis ante adeptionem dignitatis nostrae regiae qualitercumque et ubicumque jure haereditario in dominico servitio vel in reversione seu alias qualitercumque discensa nobis et dictis haeredibus nostris in cartis praedictis specificatis in forma praedicta remaneant imperpetuum et quod taliter et tali modo et per tales officarios et ministros in omnibus deducantur gubernentur et pertractentur sicut remanere deduci gubernari et pertractari deberent si ad culmen dignitatis regiae assumpti minimi fuissetmus ac insuper quod talia et hujusmodi libertates jura regalia consuetudines et franchises in Ducatu comitatibus honoribus castris maneriis feodis ac caeteris possessionibus et dominiis praedictis in omnibus et per omnia imperpetuum habeantur et exercentur continuentur fiant et utantur et per tales officarios et ministros gubernentur et exequantur quae et qualia et per quales officarios et ministros tam tempore dicti Domini et patris nostri quam temporibus aliorum progenitorum et antecessorum nostrorum in eisdem Ducatu comitatibus honoribus castris maneriis feodis ac aliis possessionibus et dominiis praedictis uti et haberi ac regi et gubernari consueverunt virtute cartarum praedictarum:*" by virtue of which said last Charter and Letters Patent of King Henry IV., the same rights, liberties, franchises, and all other privileges and advantages whatsoever, did, after the death of the said King Henry IV., descend to, and were enjoyed [441] by, the late Kings, Henry V. and VI. respectively, in right of, and united with, and annexed to, and as parcels and members of, the Duchy of Lancaster. That his said Majesty, King Henry VI., having been, in the first year of the reign of his late Majesty, King Edward the Fourth, in the year 1461, by, and with, the assent of Parliament, declared and adjudged to be convicted and attainted of high treason, it was further ordained by the said Parliament, that the said Henry, late called King Henry VI., should forfeit to the said King Edward IV. and the Crown of England, all castles, manors, lands, lordships, advowsons, hereditaments and possessions, with their appurtenances, parcel or member, of the said Duchy of Lancaster, or thereunto united or annexed; and it was also ordained and established by the said Parliament, that the same, with their appurtenances, should be the Duchy of Lancaster Corporate, and be called the Duchy of Lancaster: and that his said Majesty, King Edward IV. should have, seize, take, hold, enjoy and inherit all the same, by the name of Duchy, from all other his inheritances, separate, to him and his heirs, Kings of England, for ever; and that the County of Lancaster should be a County Palatine. And after mentioning and reciting certain acts of Parliament, passed in the reign of King Edward the Fourth, for dismembering the Duchy, and afterwards repeated in the first year of the reign of King Henry VII., it was further alleged on behalf of Her Majesty; that by virtue of the several Charters, Letters Patent, and Acts of Parliament, hereinbefore mentioned, the said Duchy, with all the rights, liberties, franchises, and all other privileges and advantages whatsoever thereunto belonging and appertaining, had descended to Her present Majesty with the Crown of these realms, but separate from the same, in as full and ample a [442] manner as the same were possessed by any of the before-mentioned Kings of England; by reason whereof, it was alleged and submitted, that the said deceased, having died a bastard, a spinster, and intestate, domiciled within the said County Palatine of Lancaster, the said goods, chattels, and credits, of the said deceased, within the said County Palatine, had devolved upon, and belonged to, Her said Majesty, in right of Her said Duchy and County Palatine: and he prayed, that letters of administration of all goods, chattels and credits of the said Ann Rothwell, deceased, should be granted and committed to him, the said John Teesdale, as the nominee of Her Majesty, in right of her Duchy and County Palatine of Lancaster, and for the use of Her Majesty, in right of her said Duchy and County Palatine.

The reply, by the nominee of the Crown, on behalf of Her Majesty, alleged, that, at the times of making and granting the Charters and Letters Patent of the 51

Edward III., and 13 Richard II., the Earl of Chester had not, as alleged, possessed and enjoyed, within the County of Chester, the right to take and have to his own use and profit, the goods, chattels, and personal estates and effects within the said county, of persons dying domiciled therein, intestate, and having none of kin: that the right to such goods, as well within the said county, as elsewhere, was in the Ordinary of the diocese, wherein the deceased resided at the time of his death, and that the Ordinary disposed thereof, according to his conscience, in pious uses; that the law trusted him with the sole distribution thereof, and that the clergy, in this trust, were unaccountable to any, but to God and themselves. That by the Statute (Westminster, ii.) 13 Edw. I., c. xix., it is recited and enacted that, "Whereas after the death of a person dying intestate, [443] which is bounden to some other for debt, the goods come to the Ordinary to be disposed; the Ordinary from henceforth shall be bound to answer the debts, as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden if he had made a testament." That by the Statute (Westminster, i.), 31 Edw. III., c. xi., it is recited and enacted, "*Item*, it is accorded and assented, that in case where a man dieth intestate, the Ordinaries shall depute the next and most lawful friends of the dead person intestate, to administer his goods, which deputies shall have an action to demand and recover, as executors, the debts due to the said person intestate, in the King's Court, for to administer and dispend for the soul of the dead: and shall answer also in the King's Court to other, to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries, as executors be in the case of testament, as well of the time past as the time to come." That divers other Statutes were afterwards made and passed, touching the granting of letters of administration of intestates' effects, viz., 21 Hen. VIII., c. v., s. 3 and 4; 43 Eliz., c. viii.; 22 and 23 Car. II., c. x.; and 29 Car. II., c. iii., s. 25; but that the case of an intestate dying without kindred is not within the purview of those acts; that in all such cases, as well in the County of Chester and Duchy and County Palatine of Lancaster, as elsewhere, except where, by prescription, lords of manors and others exercise the franchise, it hath been, and now is, the invariable practice of the Ordinary to commit and grant the administration of the goods, chattels, and credits of such deceased persons to the nominee appointed by and for the use and benefit of the Crown, or to the [444] lawful creditors of the deceased; that the Crown hath, by warrant under the royal sign manual, countersigned by the High Treasurer, Chancellor, or Under Treasurer, or Commissioners of the Treasury, for the time being, granted the proceeds of all such goods, chattels, and credits, when collected by such nominees, as well in the said County of Chester and Duchy and County Palatine of Lancaster as elsewhere, or the greater part thereof, to and among the natural next of kin of such deceased persons and others, in such manner, shares, and proportions as to the Crown has appeared meet. That the goods, chattels, and credits of persons dying intestate, and having none of kin, were not "*jura regalia*," of franchise, of the Crown, at the times of making and granting the Charters and Letters Patent, or creation of the said Duchy and County Palatine of Lancaster, and were not, and could not be, granted by any or either of the said Charters of Letters Patent as such "*jura regalia*," or franchise, for that they belonged to the Ordinary, and were not mentioned in the said Charters or Letters, and, consequently, that they could not have devolved upon, and did not belong to, Her Majesty, in right of her said Duchy or County Palatine. That by the Statute, 1 Will. IV., c. 25, intituled, "An Act for the support of His Majesty's household, and for the honour and dignity of the Crown of the United Kingdom of Great Britain and Ireland," by the 12th section, among other things, it was enacted, "that nothing therein contained should extend, or be construed to extend, in anywise to impair, or affect, or prejudice any rights or powers of control, or management, or direction which had been or might be exercised by authority of the Crown, or other lawful warrant, relative to the granting or distributing of any personal property devolved to the Crown by reason of the want [445] of next of kin, or personal representative of any deceased person, but that the same rights and powers should continue to be used, exercised, and enjoyed in as full, free, ample, and efficient manner, to all intents and purposes, as if the said Act had not been made." And, in conclusion, the Judge was prayed to reject the prayer of the promovent,

and to decree letters of administration of the goods and chattels of the said Ann Rothwell, deceased, to George Maule, as the nominee, and for the use and benefit of Her Majesty.

The rejoinder, filed on behalf of the Duchy, expressly denied, that, at the times alleged in the reply, the right to the goods, chattels, and credits of persons dying intestate, as well within the said County of Chester, as elsewhere, was in the Ordinary of the diocese wherein such person resided at the time of death, and that the Ordinary disposed thereof according to his conscience, in pious uses, and that the law trusted him with the sole distribution thereof; and that in this solemn and conscientious trust, the clergy were unaccountable to any, but to God and themselves; and it was further expressly denied, that in all cases where an intestate died without kindred, it had been, and was, as well in the said County of Chester, and Duchy and County Palatine of Lancaster, the invariable practice of the Ordinary, to commit and grant letters of administration, to the nominee appointed by, and for the use and benefit of, the Crown, or to the lawful creditors of the deceased. And it was expressly alleged, that if the Ordinary had, at any time, committed and granted the administration of the goods, chattels, and credits of any person dying intestate, and without kindred, domiciled in the Duchy and County Palatine, as alleged in the reply, such letters of administration had been granted [446] wrongfully, and illegally, and against the rights of Her Majesty, in right of Her Duchy and County Palatine of Lancaster; and it was denied, that the said goods, chattels, and credits of a person dying intestate, and having none of kin, were "*jura regalia*," or franchise of the Crown, at the time of granting the Charters and Letters Patent, or creation of the Duchy and County Palatine; and it was further denied, that the said goods, chattels, and credits were, and could have been, granted by either or any of the said Charters, or Letters Patent, as such "*jura regalia*," or franchise, as aforesaid.

Both parties filed affidavits in support of the principal facts and allegations contained in the pleadings. They also filed schedules of administrations, which had been granted, during the present century, to intestates' property within the Duchy of Lancaster. The majority of these letters of administration were granted to the nominees of the Crown; but some were granted to the nominees of the Duchy. In none of these cases, the question at issue had been raised.

After hearing counsel on both sides, the Chancellor of Chester (The Rev. Henry Raikes), on the 30th of November, 1843, pronounced judgment, holding, that the right to intestates' goods did not pass to the Duchy, by the words "*jura regalia*," or any other words in the Charters; and that, at the date of the Charters, the right to such goods inherently belonged to the Crown, as "*bona vacantia*," and pronounced in favour of the promovent, and decreed letters of administration, to the nominee of the Crown, in right of the prerogative.

From this sentence and decree, an appeal was prosecuted, on behalf of the Duchy, to the Chancery Court of York, where the case was again argued by counsel, and the surrogate (The Rev. Robert Sutton), by his Judgment, bearing date the 21st of March, [447] 1844, reversed the Judgment of the Court of Chester. This Judgment was as follows:— "The plenitude of the words of the original grant of Palatinal rights, and *jura regalia*, to the Duke of Lancaster, and of the subsequent Charters and Acts of Parliament, confirming it, would comprehend the right in question. The proof adduced on both sides, of the exercise of the right, is too modern, and too conflicting, to be of much weight. The Court is of opinion, that the Crown is entitled to the administration, in right of the Duchy of Lancaster."

From this Judgment, Francis Hart Dyke, Her Majesty's proctor, on behalf of the Crown, brought the present appeal: pending the same, John Teesdale, Her Majesty's nominee on that behalf, died: when Her Majesty, by warrant under Her Royal Sign Manual, bearing date the 12th of January, 1846, appointed the now Respondent, Thomas Walford, Solicitor for the affairs of the Duchy of Lancaster, Her nominee in his stead. The Appeal now came on for hearing.

The Queen's Advocate (Sir John Dodson), the Solicitor-General (Sir David Dundas), Mr. Chilton, Q.C., and Mr. C. Townsend, for the Appellant.

The Queen's Advocate.—I appear for the nominee of the Crown, *jure Coronæ*. The cause comes here upon Appeal from the Chancery Court of York, to which Court it was appealed from the Consistory Court of Chester. The Court at York reversed

the decision of the Consistory Court of Chester, the Judgment of which, I appear, with my learned friends, to uphold. The question turns upon [448] the true construction and interpretation of the several Charters, erecting the Duchy of Lancaster into a County Palatine. This was effected by Charters, Letters Patent, and Acts of Parliament. The first Charter was made by Edward III., in the year 1377. By this Charter, he granted to his son, John of Gaunt, for life, the county of Lancaster, as a County Palatine. Richard II., in 1390, by another Charter, extended this grant to the heirs male of his body lawfully begotten. Under these grants, John of Gaunt held the Duchy, in tail male, till his death. Upon that event, his son, Henry, afterwards Henry IV., made a Charter, with the assent of Parliament, by which it was declared, that the Duchy was to be held by him, and his heirs, separate from the Crown, with all rights, liberties, etc. Henry V. succeeded to the Crown, and to the Duchy, which descended to Henry VI., who was deposed and adjudged guilty of high treason; whereupon Edward IV. took, by virtue of an Act of Parliament, the Crown, and also the Duchy, as a County Palatine, to be held by him and his heirs for ever. Since that period, the Duchy has descended, through successive Kings of England, to Her present Majesty, in whom it now is vested, by a title distinct from her Crown. Two questions only, are raised by this Appeal. First; Whether, at the date of the Charters of Edw. III., and Rich. II., to John of Gaunt, the King had himself the right to the personal estate of persons dying within the Duchy, intestate or illegitimate, without any known relations. And, Secondly; Supposing the right to be in the Crown, at that time, whether it passed by the grants to John of Gaunt.

I. We submit, that the right to an intestate bastard's estate, at the date of the Charters of 53 Edw. III., in the year 1377, and 13 Rich. II., in 1390, was in the Church, and not in the Crown. To determine this question, [449] it is not necessary to enter into the history of the granting of intestate estates, but to inquire simply what was the law respecting them, at the time of making these Charters. The best evidence will be the Statutes of the Kingdom. By the Statute (Westminster, ii.), 13 Edw. I., c. xix., the Ordinary is directed to pay the debts of intestates. The Statute contains this passage: "Whereas after the death of a person, dying intestate, which is bounden to some other for debt, the goods come to the Ordinary to be disposed; the Ordinary, from henceforth, shall be bound to answer the debts, as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden if he had made a testament." It is clear, from this recital, that, prior to the Statute, the Ordinary took all the personal property of the intestate, without being accountable for it. This is not an Act declaratory of what the law was, in respect to the payment of the debts of an intestate, but what it should be in future. The object of the Statute was, to make the property, in the hands of the Ordinary, liable to the debts of the intestate. Before this Statute, he was not liable to pay the debts; he could dispose of the goods, in pious uses, as he thought fit. The property of an intestate belonged to the Church beneficially. It shows the state of the law, at that time, that the right of administration to him that died intestate, was committed to the Ordinary, who alone had the disposition thereof, and acted under the direction of the Church, or, as he thought fit, in applying the property to pious uses; and this continued down to the passing of the Statute (Westminster, i.) 31st of Edw. III., c. xi. By that Statute, the Ordinary was bound, from that time forth, to commit the administration of the estate to "the next [450] and most lawful friends of the dead person intestate;" and it was further enacted, that "they should be accountable to the Ordinaries, as executors be, in case of testament." The Statutes 13 Edw. I., c. xix., and 31 Edw. III., c. xi., were anterior to the Charters, and are distinct legislative recognitions of the then exclusive right of the Ordinary to the intestate's effects. The result of these Statutes, as well as the subsequent Acts, of the 21st Hen. VIII., c. v., sec. 3 and 4; 43 Eliz., c. viii.; 22 and 23 Car. II., c. x.; and the 29 Car. II., c. iii., s. 25, is, that there was no right, at the time of the passing of any of these acts, in the Crown, to the goods of intestates, but that the right was in the Ordinary, subject to being applied according to those several Statutes. The old authorities on Ecclesiastical law, upon this subject, are to the same effect. Lyndwood published the *Provinciale*, in the year 1341-2, which contains the constitutions of Archbishop John of Stratford, passed in the year 1341-2, and also refers to an earlier Statute of Archbishop Boniface, passed in the year 1261. The constitution of

Archbishop John of Stratford, (Lyndw., *Prov.*, lib. 3, tit. 13, "*De Testamentis*," p. 171, Edit. 1679.) is in these words: "*Statuta bona memoria Bonifarii, quondam Cantuariensis Archiepiscopi, Prædecessoris nostri, circa bona intestatorum, et Ascriptitiorum, aliorumq. servilis conditionis hominu ultimas voluntates, quod incipit 'Cæterum contingit interdum, etc.' a multis in dubium revocatum noviter recensentes, quibusdam, ad id additis, et aliis ab eo subtractis sub verbis infra scriptis. Decernimus sic in posterum firmiter observandum:*" and he then states, that it sometimes happens that, on the death of intestates, the feudal lords would not permit the debts of the deceased to be paid out of their personal effects, nor provisions to be [451] made for the widows and children: "*Vel aliter per dispositionem Ordinariorum bona prædicta pro ea portione quæ, secundum consuetudinem patriæ defunctos contingit, permittunt distribui pro eisdem,*" etc. (Lynd. *Prov.*, p. 172): and he forbids these acts, under ecclesiastical penalties. And, in another Constitution, he directs—" *Necnon ab intestato decedentium solutis debitis eorundem, bona quæ supererunt, in pias causas, et personis decedentium consanguineis, servatoribus et propinquis, seu aliis pro defunctorum animarum salute, distribuant et convertant, nihil inde sibi retento,*" etc. (*ib.* p. 180). From this, it appears, that the property of an intestate did not go to the next of kin absolutely, but only as the Church thought proper, after the *pia causæ* had been provided for. The gloss of Lyndwood, on "*pias causas*" is: "*Utpote, inter personas miserabiles, viz. pupillos, viduas, peregrinos, et pauperes auxilio proprio destitutos; item ratione morbi vel ætatis expositos,*" etc. (*ib.* p. 180). And further, "*Inter pias etiam causas munerantur quæ relinquuntur ad custodiam civitatis,*" etc. The gloss on the word "*decedentium*" is less intelligible: he says, "*Hic oportet distinguere inter Clericos decedentes ab Intestato, et Laicos; item inter Clericos Beneficiatos et non beneficiatos;*" (*ib.* p. 180) and then he goes on rather to describe what the law was at the time respecting the distribution of intestate estates, than what the rights of the Church or the Crown were. The gloss hardly appears to belong to the text; for in lib. 3, tit. 28, "*De Immunitate Ecclesiæ*," p. 263, this passage occurs: "*Quidam etiam Domini temporales, et eorum Ballivi, bona decedentium ab intestato in suis districtibus ad ipsos Dominos prætendentes fore, quamvis errone devoluta, ne per Ordinarios bona hujus-[452]-modi pro debitorum solutione sic decedentium, ac in alios pios usus pro ipsorum animarum salute convertantur utiliter, prout consensu Regio et Magnatum Regni Angliæ, tanquam pro jure Ecclesiasticæ libertate ab olim extitit ordinatum, impediunt, in derogationem Ecclesiastica libertatis jurisque, et jurisdictionis Ecclesiasticorum impedimentum et læsionem enormem.*" This shows, that the Temporal Lords interfered with the liberties of the Church, and he prohibits these acts under penalties. In the Constitution of Othobon, Legate to Pope Gregory IX., in the year 1269, (Lynd., *Prov.*, tit. 23, "*De Bonis Intestatorum*," p. 121,) the summary is, "*Intestatorum bona per provisionem a Prelatis Angliæ cum Regis et Baronum approbatione ordinatam in pios usus convertenda Prelati contra dictam provisionem recipere vel occupare nequaquam præsumant.*" These are the Ecclesiastical authorities on this subject.

By the Common law and custom of England, the Ordinary had also the right to dispose of intestates' goods, *in pios usus*. It is said by Mr. Justice Weston, in *Graysbrooke v. Fox* (Plowd. 275), "that by the Common law, before the Statute, 13 Edw. I., c. xix., if a man had died intestate, the Ordinary should have had his goods to dispose '*in pios usus*;' " in that case, the right of administration was much discussed: it is the first authority on the subject: and in *Offley v. Best* (1 Levinz. 186), and *Manning v. Napp* (1 Salk. 37), it was said, that the right to administer intestates' effects was in the Ordinary. In *Henslow's Case* (9 Coke's Rep. 36), the power of the Ordinary, before the Statute, 13 Edw. I., c. xix., and the alterations made by that Statute, was much discussed and questioned, and that case will no doubt be relied upon by the Re-[453]spondent as an authority in his favour: it has, however been overruled. *Hughes v. Hughes* (Carter's Rep. 125). *Snelling v. Norton* (Cro. Eliz. 409). *Manning v. Napp* (Salk. 37). Lord Coke, in *Henslow's case* (9 Rep. 38), speaking of the Constitution of Archbishop John of Stratford, as being made in the year 1380, made a mistake in the date, which is very material: the Constitution of Stafford was made in London, in the year 1341-2. *Hughes v. Hughes*, Arch. Parker's Book, Latin edit. 1573, cited by Lord Coke (9 Rep. 38).

The Magna Charta of King John, c. 18, art. 27, contains the following passage: "*Si aliquis liber homo intestatus decesserit, catalla sua per manus propinquorum, parentum et amicorum suorum, per visum Ecclesie, distribuuntur, salvo unicuique debito que defunctus ei debebat*" (2 Bla. Law Tracts, App., p. xii.). Selden, in treating "Of the Origin of Ecclesiastical Jurisdiction of Testaments," p. 2, c. 3, says, that this provision formed part of the Great Charter of Henry III., and is contained in many of the ancient manuscripts, though omitted in the exemplification (see note in *Warwick v. Greville*, 1 Phill. Ecc. Rep. 124). The result of these authorities, particularly the early Statutes, is, that, prior to the years 1377 and 1390, the right in contest, was in the Ordinary, and not in the Crown, and, consequently, the Crown could not grant the right, for it could not grant that which it never possessed, or if it ever had, it was then vested in the Church.

II. If, however, I am wrong on this point, and that the right to goods of persons dying intestate and illegitimate, without known relations, was absolutely in the King at the date of the Charters, and that he had the [454] power to grant it, the question is, did the Crown effectually grant it to the Duke of Lancaster? That must depend upon the Charter, 53 Ed. III., which is the title-deed upon which the Respondent relies. This Charter confers only such rights as the former Earl of Chester was known to possess. But it is nowhere shown, that the Earl of Chester ever possessed or exercised the right to the goods of persons dying intestate. It is the foundation of the Respondent's title to make out, that the Earl of Chester had such a right; yet there is no Charter to Hugh Lupus, the first Earl of Chester, forthcoming. The Charter of John of Gaunt is in terms qualified; the grant of "*jura regalia*," was not of all "*jura regalia*," but of such only as appertained to the Earls of Chester, "*sicut Comes Cestrie dinoscitur obtinero*," nor is there any proof, that it was exercised by the Duchy of Lancaster. The few acts of modern usurpation by the Duchy, do not afford proof of user. If the grant is to be considered as extensive, as the Duchy contend for, then what right could the Crown have had to appoint a Bishop of Chester? which right, according to Lord Coke (4 Inst. 211), was in the King. "*Tenet Episcopus ejusdem civitatis de Rege, quod ad suum pertinet Episcopatum; totam reliquam terram comitatus tenet Hugo Comes de Rege*."—[Lord Brougham: The County Palatine of Chester is said by Lord Coke, 4 Inst. 211, to be by prescription.]—What is conferred upon a Count Palatine, is jurisdiction over "*totam terram*," but not all "*jura regalia*," for if so, he would have had the appointment of Bishops. Grants by the Crown are to be strictly construed, 17 Viner's Abr., tit. "Prerogative," p. 126, 130. Another prerogative right is the "*fiscus*," or mint. The King had a mint at Chester (2 Ruding, Annals of the Coinage of Great Britain, 157), [455] and, although William the Conqueror, in 1070, created Hugh Lupus Earl of Chester, yet the coins struck there, during the time it remained a County Palatine, were with the heads of Will. I., Hen. I., Hen. II., and Edw. I., but no coins are extant, from that mint, with the effigies of an Earl of Chester, or Duke of Lancaster. It is clear, therefore, that all "*jura regalia*" were not granted, and that the Charters only passed the right of jurisdiction, and rights arising from tenure. Prerogative rights, unless specially named, do not pass; consequently, I submit, first, that at the time of granting these Charters, the right to the goods of intestates was not in the Crown, but in the Church; and secondly, that the words of the Charter, granted to John of Gaunt, do not of themselves, carry the rights insisted on, much less can they do so by reference to a supposed grant to the Earls of Chester, which is not produced.—[Dr. Lushington: Supposing a benefice in the Duchy were to lapse to the Crown, would it pass "*jure Coronæ*," or "*jure Ducatus*?"]—Such a case, as a lapsed benefice, I am informed, has never occurred.

The Solicitor-General [Sir David Dundas].—This is a case of a bastard intestate, domiciled in the Duchy of Lancaster, leaving goods, but without kin; and I submit that the Queen, by hereditary right, *jure Coronæ*, is entitled to the administration of the goods. The goods of all intestates, throughout the kingdom, become vested in the Queen, as *ultima hæres*. Her title is completed by the grant from the Ordinary, to whom both the Crown and the public are obliged to go, for letters of administration. It may be asked, how in law the Queen became the *ultima hæres*? By the civil law, the Emperor succeeded as *ultimus hæres*, [456] and was entitled to the "*bona vacantia*" of deceased persons. Cod., lib. 10, tit. 10. "*De homi-*

vacantibus;" but there is no authority in our law for calling intestates' goods "*bona vacantia*." In Williams, "On Executors," p. 334 (3 edit.), it is stated thus: "If a bastard, who, as *nullius filius*, has no kindred, or any other person, having no kindred, die intestate, and without wife or child, it has formerly been holden that the Ordinary could seize his goods, and dispose of them to pious uses; but it is now settled, that the King is entitled to them as *ultimus haeres*, subject, nevertheless, to the debts of the intestate;" and he cites in support of this proposition the cases of *Jones v. Goodchild* (3 Peere Will. 33), *Rutherford v. Maule* (4 Hagg. Ecc. Rep. 213), and *Megit v. Johnson* (2 Doug. 542): this last authority was the case of a *jelo de se*: Lord Mansfield doubted whether the right of the Crown to the goods of an intestate, vested in the Crown for forfeiture, could be conveyed, except by Record; but he held it to be clear, that, "had he been a bastard, or, being legitimate, had died without kin, the King would have taken as *ultimus haeres*." The substantial question then is, has the Crown parted with this right, whatever it is, and has it parted with it, to the Duchy of Lancaster? The other side contend, that it has parted with the "*jura regalia*," and that this right is a part of the "*jura regalia*;" but we submit, that the Crown did not part with it, at the time of the Charter, for the right was not in the Crown, or, at all events, if it was in the Crown, the words of the Charter do not convey such rights to the Duke of Lancaster. The first point, therefore, is, whether at the time of the grant, the right was in the Crown or the Ordinary.

[457] I. The origin of the Ecclesiastical jurisdiction over Wills, is wrapped in mist and darkness. Selden, a learned man in Church matters, but an authority hostile to the Church, and not an unbiassed writer, says, that he cannot see his way clearly. According to Spelman (edit. by Bp. Gibson, 1723), in his work, "On Probate of Wills and Testaments," P. 1, p. 129, the clergy granted probate of Wills, even in Justinian's time, (A.D. 530,) Cod., lib. 1, tit. 3, s. 41, and tit. 6, s. 23; referring to the fourth Council of Carthage, which ordained that, "*Episcopus tuitionem testamentorum non suscipiat*," and to Gratian's Gloss, which says, "*Tuitionem id est apertionem*," etc., he construes, as Selden, in his work, "Origin of Ecclesiastical Jurisdiction of Testaments," vol. iii. p. 1665. Ed. 1726, does, *tuitio* for *aperture*, or probate. The 18th of William the Conqueror (A.D. 1084), is supposed to be the commencement of the secular authority of the Ecclesiastical Court, previously to which, the Bishop sat in the County Court, jointly with the Sheriff. In his own Court, the Bishop assumed jurisdiction over Wills, and over intestates' property. Henry's History of Great Britain, vol. iii. p. 403. Muratoris, Antiq., Italicae, vol. v. p. 654. It will be necessary to ascertain, in the first place, what were the Saxon laws as to intestates. In the ancient laws and institutes of England (vol. i. p. 413), under the head "Laws of King Canute," c. lxxi., it is said, "And if any one depart this life intestate, be it through his neglect, be it through sudden death; then let not the lord draw more from his property than his lawful heriot. And, according to his direction, let the property be distributed very justly to the wife, and children, and rela-[458]-tions: to every one according to the degree that belongs to him." Again, at p. 481 of the same collection of laws and institutes, under the head of "The Laws of King William the Conqueror," c. xxxiv., tit. "*De sine Testamento Morientibus*," it is laid down, "*Si quis paterfamilias casu aliquo sine testamento obierit, pueri inter se hereditatem paternam equaliter dividant*." These old laws refer to land, and not to goods and chattels. The word "*hereditatem*" clearly shows, that they were dealing with the land, not with the goods and chattels of intestates. Then came the Magna Charta of King John, (A.D. 1215,) which confirmed the right of the Church over intestates' property c. 18, Art. 27, 2 Bla. Law Tracts, App., p. xii., cited *ante*, p. 453).—[Lord Brougham: It is admitted by all political writers, that the Magna Charta was declaratory.]—This right is again recognised to be in the Church, by two Charters, the 1st of Henry III. and the 9th Henry III. in 1225: one of the attesting witnesses to this Charter, was Ranulphus Earl of Chester, who was fourth in descent from Hugh Lupus. If then the right to intestates' goods had been granted to Hugh Lupus, how did it happen, that he witnessed this Charter, which admits the right to be in the Church? The clause, "*Si aliquis liber homo intestatus*," etc., is not contained in the printed copy of the Charter of King Henry III. Selden, "Origin of Ecclesiastical Jurisdiction of Testaments," p. 2, c. 3, however, says, "in very many of the ancientest manuscripts,

this clause is to be found, though it is omitted in the exemplification, and is generally omitted in the printed editions of that Charter." Prynne (1 Hist. of King John, pp. 18, 19, and 20: ed. 1672), a bitter enemy to the Church, says, [459] that the 18th clause of the Magna Charta of King John, which provides that intestates' goods shall be distributed "*per visum Ecclesiae*," (*ante*, p. 453) was wholly expunged from the Charter of Henry III.: but Selden does not adopt the view of Prynne: and Lord Coke (2 Inst. cap. 18, p. 32), in his reading upon the Magna Charta, does not say a word about the omitted clause. But it may be contended, that by the words "*per visum Ecclesiae*," was meant only to give a power of supervision. I submit, however, that the Church exercised under those words, the right of granting probate and administration.—[Lord Brougham: Chief Baron Gilbert, in his Reports (p. 206), cites the Charter of Richard I.] Yes, it is mentioned by Gilbert, as sanctioning the distribution of intestates' goods by Ecclesiastical authority. Bacon's Abr., tit. "Executors and Administrators," (E). Then comes the Statute of Westminster, ii., 13 Edw. I., c. xix. What construction can be put upon this Statute, but that it confirms the power, that the Church then had, over intestates' property! The authority of the Ordinary is admitted, "*Cum post Mortem alienius decedentis intestati et obligati aliquibus in debito bona deveniant ad Ordinarios disponenda*," and it enacts that he shall, out of the goods of the intestate, be answerable for the deceased's debts. This Statute was followed by the 18th Edw. III., Stat. iii., c. vi., which declares, that causes testamentary, notoriously pertain to the cognizance of Holy Church. The 31st Edw. III. Stat. i., c. 11, further enacts, that the Ordinaries shall depute "the next and most lawful friends of the dead person intestate," that is, the next of kin of an intestate, "to administer his goods." Under an equitable construction of the term "next of kin," the Queen, as *ultima haeres*, [460] may, perhaps, come in under this Statute.—[Lord Brougham: There can be no doubt that the Queen is *ultima haeres* of the land, as all land originally came from the Crown; she comes in upon the feudal principal, because the Crown is Lord of the fee. The French word "*biens*," used in the Statute, 31 Edw. iii., Stat. i., c. 11, though translated "goods," has a larger signification: it means lands, as well as goods; such at least is the modern construction of the word.]—There can be no question about land, but they would not call "*bona vacantia*," lands. The Statute, 21st Hen. VIII., c. v., sec. 2, recognises the power of the Ordinary, to grant administration of intestates' goods, to the party entitled thereto. The Statute, 26th Hen. VIII., c. 1, secures to the Crown all the authorities, profits, and commodities appertaining to the Supreme head of the Church. It may be a question whether by force of this last Statute, the Crown did not acquire the same power over the property of the Church, as belonged to the Ordinary. Another Statute, *in pari materia*, is the 22nd and 23rd Car. II., c. x. In *Oldham v. Pickering* (Carthew, 376; S.C. 2 Salk. 464), Lord Holt said, "Since the Statute, 22 and 23 Car. II., it has been held that the 31st Edw. III., c. 11, was thereby repealed; and he held, "that the reason of distribution of an intestate's goods, by the Ordinary, before the Statute (22 and 23 Car. II.), was because there was no property of those goods in anybody; therefore, the Ordinary having possession, he disposed of them at his pleasure, for there was no proprietor to control him." The opinion of so eminent a judge, as Lord Holt, is decisive. So in the case of *Edgcomb v. Dee* (Vaughan, 96), it is [461] said, that by the 31st Edw. III., c. 11, administrators are to administer and dispend for the soul of the deceased, and to answer to others to whom the dead persons were bound; and then it is added, "and as this was the ancient law and practice before in the Ecclesiastical Court, so by the new Act in the 22nd and 23rd of the King, for better settling of intestates' estates, it is enacted, etc. This appears to be the ancient law by the Great Charter, c. 18, and long before, by Glanvill, in Hen. II.'s time, and Bracton, in Hen. III.'s time." Such is the statutory ground of the right to intestates' effects. I now proceed with the early text-writers upon this subject. Lord Bacon, in his "Use of the Laws" (vol. xiii. p. 245, pl. ix. edit. 1831), says, "When a man possessed of goods dieth, without any Will, then such goods as the executors should have had, if he had made a Will, were, by ancient law, to come to the Bishop of the diocese, to dispose for the good of his soul that dieth, he first paying his funeral debts, and giving the rest *ad pios usus*. Finch, in his "Discourse on Law" (B. 4, ch. 7, p. 410; edit. 1759), a work of authority, frequently

referred to by Blackstone, states, "If no Will be made, the Ordinary shall administer all the chattels that were in his possession. For he, which had the charge of his soul in his life, is presumed the fittest person to have the care of disposing his goods *in pios usus*, after his death. And, therefore, the Ordinary may seize the goods, and must keep them without wasting, and may give, aliene, or sell them, at his will, and dispose the money coming thereof *in pios usus*. And if he do not so, he breaketh the confidence which the law repositeth in him;" and to the same effect [462] are the following authorities: Perkins, "On Testaments" (p. 486); Gilbert, "On Tenures" (edit. by Watkins, p. 278); John of Gaunt's Will of 1499 (Nicholl's Royal Wills, p. 145); Bacon's Abridgment, "Executors and Administrators," (E); a work, I admit, of not very great authority, though the title I refer to, is said to be by Chief Baron Gilbert; Blackstone (Comm., vol. ii. p. 494); *Palmer v. Allcock* (3 Mod. 58); 11 Viner's Abr., tit. "Executors," (A) 1. *Graysbrook v. Fox* (Plowd. 275). *Manning v. Yapp* (Salk. 37). It may be inquired, what was the state of the law at the time of Henry II. Glanvill, who is presumed to have lived in his time, has this passage, which at first sight seems against the Crown. He asks who ought to succeed to the land of bastards, as the Lord cannot? He then says (Glanvill, Book 7, ch. 16): *Cum quis vero intestatus decesserit, omnia catalla sua sui Domini esso intelliguntur; si vero plures habuerit Dominos quilibet illorum catalla sua recuperabit quae in feodo suo reperiet*. He then speaks of "*Usurarii*:" "*Usurarii vero, omnes res (sivi testatus sivi intestatus decesserunt) Domini Regis sunt*." It will not be fair to apply this to bastards; there are three classes of persons, spoken of in this Chapter: *bastardi*, *intestati*, and *usurarii*. The passage, if taken *simpliciter*, does not militate against the authorities before referred to. The words "*damnati ad mortem*" are not to be found in Glanvill, though they are in the *Regiam Majestatem* of Scotland, by Skene, a Scotch lawyer, of great learning on the feudal laws, which work is almost a copy of Glanvill, in the "*Quoniam Attachamenta*," or "the Baron Lawes." Craigii, in his work, *Jus Feudale*, [463] p. 51, refers to these two books. There is a passage in Stephens's Glossary, which refers to the *Codex of Justinian*, ("*De bonis vacantibus*," lib. 10, tit. 10, s. 1,) but I protest against the term "*bona vacantia*" being imported into the Ecclesiastical Courts: there is no passage to be found, warranting such a construction, in any work of authority on Wills or Executors. Intestates' effects are not, by the law of England, "*bona vacantia*," although it may be, that by the Justinian code, the Emperor took the *bona vacantia* of a person dying within his dominions, but it would only belong to the treasury of the Lord. Now, can it be said that, in this country, it is the law that a *bonum vacans* should be brought into the treasury? Certainly not; a different rule prevails in England. In the case of *Armory v. Delamirie* (Strange, 505), a chimney-sweep who found a jewel, was held to have a right to retain it against the Crown and every one else. This shows that the law of England never presumed that the *bonum vacans* ever belonged to the Lord of the fee, or the Crown. Blackstone, a great prerogative lawyer, once said, that all game in England was *bona vacantia*, and belonged to the Crown; but Chitty, "On Prerogatives of the Crown," p. 136, says, only certain things belonged to the King, under that title, as swans, whales, sturgeons, gold and silver mines, estrays, warfs, and wreck. Britton, in his "Pleas of the Crown" (Ch. 17, 18, 19, Kelham's Edit.), (*temp.* Edw. III.) when he speaks of the rights and prerogatives of the Crown, and enumerates them all, does not include, intestates' effects. Neither does Comyn, in his Digest, tit. "Prerogative," (D), mention this right among the prerogatives [464] of the Crown; and in Cruise's Digest, tit. "Franchise" (vol. iii. 279), although many different kinds of franchises are enumerated, yet "*bona vacantia*" is not mentioned. It is true that under the title of "Escheat" (30) (vol. iii. p. 451), escheators are mentioned by Cruise; but these officers had to do with land alone, and not personal property. In a very old book, by Judge Doddridge (History of Ancient and Modern state of Principality of Wales, Duchy of Cornwall, and County of Chester), treating of the Earldom of Chester, it is said, that there was an officer there called Escheator, but that he had nothing to do with intestates' effects. Blackstone (1 Comm. B. 1, ch. 8), under the head of sources of the King's revenues, enumerates eighteen different sorts, and it is extraordinary, that he should not have included this, if it existed, especially as he says the King is *ultimus haeres*, and *pater patriae*. The next point is, whether there is any evidence of user in this

matter. I submit that the instances of the grants of letters of administration to the nominee of the Duchy, since the present century, are no evidence of user. In *Jewison v. Dyson* (9 Mee. and Wel. 510), the question raised was, whether the Crown, in right of the Duchy of Lancaster, had the exclusive right of appointing a coroner within the Honour of Pontefract; the Court of Exchequer held the right to appoint coroners to belong exclusively to the Duchy, notwithstanding modern usage to the contrary. These are the grounds on which we seek to maintain our first proposition, that the right to dispose of intestates' goods was not in the Crown, but in the Ordinary, at the time of the grant by these Charters, and that from the date of these Charters, to the present day, the Ordinary has always had the right to this property, and that the Crown came in, either by the Statute, or [465] the Common Law, as *ultimus haeres*, and took the property of intestates dying without kin, through the medium of the Ordinary's administration.

II. The consideration of the Charters. This is an alleged grant of a County Palatine *ad similitudinem* of another grant. It lies on the Respondent to show, by referring to the grant of assimilation, what the rights of the County Palatine of Chester were: whether that which they now seek was contained within it. They rely upon the two Charters of 1377 and 1390, which are substantially the same, for in both these Charters there is a grant of "*quaecumque alia libertates et jura regalia ad Comitatum Palatinum pertinentia, adeo integre et libere sicut Comes Cestriae infra eundem Comitatum Cestriae dinoscitur obtinere.*" Was the similitude to be, to the Earl of Chester, at the time of this grant, or to Hugh Lupus? I submit that the only fair and natural construction is, that it referred to the Earl of Chester, at the time of the grant to John of Gaunt. What is the meaning of the word "*dinoscitur*?" This word, in the present tense, applies to the condition of the Earl of Chester, at that time, not going back to the time of Hugh Lupus. The Earldom of Chester is mentioned by Camden (*Britannia*, pp. 427, 456, 464, Ed. 1607) as having been conferred by William the Conqueror, upon his son, Hugh Lupus, as a Count Palatine, about the year 1070; and the last Earl of Chester, descended from Hugh Lupus, it is said in *Kings Vale Royall of England* (52, 145: see Omerod's *Hist. of Chester*, vol. i. p. 139, sec. iv.), died in 1237, in the 21st year of Henry III. This was after the Great Charter of the 9th Hen. III., which confirmed the right in question to the Church, and to which the name of Ranulphus, Earl of Chester, appears as a witness. Henry the Third, after [466] this Charter, seized the earldom, and appropriated it to himself, and created his son, Edward I. Earl of Chester (Omerod's *Hist. of Chester*, p. 140), by such a title only as he could grant: certain royal liberties were given, but the right to intestates' effects is not included. Edward I. was taken prisoner, and the County of Chester was given as his ransom. Simon de Montfort was attainted of treason, and it was forfeited to the Crown: the King re-granted it, but not in *similitudinem* of Hugh Lupus; again, it came back to the Crown. Richard II. held it in 1377. Under what title did he hold it? Edward III. gave it to the Black Prince, on whose death the King granted it to Richard, Prince of Wales, Duke of Cornwall, and Earl of Chester (Omerod's *Hist. of Chester*, p. 140).

The original grants of the County of Chester are not in existence; they have been searched for, but without success; but it cannot be questioned, and it is a matter of history, that the County of Chester has reverted again and again to the Crown. In the case of *The King v. Capper* (5 Price, 217), it was argued by Mr. Parke, whether the right to intestates' goods having come back to the Crown, it could go forth again. Lord Coke (4 Inst. 211), in his chapter on the County Palatine of Chester, makes no mention of intestates' effects, though he speaks of a Bishop of Chester, in the time of William I., and states that he held his office of the King, not from Hugh Lupus. "*Tenet Episcopus ejusdem civitatis de Rege, quod ad suum pertinet Episcopatum.*" The Bishop's creation was by patent. The Crown now appoints under the Statute of Henry VIII. The fact of there being a Bishop of Chester, in William the Conqueror's time, also appears from the passage in Domesday Book (Omerod's *Hist. of Chester*, 142). [467] In the 31st year of Henry the Second's reign there was a dispute respecting the temporalities of the bishopric of Chester, which were seized by the Crown (Madox's *Hist. Exch.* 212). A question may arise,

as to what is the general meaning of a County Palatine, and the Respondent may refer to Selden's "Title of Honours," where there is a definition of a County Palatine; and he speaks of the Counts Palatine being invested with a King-like jurisdiction, but he does not say to what extent (3 Edit., p. 529); but although he largely treats of the rights and privileges (*ib.* 314 to 346), there is no mention of a *jus regale* of this description as appertaining to it. Blackstone (1 Comm., p. 117) speaks of Counts Palatine and of "*jura regalia*," and says, that the Earl of Chester and Duke of Lancaster had, in those counties "*regalem potestatem in omnibus*," as Bracton expresses it. Lord Hale, however, said, that Bracton was neither law or history. In the case of The County Palatine of Wexford (Davies's Rep. 159; Engl. Edit.), in the Irish Exchequer, there was a great discussion about counties palatine, and that of Chester was referred to as a model, but the right is not mentioned as a *jus regale*; on the contrary, "*jura regalia*" are there said to consist of two principal points only, viz. in royal jurisdiction and in royal seignory. Supposing that your Lordships should be satisfied that the grant was *ad similitudinem* of some other grant, which is not shown, the burthen is thrown on the other side, to show that the model County Palatine had privilege as "*jura regalia*;" and without the production of Charters, or satisfactory evidence, it is impossible to say what the *jura regalia* were, that John of Gaunt was to enjoy. [468] Suppose this right to be included in "*jura regalia*," did the Crown grant it? Certainly not in express terms. It is conveyed by the name of "County Palatine." That would not carry it. Does it pass by virtue of the words of the grant, "*quacunque alia libertates et jura regalia ad Comitem Palatinum pertinentia*?" It must be a royal right appertaining to a Count Palatine. It may have pertained to Emperors, but never to Counts Palatine. A grant of a Chancellor would not carry a Court of Equity. In *Fisher v. Batten* (Ventr. 157), Lord Hale says, "I do not think the bare granting of a Chancellor will incidently give a Court of Equity, nor is such a Court incident to a County Palatine, though there is a general grant of '*jura regalia*.'"—[Baron Parke: You cannot create a Court of Equity, without an Act of Parliament.]—All the authorities as to the King's grants and the modes of construing them, are collected in Cruise's Dig., tit. "King's Grant," xxxiv. (vol. v. pp. 35 and 45). General words will not carry, in Kings' grants, which pass nothing by implication. Thus in The case of Mines (Plowd. 330, b.), it is laid down, that if the King granted lands, and mines therein contained, it passes only certain mines, and not mines of gold and silver. Even though there be words of reference to another grant, the grantee will not take anything not expressly mentioned. *The King v. Capper* (5 Price, 217). If the right claimed had originally passed from the Crown, it had reverted to it; Comyn's Dig., tit. "Franchise," (G) 1; and in order to the recovery of a right which has merged in the Crown, it must be mentioned in express terms.

[469] Mr. Parker, Q.C., Dr. Jenner, and Mr. T. F. Ellis (Attorney-General of the Duchy of Lancaster), for the Respondent.

Mr. Parker.—The question raised, is of great importance, not only as affecting a branch of Her Majesty's prerogative, but involving the title of those who obtain administration to the goods of an intestate, dying without next of kin. The right in question never belonged to the Ordinary, otherwise than as a trust, and if not parted with by the Crown, it is still in the Crown; but we contend, that the right to the goods of intestates, in the County Palatine of Lancaster, passed, by the Charters, from the Crown.

I. The Ordinary never can contest the right with the Crown, to intestates' goods dying without kin. No case has been cited by the Appellant, in which the Ordinary ever set up a claim to the beneficial interest in such property, or disputed the right of the Crown; on the contrary, the claim of the Ordinary has always been in the nature of a trust, or confidence, and rested, originally, on the supposition of his being a trustee, for the application of the goods to pious uses. This is self-apparent, for they have, for a long series of years, admitted the title of the Crown, by granting administration to the nominees of the Crown.—Lord Langdale: There can be no doubt that the Crown was originally entitled to the goods of an intestate bastard.]—We rely upon that right, and say, that this question has nothing to do with probate, or administration. Our proposition is, that this is an ancient and undoubted right of the Crown. The Solicitor-General denies that this was a part of the prero-

[470]-gative; but he has not established that assertion. The Statute, 26 Henry VIII., c. 1, has nothing to do with it. Neither has the Appellant shown the origin of this right. No doubt, the authorities, in support of it, are not so ample as could be desired, but they show, that the title of the Crown was coeval with the other rights of the Crown at Common law. Not being able to show the origin of the right, proves it to have been by Common law. *Manning v. Napp* (Salk. 37). *Jones v. Goodchild* (3 Peere Will. 33). The right of the Crown is not confined to simple intestacies; but whenever the next of kin cannot be found, or, when found, cannot take, the Crown takes, even although an Executor has been appointed. *Middleton v. Spicer* (1 Bro. C.C. 201). *Walker v. Denne* (2 Ves. Jun. 170). *Taylor v. Haygarth* (14 Sim. 8). So when an intestate leaves a widow and no next of kin, the Crown takes a moiety. *Cave v. Roberts* (8 Sim. 214). In Comyn's Dig., tit. "Prerogative," (D.) 49, it is laid down, that the Crown is entitled to all goods which have no owner; and to the same effect is Brook's Abr., tit. "Prerog. le Roy," 12, "Biens;" Bracton, lib. 1, c. 12, s. 10; Coke, 2 Inst. 167. Blackstone (1 Comm. 299) says, besides the particular reason why the King should have treasure-trove, waifs, etc., "there is one general reason, which holds for them all; that is, because they are '*bona vacantia*,' or goods in which no one else can claim a property." This is an answer to the Solicitor-General's statement, that he could not find the term "*bona vacantia*," used by our law writers. Here Blackstone uses it. So, by the Civil law, "*bona vacantia*," went to the State. Cod., lib. 10, tit. 10. Nor is it in that sense unknown to our law; for [471] the Vice-Chancellor of England, in *Taylor v. Haygarth*, uses the term "*bona vacantia*," so in *Middleton v. Spicer*. By the feudal law, also, such goods go to the King. Cragii, in his *Jus Feudale*, lib. 1, c. 16, ss. 30, 43; lib. 2, c. 18, ss. 15, 16; treating "*de jure regis in feudis et de regalibus*," includes, among the *regalia*, belonging to the Crown, "*bona vacantia*," and the power of disposing of the goods of persons dying intestate, and without next of kin; and he denies the law, as laid down by Glanvill, in lib. 7, c. 16, that if a bastard dies without children, his goods goes to the Lord of the fee; and says, that the Crown takes them as "*jura regalia*," Lyndwood (Provinciale, lib. iii., tit. 13, p. 180), cited by the Queen's Advocate, also shows the right to be in the Crown. In *Meyit v. Johnson* (2 Doug. 542-5), Lord Mansfield held, that the King took, where there were no next of kin, subject to the debts of the intestate. All these authorities show, that the Crown is the undoubted possessor of the right. In *Graybrook v. Fox* (Plowd. 275) it is expressly laid down, that the reason why the Ordinary has immediately the property, is, that by law, the property must be in some one, therefore, the Ordinary has a limited right, up to the date of administration. The rule at Common law, is, that property must belong to somebody; and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown. This right being then in the Crown, at the time of the Charters, it was competent for the Crown to grant it, like any other franchise. It is admitted in the reply of the Appellant, to the Act on Petition, that subjects may exercise this right as a [472] franchise, and it is then alleged, that in all such cases, as well as in the County of Chester and Duchy and County Palatine of Lancaster, as elsewhere, "except where by prescription Lords of Manors and others exercise the franchise, it hath been, and now is, the invariable practice of the Ordinary to grant letters of administration of the goods of intestates dying without kindred, to the nominee of the Crown." It must be inferred from this, that they have a right to such intestates' goods. By the report of the Ecclesiastical Commissioners, it appears that some Lords of Manors still have Ecclesiastical jurisdictions, that they grant administrations, and licenses of Marriage, and are not amenable to the Bishops of the Diocese. *Hensloe's case* (9 Co. Rep. 37). A grant of such a nature, is as much a franchise as any other *jura minora regalia*, such as treasure-trove, which the Crown can grant. How could the Crown acquire this right without some Common law title? If we have established that this is a Common law right in the Crown, then we come to the Charters, to show that the right has thereby passed to us. First, we contend that this right is incident to the Crown; and under a grant of a Palatinate, the right would be incident to the County Palatine. Secondly, by the express words of the Charters, this right is granted as one of the "*jura regalia*,"— [Lord Brougham: Do you contend, that *eo ipso*, the grant of a Count Palatine,

creates a Sovereign Prince, and that as incident thereto, would be the right to pardon offences? Has the Crown at this time the power to grant "*jura regalia*," and such high franchises!—The Statute law has hampered this question. The Earl of Chester pardoned felons. He had the power by prescription. By the 27th Hen. [473] VIII. the power of making pardons is taken away; there is scarcely one of the "*jura regalia*" which can now be granted, except by the authority of Parliament. Selden (tit. of Hon., p. 2, c. 1, s. 33, c. 5, s. 8) and Spelman (Gloss., tit. "Comes," App. 13), in speaking of a County Palatine, invest it with Kingly powers, and their view of the law is fully supported by Bracton (lib. 3, ch. 8, s. 4) and Coke (4 Inst. 204). The extent of the rights of a Count Palatine, is shown in the case of The County Palatine of Wexford (Davies's Rep. 159; Engl. Edit). It appears that some of the "*jura regalia*" can be prescribed for, and others not; but if we show that there has been a grant of a County Palatine, the "*jura regalia*" passed as incident thereto, by that grant. Co. Litt. 114; Coke's 4 Inst. 204, 5, 6, 10, 11; Comyn's Dig., tit. "Franchise," (D.) 1, 2, 3, 4; Comyn's Dig., tit. "Waife," (C.); *Bowes v. Bishop of Durham* (2 Bulstr. 226). These latter cases are strong authorities, for they show, that a matter would not pass, under a grant of "*bona felonum*;" but, in the case of a County Palatine, it is incidental, as a "*jus regale*," every "*jus regale*," being understood to be in a County Palatine, without specification. It is not alleged, that there are any other of the "*jura regalia*," which are in the Crown, as Queen of England, that are not in the County Palatine. They have the right to treasure-trove, and to lands between high and low water. Upon what ground then can it be contended, that this one, of all the "*jura regalia*," did not pass to the Count Palatine? There is an express grant by the Charter of "*jura regalia*," and the only words which can in any way limit [474] the effect of the grant, are "*sicut Comes Cestrie.*" The *onus* is not upon us to prove that the Earl of Chester had it not: it lies upon the Appellant to show that he had it not; but they do not attempt to prove that the Earl of Chester was not possessed of it. The 6th and 7th Will. IV., c. xix., which transferred the rights of the Bishop, as a Count Palatine, to the Crown, recognises the doctrine, that all these "*jura*" were included in a County Palatine. These authorities prove, that a grant of a County Palatine, without more, entitled the owner, to all the "*jura regalia*" the Crown had, at the time of the grant, and, among others, this right, for there can be no reason why, if others passed, this should be reserved. The Charter of 51 Edw. III. gave to John of Gaunt all the "*jura regalia*" pertaining to a County Palatine, as freely as the Earl of Chester had enjoyed them. There is nothing to show, that this was a restriction; it was by way of enlargement. We have nothing to make out, but that this is a County Palatine. The Appellant has failed to show, that at any particular time, between William the Conqueror, and this grant, this "*jus regale*" did not exist: our position is, if Chester was a County Palatine at all, this right must have belonged to it. *Rex v. Capper* (5 Price, 258) was referred to by the Appellant; there the Court of Exchequer held, that extinct rights could not be reconveyed by general words. That case is in our favour; we do not rely upon general words, we rely upon the words of the grant of a County Palatine. There are no restricting words in the grant, and it is upon the other side to show an exception or reservation. At one time there was no Bishop of Chester, the See was that of Lichfield and Coventry. The only "*jus regale*" [475] which the Appellant suggests that there has been no user in the County Palatine of Chester, is, that of coining money. But this is not properly a "*jus regale*."

[Mr. Pemberton Leigh: The Appellant says, that supposing originally in the Anglo-Saxon times, the right in question, was in the Crown, yet it afterwards became vested in the Church, and that being vested in the Church, at the time of this grant, it could not be granted by the Crown by this Charter.]

II. The proposition of the Appellant, is, that at the date of the Charter, the right in question was in the Ordinary, and not in the Crown; but the entire argument, and the authorities cited upon this point, turn solely upon Ecclesiastical jurisdiction; but that has no bearing upon the beneficial right, and was never denied. Our position is, that the Ordinary never had a beneficial right. There is no authority to be referred to, of any instance of any claim by the Ordinary to the beneficial right to such property. Lyndwood (Provinciale, lib. iii. tit. 13, p. 166. *in verb.* "Beneficiatorum") refers to the Constitution of Johannes Stafford, which

contains an express prohibition upon the Ecclesiastical powers from claiming anything beneficial out of the goods, and urges only, that the Church is better able to discharge the trusts. So also the Constitution of Orthobon (*ib.*, tit. 23, s. 2, p. 121) prohibits the Ordinary from applying the property to his own use. The authorities cited by the Appellant, on this head, only show that the Ordinary had merely a qualified right of property for administration purposes. —[Mr. Pemberton Leigh: I suppose the Church were exclusive judges of what were "*pro usibus*." Could the Ordinary, before the Reformation, (for many pious uses have since become superstitious uses,) have [476] been called upon, by the Crown, to account?—If the Court of Equity was as well understood then, as now, they would have been compelled to account and distribute. There is no doubt, very great obscurity exists as to the origin of the jurisdiction of the Ecclesiastical Courts, but we now understand what the office of the Ordinary is, and the extent of the next of kin's rights, which exist by the Common law. It was always considered as a trust binding upon the conscience of the Ordinary, and not a beneficial interest. Thus in *Marice v. The Bishop of Durham* (9 Ves. 399), Sir William Grant held, that it was impossible for the Bishop of Durham, under a trust which failed, to claim such property as his own, and his decision was affirmed by Lord Eldon, on appeal (10 Ves. 521). If the Ordinary has it not now by right, he never could have had it by right; it must have been by usurpation, and wrongfully, and the claim could not be maintained. For if the Ordinary had this right universally, what has withdrawn it? There has been no Act of Parliament passed to deprive him of it. It would have been contrary to the Common law for the Ordinary to have the jurisdiction over the intestate's property, and also to have had a beneficial interest therein. It would be making him a judge in his own cause. He never had more than the right of administering. The right of the widow, and children, and next of kin, are coeval with the Common law, and have never been lost sight of, but have been considered as sacred rights by the highest authorities. Selden (Treatise on Dispositions of Intestates' Estates, c. 1), Glanvill (Book 7, c. 6; Book 12, c. 20), Gilbert (Rep. 206), Matthew of Paris (P. 161), Bracton (Book 2, c. 6, s. 2), [477] and Fleta (Book 2, c. 7, s. 10), acknowledge the right of the next of kin in the personal estate of an intestate. By the Common law, at the time of Henry the Second, a man could not avoid dying intestate as to part of his estate, as his wife and children were entitled to a part of his property. Blackstone (2 Comm. c. 32, p. 491). If the next of kin had a right to a portion of an intestate's estate, how could the Ordinary have a beneficial right to it? The only effect of the quotation from Lyndwood, complaining of the Barons, is the assertion of the right to jurisdiction, to distribute the goods among those who have legal rights in them.

The next point to be considered is the Statutes. The Statute (Westminster, ii.) 13 Edw. I., c. xix., declaring that the Ordinary is bound to answer the debts of the intestate, was simply an act declaratory of the Common law, and is so stated by Lord Coke, 2 Inst. 397, *Snelling v. Norton* (Cro. Eliz. 409), and is inconsistent with the notion that he had a beneficial interest. Neither does the Statute 31 Edw. III., c. xi., show, that the Ordinary had a beneficial interest, nor any other Statute down to the 21 Hen. VIII. The Appellant's argument, is, that the Ordinary had an absolute right beneficially, and that being in the Ordinary, it could not be in the Crown; and they cite for this, *Hughes v. Hughes* (Carter, 125), *Graysbrook v. Fox* (Plowd. 275), *Oldham v. Pickering* (Carthew, 376), and *Manning v. Napp* (1 Salk. 37). In none of these cases was the beneficial interest of the Ordinary discussed. Moreover, the authority of *Manning v. Napp* has been questioned. *Middleton v. Spicer* (1 Bro. C.C. 203). The Ordinary does in many cases grant administration, although it be not within the Statute [478] of Distributions, as where a wife, entitled to *chores in action*, dies, the husband cannot, under any Statute, claim a right of administration, yet the Ordinary will grant letters of administration to him. *Watt v. Watt* (3 Ves. 244). The grant follows the interest. That case shows a close analogy, as between the husband and the Crown, to the present case. The husband cannot come at his wife's property without letters of administration. No Statute gives him the right, nothing except the common jurisdiction of the Ordinary entitles him to claim the grant. It is not the administration, as contended by the Appellant, which gives the Crown this right of property: it is that in respect of

the right of property, which is the substance, and the administration, which is the course of proceeding, to enable the party to come in and assert his substantial rights in a Court. The grant of administration by the Ordinary was founded on a Common law right. It was not by Statute; and as the Appellant has referred to no Statutes to show the origin of this right, it must be assumed that it was coeval with the Common law; and existed at the time of the grant of the Duchy of the County Palatine of Lancaster to John of Gaunt.

Mr. Ellis (the Attorney-General of the Duchy of Lancaster), on the same side.—The nature of the right of the Crown, is stated in Williams, "On Executors," p. 334 (3rd edit.):—"If a bastard, who, as *nullius filius*, has no kindred, die intestate, and without wife or child, it has formerly been holden, that the Ordinary could seize his goods, and dispose of them to pious uses; but it is now settled that the King is entitled to them as *ultimus haeres*; subject, nevertheless, to the debts of the intestate. Yet in such [479] case it is the practice to transfer the royal claim by Letters Patent, or other authority, from the Crown, with a reservation, as it is said, of a tenth, or other small proportion of the property, and then the Ordinary of course grants to such appointee the administration. It has indeed been asserted, that such Letters Patent are merely in the nature of a recommendation; and that though it be usual for the Ordinary to admit such patentee, yet it is rather out of respect to the King, than strictly right." The right of the Crown, as ultimate owner of things not appropriated, appears in the Civil Law. In Eden's *Elementa Juris Civilis*, lib. 3, tit. 13, p. 161, it is said, that there are "*tres ordines successionis ab intestato*," descending, ascending, and collateral; "*his vero deficientibus conjuges, et postremo fiscus admittuntur*." The distinction between *fiscus* and *aerarium* early ceased to be of importance; but, as far as it exists, it is in favour of the Respondent, "*fiscus*" being the property of the Sovereign, as distinguished from the State. Eden adds, p. 164: "*Postremo si nullus sit successor legitimus succedit fiscus, non quidem ut haeres, sed velut in bona vacantia*;"—"dicuntur autem bona vacare, quae jacent propter defectum legitimorum successorum." Whether the phrase "*ultimus haeres*," or "*bona vacantia*," be used, the meaning is the same. In a note to the passage just cited, Eden says that a bastard can have no heirs except of his body. The same doctrines are in Lyndwood (*Provinciale*, lib. iii. tit. 13, p. 180, not f.). The Crown, it will be admitted, has this right, now throughout England, wherever it has not been granted away.

Now, the Charters, which are before the Court, give to the Duchy all "*jura regalia*." Some restriction has been suggested, in legal treatises, as to the effect of the language in grants by the Crown; but, in *Jewison* [480] v. *Dyson* (9 Mee. and Wel. 540, 567), it was pointed out that the authorities, when examined, show merely that in grants by the Crown, no more is to be inferred than would be inferred from the same language if used by a subject. In that case it appeared that the Duchy, under these words, had created the Borough of Pontefract, which still exists. In 4 Inst. 211, Lord Coke states that the Earl of Chester, having "*jura regalia*," "had *Comitatum Palatinum* without any express words." Therefore, the grant of the "*jura regalia*" gives the Palatinate, rather than the Palatinate the "*jura regalia*." The Earl of Chester also, by such grant, had the power to hold a Court of Equity, though it has been laid down that, by simple grant, the Sovereign cannot give such a Court. So there is a Court of Equity in the Palatinate of Durham. The chapter in Coke furnishes an answer to the objection suggested as to the grant to Richard, Earl of Chester. In Lord Coke's time, the full "*jura regalia*" existed in the Palatinate of Chester; they, therefore, existed either by prescription or by the grant: in either case, they existed before the grant of the Palatinate of Lancaster. In Selden (Titles of Honour, Part 2, ch. 1, 246, ch. 5, p. 529) will be found a general discussion upon Counties Palatine; and the reality of the franchise is there asserted.

The next question is, whether the right now claimed be among the "*jura regalia*," which passed by the Charter. Now, that it is a "*jus*," is indisputable. It must also be "*regale*;" for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to

treasure-[481]-trove, and other analogous rights, all of which are enjoyed, in fact, by the Duchy. Now that treasure-trove, wreck, and the like, go to the Crown in the character of "*bona vacantia*," appears from 2 Inst. 167, where Bracton's doctrine is recognised. In Year-Book Mich. 8 Hen. IV., fol. 2, B. plac. 2, it is held that, generally, by a grant of felons' goods the goods of such as stand mute on a charge of felony do not pass; but the Crown has them, says Gascoigne, C. J., because all the goods that are in England, and that no man hath property in, shall be adjudged to the King. Now, in a County Palatine, such goods do go to the county, and not to the Crown; *Rex v. The Bishop of Durham* (3 Bulst. 156; S.C. 1 Roll. Rep. 399). This shows indisputably that the County Palatinate takes the "*bona vacantia*;" and the case is the stronger, because it contains an express reference to the decision just cited from the Year-Book of Hen. IV. The time of Hen. IV. is not far from the date of the Charter of Edw. III. In default of evidence of contemporary usage in Lancashire or Cheshire, an inference may be drawn from the practice in Normandy when it was a fief of the French Crown. It is most probable that William the Conqueror meant to place the Earldom of Chester, in England, on the same footing as the Duchy of Normandy in France. Now, from the Grand Coutumier of Normandy (compiled, according to the preface to 2 Inst., about the year 1230, which agrees with what is said in the *Stille de Procéder*, at the end of Rouille's edition of the Grand Coutumier), it appears that the Duke not only had treasure-trove (ch. 18), but *choses gayves* (ch. 19), which are denied as things "*que ne sont appropriées*." And in Terrien's Commentary on the Law of Normandy (B. 5, c. 11, p. 12.), it is said [482] that these are elsewhere called *choses espaves*, which are "*délaissées à posséder par celui à qui elles appartiennent*." In Berault's Commentary on c. cxlvii. of the Coutume Réformée of Normandy, compiled after the Dukedom had ceased to be independent, it is said, that the moveables of a bastard, dying without issue or will, go to the King, and not the Lord, the King having now become entitled to the "*bona vacantia*," as the Duke was before. The express exceptions, in the Charter, of tithes, fifteenths, subsidies of the clergy, pardon of life and limb, revision or error in the Courts of the County Palatine, and the obligation to send members to Parliament (from which Cheshire was exempt), show how largely the granting words are to be construed.

It is suggested that, inasmuch as the rights are granted to the County Palatine of Lancaster "*adeo integre et libere sicut Comes Cestrie infra eundem Comitatum dinoscitur obtinere*," the grant is exceptive, and it lies on the Duchy to prove, as matter of fact, that the Earl of Chester had these rights. But, First, the words describe, not the thing granted, but the mode of tenure: a known thing is granted, but subject to the feudal obligations under which the Earl of Chester lay. In *Rex v. Capper* (5 Price, 217), the liberties were not known except by reference. Here it is as if any other known thing, as a market or free warren, were granted to be held as I. S. held them: I. S.'s tenure would then be looked at, to ascertain, not the meaning of warren or free market, but what his interest or tenure was. Secondly, the burthen of proof, if thrown on the Duchy, is satisfied. What the rights of the Counties Palatine of Chester and Lancaster are, appears from the legal authorities of several centuries; and this is no longer a question [483] of fact, any more than the existence of London as a County, of Durham (before the late Statute) as a district into which particular writs ran, of gavelkind in Kent, of the custom of merchants, and many other matters of which the Courts take cognizance.

It was urged that the Earl of Chester did not appear to have created Bishops of Chester. But, before the time of Henry the Eighth, the Bishopric of Chester was mixed up with that of Lichfield and that of Coventry, and could not belong properly to the County Palatine; *King's Vale-Royal*, p. 40, *et seq.* Therefore, land belonging to that Bishopric was not held of the Earl, since the Bishop himself could not so hold; and this explains the passage in Domesday Book, cited by Coke, 4 Inst. 211. But, further, while the Bishopric was vacant the Earl took the temporalities. This appears by a Charter of 1 Henry IV., given in the *Reports touching the Dignity of a Peer of the Realm*, App. v. p. 128. It has been asked whether coins were struck by the Palatine. If they were, it would not strengthen the case for the Duchy: because coins were struck in ancient times by persons of much lower authority, as Archbishops and Bishops. In fact, many coins were struck by the Bishop of

Durham: and a work has been published on these coins exclusively: but this was probably not in right of the Palatinate.

The principal argument on the other side is, that the Crown had not, at the time of the Charter, the right in itself. Now the Charter of 51 Edw. III. is later than the latest change of the law on this subject, which was by 1 Stat. 31 Edw. III., c. xiv. Therefore the Crown gave all it had after that Statute: but, after that Statute, it certainly had the right, or it would not have it now in any part of England. It is, how-[484]-ever, said that no more is given than the Earl of Chester had; and that, when the Palatinate of Chester was created, the Crown had not the right, but that the Ordinary had it till the Acts of 1 Stat. 13 Edw. I. (Westminster ii.), c. xix., and 31 Edw. III., c. xi. One answer has already been given, that the Charter does not refer to the Earl of Chester's holding for the subject of the grant, but only for the mode of holding. But, further, the Crown had the right at the time of the creation of the Palatinate of Chester. No authority has been mentioned from which it appears that the Ordinary had any right to the goods: he had only the *jus distribuendi*, which he has now; the Statutes referred to affect the distribution only. The origin of this right of distribution may have been his sacred character: or there may have been a grant by the Crown, which would account for prescriptive administrations. In *Hensloe's Case* (9 Co. Rep. 36 b. 38 b.) it is laid down that the property is in the Ordinary, not *simpliciter*, but *secundum quid*; and that the Statute of Westminster (the Second) merely affirmed the Common law. The early state of the right appears, both before and after the creation of the Palatinate of Chester, from the Laws of Canute, of William the Conqueror, and of Henry I. (Ancient Laws and Institutes of England, vol. i. pp. 177, 207, 216): Lyndwood, Prov., lib. iii., tit. 13, p. 179; 2 Inst. 32. The prerogative administrations were granted in order that there might be only one collection when the property was in different Dioceses: if the Ordinary had been owner, each Ordinary would have taken his own share. *Manning v. Napp* (1 Salk. 37) contains no decision: and the dictum, contradicting *Hensloe's Case*, [485] relates merely to the historical origin of the right of administration. At any rate, that case, being later than the last change in the law, cannot show anything against the ancient right of the Crown which would not destroy its present undisputed right. The same remark applies to *Oldham v. Pickering* (Carthew, 376). In *Graysbrook v. Fox* (Plowd. 280) the right of the Ordinary is asserted, but his beneficial ownership is denied. And, further, as neither of the Statutes referred to takes any absolute property from the Ordinary, or gives any to the Crown, the right of the Crown before the Statutes must have been what it is now. Lastly, even if the Ordinary had a beneficial property, the ultimate property of the Crown must have existed behind that, as behind the property of all owners: the right, therefore, which the Crown now has is simply what it always had. If the argument on the other side were correct, the only inference would be, that the right of the Crown is now accelerated by the failure of the Ordinary's interest; but the right itself would be no other now than before, and, therefore, would have passed to the Duchy by the grant of the Crown at any time.

The Queen's Advocate [Sir John Dodson], in reply.—The Respondent denies that the Ordinary ever had any beneficial interest in intestates' goods, and contends that he was a mere trustee. Lyndwood (Provinciale, lib. iii., tit. 13, p. 180), however, shows that the Church had a full right to take and dispose of such goods, according to its discretion, *in pios usus*, which left no residue; therefore, a Court of Equity could not interfere with the Ordinary to compel [486] him to pay over the residue, to the next of kin, or, if there were none, to the Crown, as there is nothing left for the Court to deal with; that being so, the Ordinary cannot be called a mere trustee. The authorities referred to by the Respondent, of *Middleton v. Spicer* (1 Bro. C.C. 201), down to *Taylor v. Haygarth* (14 Sim. 8), have no bearing upon the question at issue. In the case of the Ordinary, there was no want of any person to take it, or of uses to which it could be applied. There is no contest here between the Ordinary and the Crown; it is between the Crown and an alleged grantee of the Crown. Again, it is said that the 13th Edw. I. and the 31st Edw. III. were merely an affirmation of the Common law. This we deny, for they distinctly point out, that the Ordinary is to be liable only "from henceforth." The next point contended

for, by the Respondent, was, that the mere creation of a County Palatine, with the words "*jura regalia*," is sufficient to carry with it all "*jura regalia*" whatever. This proposition is unsupported by authority or precedent, and is carried too far; for if all these rights are incident to, and inherent in, every County Palatine, if the extinguishing of a County Palatine were sufficient to put an end to all "*jura regalia*," why should it have been necessary to enumerate them in the Act 6 and 7 Will. IV., c. xix., taking away the Palatine from Durham? The appointment of a Bishop, is a "*jus regale*," yet it was never exercised by the Earl of Chester. It is not pretended that this important "*jus regale*" went to the Duke of Lancaster. Suppose the Church was a mere trustee of the goods, at all events, it had the legal title vested in it. The authorities and Statutes show, that this right was in the Church at the date of the Charter of 1377. Not [487] being then in the Crown, it could not be granted to the Duke of Lancaster by that Charter.

Judgment was reserved, and was now delivered by

The Right Hon. T. Pemberton Leigh (June 28, 1848).—The question in this case, relates to the right of Administration to the goods of a bastard, who died intestate and unmarried, in the County of Lancaster. The contending parties are the nominee of Her Majesty, in right of Her Crown, and the nominee of Her Majesty, in right of Her Duchy of Lancaster.

In the Consistory Court of Chester, where the cause was first heard, a decision was pronounced in favour of the nominee of the Crown. This sentence, however, was reversed, on appeal of the Consistory Court of York, which pronounced in favour of the nominee of the Duchy; and from this latter sentence the cause now comes by appeal before us.

The claim of the Duchy is founded upon a grant made in the year 1377, by Edw. III. to John of Gaunt, Duke of Lancaster, by which the County of Lancaster was granted as a County Palatine, with various liberties and franchises to the Duke, for his life. By subsequent Charters and Acts of Parliament, the Duchy, with such rights as were originally granted with it, is now vested in Her Majesty, by a title distinct from that of Her Crown.

The sentence complained of, has decided that, amongst the franchises granted to the Duchy, was the right of administration to the estates of intestates dying without kindred.

The Appellant has made two principal points: He contends, First, that, at the date of the grants, in [488] question, the right now in dispute, was vested, not in the Crown, but in the Church, and could not, therefore, pass by the grant. Secondly, that if the right was at that time in the Crown, the words of the grant were not sufficient to pass it to the Duchy.

We will consider these points in their order.

It was argued, indeed, on behalf of the Respondent, that it was immaterial, whether this right existed in the Crown, at the date of the grant, or not; for that, if it accrued subsequently, as one of the "*jura regalia*," it would pass, under the preceding grant of "*jura regalia*," to the Duchy: and authority was cited, which was supposed to favour that proposition. As we are satisfied, however, that this right existed in the Crown, at the date of the Duchy Charter, it is not necessary to consider this point.

Great learning and research were exhibited by the Counsel on both sides, in the argument of this question, to show, to whom, in very ancient times, the personal property of persons, dying intestate, of right belonged; and we were referred to a series of authorities, beginning in the Anglo-Saxon period, and extending to very recent times. We have carefully examined and considered these authorities, which, although they leave some parts of the subject involved in obscurity, remove all doubt, in our judgment, as to the material point, in this case, and show, that the clergy had never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession, for the latter purpose.

In the earliest times of our history, the clergy do not appear to have interfered at all in cases of intestacy. [489] The Statute of Canute, c. 71, in the Collection of Ancient Laws and Institutes, 8vo Ed., vol. i., p. 413, provides for the distribution

of the property of an intestate, amongst his wife and relations, under the direction of his Lord. The Statute is in these words:—"Of the Heriot:—And if any one depart this life intestate, be it through his neglect, be it through sudden death, then let not the Lord draw more from his property than his lawful Heriot; and, according to his direction, let the property be distributed very justly to the wife and children, and relations, to every one according to the degree that belongs to him." This Statute must be attributed to some time between the years 1017 and 1035.

The Statute of William the Conqueror, c. 34, at p. 481 of the Collection, above referred to, provides, that if a man die without a Will, his children shall divide the inheritance equally.

In neither of these Statutes is there any mention, either of the Church, or of pious uses. The first occasion in which we find any reference to pious uses, in the disposition of the estates of intestates, is in a law of Henry I., c. 1, s. 7, (Collection of Antient Laws, p. 500.) which declares that, any of the King's Barons, or men, may dispose of his "*pecuniam*" as he pleases, but if he shall have made no disposition, his widow or children, or relations, or liege men, shall distribute it for the good of his soul, as they shall see fit.

Here again there is no mention of the Church; but when regard was to be had to the supposed good of the soul of the deceased, or what were called "pious uses," in the disposition of his property, after his death, an obvious reason was afforded for the interference of the clergy; and accordingly we soon afterwards [490] find traces of their existing authority in cases both of testaments and intestacies; but without any trace of a beneficial interest being claimed by them in either case.

The Magna Charta of King John, which was referred to, as evidencing some right in the Church, at that time, provides, by the 26th Chapter, that if any holders of the King in lay fee, should die indebted to the Crown, the debt should be first paid out of his goods, and "the residue should remain to the Executors, to perform the testament of the dead, and if nothing be owing to the King, all the chattels should go to the use of the dead, saving to his wife and children their reasonable parts." The 27th Chapter (which seems to be omitted in the Magna Charta of subsequent reigns) enacts, that if any person die intestate, his chattels shall be distributed "*per manus propinquorum, parentum et amicorum suorum, per visum Ecclesie*," reserving to every one the debts due to him from the deceased.

Here the Church appears to be entrusted with the same right or duty of supervision, which the Statute of Canute had intended to vest, or assumed to be vested, in the Lord; but there is obviously nothing which gives to the Church any beneficial interest, or assumes the existence of any such beneficial interest. On the contrary, even in cases where testaments were made, and as against the dispositions of such testaments, it reserves to the wife and children their reasonable parts.

At what time, or in what manner, the right of jurisdiction by the Church, in cases, either of testaments or intestacies was originally acquired, does not distinctly appear. Previously, however, to the reign of [491] Edward the First, this jurisdiction had become generally vested in the clergy, and usually in the Bishop of the Diocese where the goods were situate, although, in many cases, this right of jurisdiction was exercised, and is still retained, by Lords of Manors and others. The Bishop, being the usual Judge in such cases, was, from this circumstance, styled the Ordinary, by way of distinction, from his extraordinary or peculiar jurisdiction. (Swinburne, 380.)

It was the office of these tribunals to judge of the validity of Wills, and, upon being satisfied with the proof, to give authority to the persons named for that purpose in the instrument, in other words, to the Executors, to perform them. If no Executors were named, or if the Executors named, refused to act, the Ordinary, or other person having the jurisdiction, was bound, by himself, or his deputy, to carry them into effect; and in like manner, where no Will was made, to carry into effect that disposition of the dead man's personal estate which the law prescribed.

But in cases of intestacy, the Ordinary, or his deputy, could only deal with such goods of the intestate as he could seize into his possession, and could neither sue for debts due to the intestate, nor be sued for debts due from him. To remedy this last injustice, the Statute, 13 Edw. I., c. xix., was passed, a Statute, which was much relied on by the Appellant. It recites, "that, after the death of a person dying

intestate, which is bounden to some other for debt, the goods come to the Ordinary to be disposed;” and it enacts, “that the Ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend; in such sort as the Executors of the same party should have been bounden, if he had made a testament.”

[492] It was argued, that it appears from this Statute, that the Ordinary was previously entitled to the goods of the intestate, free even from his debts. But this is to mistake its import. It shows, that the Ordinary could not be sued for the debts owing from the deceased, and that the right of disposition or administration was in the Ordinary; but it leaves the question, who were the parties beneficially interested, quite untouched. This is clear from the circumstance, that it applies to all cases of intestacy, even to those where there were a widow and children; yet, at this period, perhaps throughout all England, but certainly in the Province of York, with which we are now dealing, the widow and children are entitled to two-thirds of the personal estate of the intestate. Probably also, the Statute would apply to the case, where no Executors being named in a Will, the testament was in law, imperfect, and the right of administration devolved on the Ordinary, for the purpose of carrying the Will into effect.

But although the right of the Ordinary was one merely of administration, it is obvious that, at the period of which we are speaking, it would be very difficult, and perhaps impossible, to compel any satisfactory account from the Bishop, in any Court, Spiritual or Temporal; and if the administration was had, as probably it would be, by a Deputy, the Deputy was liable to account only to his principal. Under these circumstances, it was to be expected that gross abuses would prevail, and that the property would often be misappropriated to the use of the administrators; and so much the more, as regard was to be had to the good of the soul of the deceased, in the distribution of his estate, and this consideration would leave a large discretion to the Ordinary. We find accordingly, that such [493] abuses did prevail, but they were treated as abuses by both the Ecclesiastical and Civil authorities, and attempts were made by both, to correct and repress them.

In 1341, Archbishop Stratford published his Constitution, “*De Testamentis*,” and, after referring to an earlier Statute of Archbishop Boniface, as having been called into doubt, he makes various provisions to prevent extortion upon Probates of Wills, and then enacts, “that Bishops and other inferior Ecclesiastical jurisdictions, shall in no manner interfere with the goods of Testators, but permit the Executors freely to dispose of them, and in case of persons dying intestate, after payment of debts, shall distribute and employ the remaining goods, to pious uses, to the relations and servants and friends of the deceased, or others, for the benefit of his soul, retaining nothing for themselves, unless, perhaps, a reasonable compensation for the labour of the Ordinary;” and obedience to this decree is enforced under pain of excommunication.

Nothing can be more conclusive than this Ordinance upon the question of right; but probably it was found insufficient to prevent the malpractices of the Ordinary and his deputies, and a much more effectual remedy was introduced, by the 31 Edw. III., Stat. i., c. xi., which took from the Ordinary, in cases of intestacy, the right of personal administration, or of selecting a deputy, at his pleasure, and compelled him to grant administration to those who were most interested in the property, viz., the nearest relations of the deceased. This Statute also gives to the persons, so to be deputed, the right to sue for debts due to the deceased, “for to administer and dispend for the soul of the deceased,” and subjects them to actions, as Executors are [494] answerable, and provides, “that they shall be accountable to the Ordinaries, as Executors be in the case of Testament, as well for the time past, as to come.”

This Statute was passed in the year 1357, just twenty years before the date of the Duchy Charter, and it is clear, that the Church, at this time, had no right or interest, of any kind, in the property of deceased persons, beyond the right of jurisdiction, and of granting administration and the right of possession for that purpose. This Statute provides only for the case of intestates leaving kindred, but no attempt was made in the argument, to show any distinction, before this

Statute, between the case of an intestate leaving kindred and the case of an intestate dying without kindred, as far as regards the right of the Church.

The law, as it regards the succession to intestates, dying without kindred, is stated with perfect clearness by Lyndwood, who wrote in the reign of Henry the Sixth, and died in the year 1446. In his *Provinciale*, in commenting upon the Constitution of Archbishop Stratford, already referred to, after stating, very distinctly, the right of succession of relations, he distinguishes in the case of an absence of kindred, between the succession to a clerk, and the succession to a layman. In the case of a clerk, he states that, with certain exceptions, the Church succeeds; in case of a layman, the Crown. The words are, "*In lacio autem decedente ab intestato, deficientibus consanguineis et uxore, succedet fiscus.*" (Lyndwood, p. 180.)

It was suggested by Sir David Dundas, in his very able argument, that possibly the right of the Crown was founded upon an equitable construction of the Statute of Edw. III. [31 Edw. I., Stat. i., c. xi.], last referred to. If it were so, the Statute was passed before the date of the Charter, and [495] the right, therefore, at that time existed; but in truth, the Statute refers only to the legal right of distribution, and not at all to the beneficial interest. This Statute was founded on the principle, that the administration of the property ought to be granted to those who were beneficially interested in it, and as it was for that reason given to the nearest relations, when the intestate left relations, it is very probable that, by analogy, the Ecclesiastical Courts thought it right to grant the administration to the nominee of the Crown, when the Crown was interested, and in this sense the opinion, expressed by the Judges, in *Manning v. Napp* (1 Salk. 37), that the grant of administration, "to the nominee of the Crown was of respect, rather than of right," may be well founded. But if the administration was granted to any other person, the right of the Crown would remain the same. The administrator, whoever he might be, would be a trustee for the Crown.

The right of administration is very properly held, by the Ecclesiastical Courts, to follow the right of property, in other cases, not provided for, by this or subsequent Statutes. When a wife dies, leaving outstanding personal estate, administration is granted to the husband, not in obedience to any Statute, but because he has the right of property. *Watt v. Watt* (3 Ves. 246.)

The case, indeed, of the Appellant, in this branch of the argument, labours under this insuperable difficulty: If the clergy had the right at the date of this Charter, how did they ever lose it? If the Crown had it not, how did it subsequently acquire it? The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to "*bona vacantia*;" to pro-[496]-perty which has no other owner. This is the ground upon which it is plainly rested by Lyndwood, in the reign of Henry the Sixth, and by Lord Thurlow, in his decision in *Middleton v. Spicer*, in the reign of George the Third. In this case (reported 1 Bro. C. C. 202), no doubt was ever suggested, as to the right of the Crown, in case of intestacy. The great doubt was, whether a trust could be raised for the Crown, by implication, and whether the legacies given to the executors, which would have excluded them from taking the residue, in a contest with next of kin, would have the same effect, in a contest with the Crown.

We consider it, therefore, to be perfectly clear that, at the date of the Charters on which the Duchy claim is founded, the right in question, was vested in the Crown, as one of its "*jura regalia*," and the question is, whether, under the terms of these Charters, it passed to the Duchy.

The material words of the grant do not differ in the several Charters. The grant in the Charter of 1377, is, that the Duke of Lancaster shall have within the County of Lancaster, his Chancery, his Justices to hold Pleas of the Crown, as all other pleas at Common law, and all manner of executions, to be made by his writs and his ministers; then "*et quaecumque alia libertatis et jura regalia ad Comitum Palatinum pertinentia, adeo liberè et integrè sicut Comes Cestrie infra Eundem Comitatum Cestrie dinoscitur obtinere*;" saving to the Crown certain rights, only material to the present purpose, as showing the great extent to which the preceding words of grant, but for the reservation, might be held to reach.

Upon the construction of this Charter, two questions were made: First, whether

the original words [497] of the grant are sufficient to pass the right; and Secondly, whether they are restrained, by the subsequent reference to the Earl of Chester.

The grant is, first, of all "*jura regalia*," belonging to a County Palatine. These rights appear to have been very extensive. Lord Coke lays it down (1 Inst. 204), that a "Count Palatine has '*jura regalia*,' within his county, as fully as the King himself." In Coke Littleton, 114 a, he states that, though a man cannot claim directly by prescription, to have such franchises and liberties as cannot be seized, before the forfeiture appears on record, as the goods of felons, yet he may make a title to them indirectly by prescription, for he may claim a County Palatine by prescription, and by reason thereof, to have the goods of traitors, felons, etc. In the case of *The Queen v. Archbishop of York* (Cro. Eliz. 240), it was held, that the Queen was entitled to the same prerogative when she was seised in right of the Duchy of Lancaster, as when she was seised in right of Her Crown. In the case of *Bowes v. Bishop of Durham* (2 Bulstr. 219), it was held, that the Bishop of Durham, having a County Palatine and "*jura regalia*," should have, incident to a County Palatine, "*bona et catalla felonum*, and of such as stand mute," although he should not have had the goods of such as stand mute, under a grant of *bona et catalla felonum*. The same point appears to have afterwards come before the Court, on a *Quo Warranto*, and is reported under the title of *The King v. Bishop of Durham* (3 Bulstr. 156). The decision was to the same effect, and on the same grounds: and Lord Coke appears to have laid it down, (though there is some inaccuracy in the printing of the passage,) "that if one prescribe for a County Palatine, and to [498] have '*jura regalia*' within this; it extends to all which the King himself may have."

Upon these authorities, which are quite unopposed by any to a contrary effect, we cannot doubt that the right in question, passed to the Duke of Lancaster, amongst other "*jura regalia*," unless there be something in the grant restricting its effect.

Then are there any such words? The words relied on, are, that the Duke is to have these rights, "*adeo liberè et integrè sicut Comes Cestriae dinoscitur obtinere*." There is nothing restrictive in these words. It is not a grant of such privileges and franchises belonging to a County Palatine, as the Earl of Chester enjoys; but it is a grant of all liberties and royal rights belonging to a County Palatine, to be enjoyed as freely and entirely as they are known to be enjoyed by the Earl. It is not necessary for the Duke of Lancaster to show an enjoyment of rights by the Earl of Chester, in order to found his title; but if it were necessary, inasmuch as it appears that "*jura regalia*," generally, was enjoyed by the Earl, and we are of opinion, that the right in question, is amongst "*jura regalia*," we should presume the enjoyment of this right, by the Earl of Chester, unless some evidence were offered to the contrary.

Upon the whole, we are of opinion, that the right to goods belonging to persons dying intestate, without leaving husband, or widow, and without kindred, was vested in the King, in right of His Crown, at the date of these Charters; that this right, within the County Palatine, passed, with other "*jura regalia*," to the Duke of Lancaster, and is now vested in Her Majesty, in right of Her Duchy, and that the sentence complained of, must, therefore, be affirmed.

[Mews' Dig. tit. CROWN, c. CROWN PROPERTY, 1. *Generally*; g. ESCHEAT, 4. *On failure of representative*; tit. WILL, VII. PROBATE AND LETTERS OF ADMINISTRATION, a. S.C. 12 Jur. 839; 6 St. Tr. (N.S.) 699. On point (i.) as to meaning of *jura regalia*, approved of in *A.-G. of Contraio v. Mercer*, 1883, 8 A.C. at p. 778; (ii.) as to ecclesiastical element, in English law of execution, cited in *Juttendromohun Tagore v. Ganendromohun Tagore*, 1872, L.R., Ind. App. Suppt. at p. 64; see also *A.-G. v. Brodie*, 1846, 6 Moo. P.C. at p. 19; (iii.) as to appeal lying to Privy Council in ecclesiastical cases, considered in *Gorham v. Erster* (Bishop of), 1850, 7 St. Tr. (N.S.) 1084. As to Duchy of Lancaster, see *A.-G. of Duchy of Lancaster v. Devonshire* (Duke of), 1884, 14 Q.B.D. 195. The York customary succession (5 Moo. P.C. 492) was abolished by 19 and 20 Vict., c. 94, repealed by S. L. R. Act, 1892.]

REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1846-49. By EDMUND F. MOORE, Barrister-at-Law. Vol. VI.

ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

ROBERT WIGRAM CRAWFORD,—*Appellant*: RICHARD SPOONER,—
Respondent * [Dec. 11 and 15, 1846].

A ship built in a foreign port in India in 1817, within the limits of the Company's Charter, by foreigners, and which sailed under foreign flags, until 1838, when it was then and thereafter owned by, and belonged to, British subjects, resident at Bombay, is entitled, under the Proclamation of the Governor-General in Council, and the Act of the Legislative Council of India, No. X. of 1841, (passed in pursuance of the powers, granted by the Statute, 3 and 4 Vict., c. 56,) to be registered at Bombay, as a British ship, for the purposes of trade, within the limits of the Company's Charter.

This was an action on the case brought by the Appellant, (the owner, to the extent of eight sixty-fourth parts, of a vessel, called the *General Wood*,) against the Respondent, the registering officer of ships, at the port of Bombay, appointed under the Act of the Legislative Council, No. X. of 1841, for refusal to register the ship, at that port. To the declaration, the Respondent pleaded, that the ship was not, on the 11th of September, 1844 (the day named in the declaration, when the refusal was made), or before, had not been, or was then, entitled to the privileges of, or to [2] be registered as, a British ship; and thereupon issue was joined. It was afterwards agreed between the parties that the following special case should be stated for the opinion of the Court.

"In the year 1816, a ship was laid down, and in 1817, was completed and built, at Damaan, a Portuguese settlement in India, within the limits of the Company's Charter (as those limits are defined by the 3 and 4 Vict., c. 56), for and as the property of one Manoel Pereira, a Portuguese subject, and resident at Macao, who continued to own the ship, and navigate her, under the flag of Portugal, until the year 1824, when he sold and assigned the ship to one John Hudson, British subject, a master mariner, resident at Calcutta.

"John Hudson owned the ship, and navigated her under the British flag, until 1826, when he sold and transferred her to Francis Mendez, Portuguese, a merchant of Calcutta, who, in 1827, transferred her to Antonio Pereira, also a merchant of Calcutta. The vessel was shortly afterwards transferred to subjects of Portugal, at Macao, and, in 1832, was transferred by them to John Burd, a master mariner, resident at Singapore, but a subject of Denmark.

* Present: Members of the Judicial Committee, Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

"In 1833, John Burd had the vessel registered as a Danish ship at Altona, and, in 1838, he sold and transferred her to Mr. Henderson, a British subject and merchant, then resident at Bombay, by whom the ship was, in 1838, sold and transferred to Messrs. Jardine, Matheson and Co., British subjects, and merchants of Canton, in China, by whom the ship was, in the same year, re-transferred to John Burd.

"In 1841, John Burd sold and transferred the ship back to Messrs. Jardine, Matheson and Co., who, in the present year, sold and transferred the ship to Sir [3] Jamsetjee Jeejeebhoy, Sons and Co., British subjects and merchants, resident and carrying on business in Bombay, and who had since sold eight sixty-fourth parts or shares in the ship, to the Plaintiff in this action, a British subject, residing at Bombay.

"The ship was navigated under Danish colours whilst owned by John Burd; but on being transferred to Mr. Henderson, a pass was granted by the Master attendant at Bombay, under the provisions of Act No. XIX. of 1838, of the Legislative Council of India, entitled, 'An Act for prescribing the rules to be observed, in order that ships or vessels belonging to ports within the territories under the Government of the East India Company, or belonging to Native Princes or States, or their subjects, might become entitled to the privileges of British ships, under a Proclamation of the Governor-General in Council, in India, made in pursuance of the Statute, 3 and 4 Vict., c. 56. The ship was navigated under British colours, and it was transferred back to John Burd, when it was again navigated under Danish colours, and on being transferred to Messrs. Jardine, Matheson and Co., a sailing letter of licence was granted to them by Sir Henry Pottinger, the chief superintendent of the trade of British subjects in China, under which the ship sailed with British colours.

"The name of the vessel has been several times changed, and it is now the *General Wood*.

"The survey required by section vii. of the Act of the Legislative Council of India, No. X. of 1841, has been duly made by the Government officers, and the Plaintiffs, and other part owners, have also made to the registering officer the declaration contained in section v. of the Act, and all the requisites of that Act have [4] been complied with; but the Defendant, as the Registrar of Shipping for the port of Bombay, refused to register her, under Act, No. X. of 1841, or to grant her a certificate of registry, for the purposes of trade, within the limits of the Company's Charter, on the following grounds:—First. That the vessel has been sold to foreigners. Second. That she has sailed under foreign flags and under foreign names. Third. That at the time of the passing of the Act X. of 1841, she was not sailing under a pass, within the meaning of the said Act. The Plaintiff, on the other hand, contends that the ship having been built within the limits of the Company's Charter, as those limits are defined by the Statute, 3 and 4 Vict., c. [56], and being exclusively owned by Her Majesty's subjects, for whom the Governor-General in Council has power to legislate, is entitled to registry at the port of Bombay, under the Act of the Legislative Council, No. X. of 1841, for the purpose of obtaining the benefit of the Proclamation of the Governor-General in Council, annexed to the said Act; and that, inasmuch as nothing is contained in the Act, excepting or tending to except, from the operation and benefit thereof, vessels which had at any time previously belonged to persons not subjects of Her Majesty, for whom the Governor-General in Council had power to legislate, the Defendant cannot lawfully refuse to register the vessel in question, under the Act and Proclamation, by reason of her having been formerly owned by subjects of a foreign state.

"The question for the opinion of the Court is, whether the Plaintiff, and the other owners of the ship, are lawfully entitled to have the ship registered, under the provisions of the Act of the Legislative Council of India, No. X. of 1841, and the Proclamation annexed thereto.

[5] "It is agreed that all documents referred to in this case may be referred to fully on the argument.

"If the Court should decide in favour of the registry, a verdict is to be entered for the Plaintiff, with nominal damages, the Defendant undertaking to register the vessel accordingly; and if in the negative, a verdict is to be entered for the De-

defendant, with costs, either party to be at liberty to appeal; and should, pending the appeal, the vessel be registered, and allowed to sail and trade under the register, in the event of the decision of the Appeal Court being against the Plaintiff, then the registry of the vessel shall be delivered up to be cancelled."

The special case was argued on the 21st of September 1844, before the Supreme Court, consisting of the Chief Justice, Sir Henry Roper, and Sir Erskine Perry, and the Court gave an interlocutory judgment, in the nature of a verdict, in favour of the Respondent.

Judgment was afterwards signed for the Respondent, and from this Judgment, the Appellant brought this appeal, which now came on for argument.

Mr. Serjeant Channell, and Sir John Bayley, for the Appellant.—The ship *General Wood* having been built within the limits of the Company's Charter, and owned by the British subjects at Bombay, at the time of the issuing of the Proclamation and passing of the Act of the Legislature of India, No. X. of 1841, the Appellant was entitled to have it registered at the port of Bombay, and a certificate of registry granted to him, as a British ship, for all the purposes of trade, within the limits of the Company's Charter. We do not dispute that the English Registry Acts, or that most of the [6] provisions of the Maritime Code, may have formerly applied to India; what we contend now is, that the Act 3 and 4 Vict., c. 56, enabled the Governor-General to extend to a new class of ships, the privilege of British registry; and that having satisfied the terms of the Proclamation and Act of the Legislature of India, the English Ship Registry Acts had ceased to have application to ships or vessels built within the limits of the Company's Charter, which were British owned at the time of the issuing of that Proclamation. It was no necessary ingredient in the title of a British ship to registry, that her ownership should have been continuously British from the time of her build until the time of the application for her registry. Nor did it make any difference, under the 3 and 4 Vict., c. 56, that the vessel had been previously owned by a foreigner. The policy of the law applicable to ships of this class is disclosed in the Act 55 Geo. III., c. 116, and confirmed by re-enactment after appeal, by the Act, 3 and 4 Vict., c. 56; it is favourable to the exclusion of the condition of continuous British ownership, imposed temporarily on East Indian shipping. The Act, 55 Geo. III., c. 116, having declared exemption from the English Registry Acts, in favour of all ships built before the 1st January, 1816, in ports within the limits of the Company's Charter, and the Act, 3 and 4 Will. IV., c. 59, having restricted that exemption to ships continuously British owned, the Act, 3 and 4 Vict., c. 56, in a more liberal policy, repealed the restriction, re-enacted the privileges to their former extent, and permitted the Governor-General in Council, to confer privileges of equal degree on ships built after the 1st January, 1816, as ships theretofore built or then building. The provisions requiring continual British [7] ownership was expressly repealed by the Act, 3 and 4 Vict., c. 56. The intention of the Legislature was to exclude that provision of the General Registry Act, and to give power to the Governor-General in Council, to confer analogous privileges on ships built after the 1st January 1816.

Mr. Wigram, Q.C., and Mr. Forsyth, for the Respondent.—It is a general rule, that the Registry and Navigation Acts must be construed with reference to the Maritime Code at large. The argument of the Appellant, that you are to look to the Act, 3 and 4 Vict., c. 56, and the Act of the Legislative Council of India, No. X. of 1841, alone, cannot prevail. These Acts are in *pari materia* with the Code, being applicable to the same subject. The same construction was put upon the Legacy Duty Acts. *In the matter of Cholmondeley* (1 Crom. and Mee. 149). It cannot be doubted that the Registry and Navigation Acts extend to India. *Stringer v. Murray* (2 Bar. and Ald. 248). *The Recovery* (6 Rob. Adm. Rep. 341, 346). Though it was doubtful at one time. *Wilson v. Marryat* (1 Bos. and Pul. 430). The Act 3 and 4 Vict., c. 57, sec. 3, declares, that it shall be lawful for the Governor-General in Council, in India, by Proclamation, to declare ships built within the limits of the Company's Charter, to be British ships, for the purposes of trade, within the limits of the Charter. This Act of Parliament, however, gave no power to the Governor-General in Council, to abrogate or restrict that part of the Registry laws which disqualified a vessel which had been once owned by a foreigner, from being

registered as a British ship. It cannot be taken as a repeal of the former Acts: it is [8] in the affirmative only, and cannot be a repeal of those Acts, unless there be negative words, or a plain contrariety between the two Acts. *Middleton v. Crofts* (2 Atk. 675; S.C. Cas. temp. Hardw. 57). There is no indication of an intention in the Act 3 and 4 Vict., c. 56, to repeal the 6 Geo. IV., c. 110, and 3 and 4 Will. IV., c. 55, which required continuous ownership. In *Dore v. Grey* (2 Term Rep. 365), Mr. Justice Ashurst held, that the bare recital of a Statute, without a clause of repeal, was not sufficient to repeal the positive provisions of a former Statute. Even if this vessel had been a London built ship, unless she had been continuously owned by British subjects, she could not have the privileges of a British ship; 3 and 4 Will. IV., c. 59, sec. 84. The words in the Act, 3 and 4 Vict., c. 56, "being owned," is to be construed by the general Registry Laws; and by those laws, continuous ownership is required, to entitle a vessel to be registered as a British ship. There is another objection, this vessel has been sold to foreigners. By the general Registry and Navigation Laws, a ship that has been sold to a foreigner is henceforward disqualified from having the advantages of a British ship. The Act, X. of 1841, according to its just interpretation, does not authorise the registration of a vessel built previously in a foreign port, by and for a foreigner.

Mr. Serjeant Channell, in reply.—The rule in construing an Act of Parliament, is to take the words in the sense the Legislature has used them, and they are to have that effect, unless the construction of those words is, either by the preamble, or by the context of the words, controlled or altered. There can be no doubt here, that the Legislature, in using the words, "being owned," in the Act 3 and 4 Vict., [9] c. 56, meant them to meet such a case as the present. The words "which should wholly belong," "continue wholly to belong," and which imply a continuous ownership, are limited in their application to the immediate context, viz., ships condemned either as prize of war, or forfeited for a breach of the Slave Trade Abolition Act.

Lord Brougham.—Their Lordships are clearly of opinion, that the Judgment of the Court of Bombay cannot stand. The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and [10] supply the defect in the previous Act. We lean very much to construing these words in the way which has been pointed out by the learned Serjeant in his reply, that these words, which import continuous ownership, are limited in their application to the immediate context, namely, ships condemned, either as prize of war, or forfeited and condemned as forfeited for a breach of the Slave Trade Abolition Act. It seems to us to be the plain and obvious construction of that section, and that is not at all varied by the 8th and 9th sections, having the word "again" added, which makes a most material difference in its natural construction. When the words are merely "owned by British subjects," can we say that we are to impart into that a totally different consideration, and make it as if it had been, "then, and up to that time, and all times, continuously owned by British subjects?" Could the Legislature mean no such thing as that expressed in the very words to which we have been referred; supposing those words to have the largest possible construction and scope that they can have, and not to be limited according to the argument of the learned Serjeant, to which we lean, and which we think is a very tenable one; namely, to vessels condemned by the Admiralty Courts as prizes,

or forfeited under the Slave Trade Abolition Act? If those words are confined to the cases of prize and forfeitures, under the Abolition Act, *cadit questio*, because then there is an end of the whole argument with respect to continuous ownership, for the whole argument rests entirely upon those words; but if, as we, for the present, assume for argument's sake, these words have no such limitation, but that, instead of being restricted to those cases, are perfectly general, and do not apply merely to the cases of prize vessels and slave-trade forfeited [11] vessels, supposing them to be so general, according to the Respondent's argument, are we to assume that those words were added, not having existed before, for the express purpose of making what?—of making “owned,” or rather “belong to” (for that is the expression there), qualified still further, by the introduction of another requisite, viz., that they should “always have so belonged to.” If the Legislature thought it necessary to add these words, because the words “belong to,” in themselves, were not sufficient, what are we to say, then, when they leave out these words? We cannot get over that; they leave out the words in the case in question, and say, “owned by:” then if “belong to” did not mean continuous ownership, the addition of the further words, “which shall always have belonged to,” we say “owned by,” in parity of reasoning, does not mean continuous ownership; but when those new words, adding an additional condition, are taken into the account, the words “owned by” must be confined to the present meaning, viz., owned by, at the time of the registration.

It appears to their Lordships, therefore, that this is a case, free from all reasonable doubt, and that they must construe the words of the Act as they find them. There is no difference between the words of the Act and the Proclamation: we must take them together; and taking them so, we are of opinion that this judgment cannot stand. It was a judgment upon a special case: the judgment states the facts, in the nature of a special verdict, and this is in the nature of a Writ of Error, upon that special verdict, though it only purports to be upon a special case. We reverse the Judgment of the Court below, and give Judgment for the Plaintiff, with nominal damages.

[Mews' Dig. tit. SHIPPING, A.; III. REGISTRATION, 1. *Under M.S. Acts*, b. *Foreign Owners—Foreign Ships*. S.C. 4 Moo. Ind. App. 179. On point (i.) as to what is a British ship, cf. s. 1 of Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60); (ii.) as to inability of Court to supply *casus omissus* (6 Moo. P.C. 9), cf. *Mersey Docks, etc., Board v. Henderson*, 1888, 13 A.C. 602; *Green v. Wood*, 1845, 7 Q.B. at p. 185; *Whiteley v. Chappell*, 1868, L.R. 4 Q.B. 147; *Pinkerton v. Easton*, 1873, L.R. 16 Eq. 490, 492; *Scott v. Legg*, 1877, 10 Q.B.D. 238. 3 and 4 Vict., c. 56, was repealed as to all H.M.'s dominions by S.L.R. (No. 2) Act, 1890; Act X. of 1841 was amended by Act XI. of 1850; Act V. of 1883; and Act VII. of 1891.]

[12] ON APPEAL FROM THE SUPREME COURT AT MADRAS.

HIS MAJESTY'S ATTORNEY-GENERAL, at the relation of GEORGE WESTCOTT,—*Informant*; WILLIAM DOUGLAS BRODIE and Others,—*Defendants** [Dec. 15, 1846].

Heard ex parte.

The Supreme Court at Madras (established by the Madras Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England, over charities [6 Moo. P.C. 21].

* Present: Members of the Judicial Committee,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

By the 53 Geo. III., c. 155, sec. 111, the Advocate-General is entitled to appear and represent the Crown in informations for the administration of charitable funds [6 Moo. P.C. 22].

The questions raised by this Appeal were, First, whether the Supreme Court at Madras had an equitable jurisdiction, similar to that exercised by the Court of Chancery in England over Charities; and, Secondly, whether the Advocate-General at Madras had authority to appear on behalf of the Crown, and prosecute an information, filed for the administration of funds dedicated to charitable purposes.

These questions arose under the following circumstances:

Peter Uscan, an Armenian merchant, and inhabitant of Madras, by his Will, bearing date the 11th day of January, 1750, bequeathed the sum of 1000 pagodas, in trust, to pay out of the interest of such principal sum, sufficient to keep in repair a bridge and stairs, [13] which he had built upon the river at St. Thomas's mount. By a codicil, the testator enlarged the bequest to 1200 pagodas. The testator died in the year 1756. On the 8th of January, 1805, an information was filed "by His Majesty's Attorney-General, at and by the relation of George Westcott, Esq., and others," in the Supreme Court at Madras, against William Douglas Brodie, Alexander Cockburn, and Joseph Baker, the trustees, in whom the sum was then vested, praying that the trusts of the Will might be settled and established, and the above charitable bequest carried into execution. This information was signed as follows:—"For His Majesty's Attorney-General, Alexander Anstruther," who was the then Advocate-General, at Madras. The usual proceedings having taken place in the cause, the Supreme Court, by a decree made in 1805, referred it to the master, to take an account and for appointment of trustees. The master made his report, which was confirmed. Various orders were made in the suit, by the Court, at the instance of the Advocate-General, between that year and the year 1817. From the year 1817 down to the year 1843 no proceedings were taken in the suit.

On the 28th of July, 1843, a petition was presented, entitled in the cause, by the Rev. Antonio de Rozario Cardozo, the vicar of St. Thomas's mount, a stranger to the suit, in which he stated, that all the trustees were either dead or had left India; that he had expended various sums of money in repairing the said stairs; that they were still out of repair; and the petitioner prayed, that he might be paid out of the trust-funds, the sums expended for the repairs, and that the money might be invested in Government securities, and the interest paid to the petitioner, to be applied by him, [14] in and about repairing and keeping in repair the steps.

Upon this petition coming before the Court, on the 28th of July, 1843, George Norton, Esq., in his capacity of Advocate-General of Madras, informed the Court, that he had received no notice of the petition or motion, then before the Court, and entitled in the cause, and claimed, on the part of Her Majesty's Attorney-General, a right to appear, and be heard in opposition to such motion, in case he should deem it expedient; but the Supreme Court ruled, that he had no right in his character of Advocate-General, to such notice, or to be heard in respect of such motion.

On the 7th of August, 1843, a further motion was made on behalf of the petitioner, when the Advocate-General again claimed the right to be heard, but the Supreme Court refused to hear him, and made the order upon the motion of the petitioner.

The Advocate-General, on the 2nd of October, 1843, on behalf of Her Majesty, moved the Supreme Court, upon notice, that the order of the 7th of August, 1843, might be set aside for irregularity: first, because the Petitioner had no right or interest in the suit, or in the funds standing to the credit thereof; secondly, because the prayer of the petition was moved for without any notice having been served on the Advocate-General: and thirdly, because (having reference to the state of the suit) any further proceedings in the same, must and ought to originate on behalf of the Crown, and at the suit, or on the motion, of the Advocate-General.

The Supreme Court, upon this motion, determined that the Appellant had no right, as Advocate-General, to appear or to be heard, and refused the motion. The grounds on which the Court decided that the [15] Advocate-General had no right to appear were, first, that the right of the Advocate-General to represent the Crown, under the Statute, 53 Geo. III., c. 155, sec. 111, was confined to matters in-

volving pecuniary interests, and did not embrace those functions which the Attorney-General discharges for the purpose of enforcing the prerogatives belonging to the Sovereign, as *parens patriæ*; and, secondly, that if the Statute could be construed as conferring powers to act on behalf of the Crown, in the superintendence of charities, there existed, in India, no jurisdiction to which such powers could be made to attach.

The Advocate-General petitioned for leave to appeal to Her Majesty in Council, which the Court granted. No one appearing in support of the order of the Supreme Court, the appeal was heard *ex parte*.

The Attorney-General (Sir John Jervis) appeared for the Crown, and said that the Crown was in favour of the appeal, but offered no argument.

Mr. Wigram, Q.C. (with whom was Mr. E. J. Lloyd, and Mr. Edmund F. Moore,) for the Advocate-General.

The grounds upon which the Supreme Court refused to hear the Advocate-General, were, first, that that Court had no jurisdiction, in matters of charity; and, secondly, that if there was jurisdiction in the Court, yet that the Advocate-General had no right to represent the public. Neither of these propositions can be maintained.

I. The Supreme Court has jurisdiction in matters of charity.—[Lord Brougham.—There can be no question, that the Supreme Court has jurisdiction over charities; [16] we are surprised that there could be any doubt, after we decided that fact, in the case of *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, 175).—Yes, and in *Mitford v. Reynolds* (1 Phillips, 193), Lord Lyndhurst expressly recognised that decision: he said, "I understand from the Acts of Parliament (13 Geo. III., c. 63, and 21 Geo. III., c. 70), by which the Supreme Court of Calcutta was founded, and from the case of *The Mayor of Lyons v. The East India Company*, that the Supreme Court of Calcutta exercises an equitable jurisdiction similar to, and corresponding with, the equitable jurisdiction of this Court, in matters of charity." By the Charter of Madras, of 1800, the Supreme Court is constituted a Court of Equity, to have an equitable jurisdiction, with the same power and authority to administer justice, in a summary manner, according, or as near as may be, to the rules and proceedings of the High Court of Chancery in Great Britain. It must be taken as a Court of Equity, in the largest sense. There is no difference between the Charters of Madras and Calcutta in respect to their equitable jurisdiction. If the Court below meant that the Supreme Court of Madras, although a Court of Equity, had not the same powers in respect of the administration of charities, as belong to the Court of Chancery in England, it was quite wrong. It might be, that the Supreme Court had not that peculiar jurisdiction which the Lord Chancellor, in his discretion, exercises for the Sovereign, individually, under the sign-manual. That question, however, cannot arise here. The Chief Justice thought that the Equity side of the Exchequer, previous to the abolition of that Court and its transfer, had no original jurisdiction in matters of charity. This was quite a [17] mistake, as is plainly shown from the cases of *The Attorney-General v. Holland* (2 You. and Col. 683), and *The Attorney-General v. Molland* (1 Younge, 562).—[Lord Langdale.—That point is clear. What however was the nature of the jurisdiction of the Court of Chancery, in matters of charity, prior to the Statute, 43 Eliz., c. 4?—It is mentioned by Lord Commissioner, Sir Joseph Jekyll, in the case of *Eyre v. Countess of Shaftsbury* (2 P. Will. 118), that, "the right, which the King has, as *pater patriæ*, to take care of his subjects in cases of charities, etc., falls under the direction of the Court of Chancery." It is part of the general equitable jurisdiction. There is nothing peculiar at all in the circumstances of this particular fund being a charity; it is a trust, and it was in that light only that the Court was called upon to execute it.—[Lord Langdale.—The question then is, whether there is a law-officer in India, properly constituted to represent the Crown.]—The Advocate-General is competent to represent the public, by virtue of his position as principal law-officer of the Government, as also by the Statute, 53 Geo. III., c. 155, s. 111, which authorizes the Advocate-General to exhibit, in the Supreme Court, any information, or informations, in the nature of an action or actions at law, or of a bill or bills in Equity, for, or in respect of, any matter, cause, or thing, whatsoever, as fully and effectually, to all intents and purposes, as His

Majesty's Attorney-General, for the time being, is, by law, authorised to exhibit any such information or informations in any of His Majesty's Courts of Equity in this country. The Court below restricts the right of the Advocate-General, by confining his right to represent the Crown, to matters involving pecuniary interests only. This is a limited interpretation, and contrary to the rule, [18] which has always been, to construe remedial acts, like the present, largely, and not restrictively. *Evans v. Jones* (9 Bing. 316); *The King v. Pierce* (3 Mau. and Sel. 65-6). In *The Corporation of Ludlow v. Greenhouse* (1 Bli. New. Rep., 18), Lord Redesdale explained the origin of the Attorney-General being a party to charity cases, in these words: "Now, why was the Attorney-General a party before this Act (52 Geo. III., c. 101) passed, in informations filed for the purpose of carrying into execution any charitable purpose, or remedying any abuse which might exist with respect to the application of funds given for the purposes of charity? The ground stated in all the books is this, that the King is to be considered as the *parens patrie*, that he is the protector of every part of his subjects, and that, therefore, it is the duty of his officer, the Attorney-General, to see that justice is done to every part of those subjects." Again, Sir Anthony Hart, in *The Attorney-General v. Mayor of Galway* (1 Molloy, 103), expresses his opinion, that "it is the privilege of the Attorney-General, acting on behalf of the public, to come into a Court of Equity, even for a legal matter." The Advocate-General, as the principal law-officer, was originally a party to the suit.

It is a fallacy to view the Crown as the present *parens patrie* in India. The delegated Government, the East India Company, is *parens patrie*. By the present Charter, 3 and 4 Will. IV., c. 85, the entire Government of India is, down to the year 1854, placed under the direction of the East India Company, subject to the Board of Control. They are lessees under the Crown, of the Government of India, during the term of the Charter, and stand, for the period of the [19] lease, in the place of the Crown, as *parens patrie*. There can be no doubt that the East India Company is the Sovereign ruling power. *The Nabob of the Carnatic v. The East India Company* (2 Ves. Jun. 56); *Gibson v. The East India Company* (5 Bing. N.C. 273). The East India Company take the privileges, with the corresponding duty, of guarding and protecting the public rights by their law-officer, who is as much a public officer, as the Attorney-General of England.—[Dr. Lushington.—The only difficulty is this; suppose the Crown and the East India Company to have adverse interests?—No such case could occur. Under the Charter, the East India Company can have no right in anything, except as trustees for the Crown. It would be similar to the case of *Dyke v. Walford* (5 Moore's P.C. Cases, 434), which lately occurred here. The question there was, to whom letters of administration, to an intestate bastard, leaving goods in the Duchy of Lancaster, should be granted; whether to the Appellant, as Her Majesty's Procurator-General, on behalf of the Solicitor for the affairs of Her Majesty's Treasury, Her Majesty's nominee, as having devolved to Her Majesty, in right of Her royal prerogative; or to the Respondent, the Solicitor for the affairs of Her Majesty's Duchy of Lancaster, as having devolved to Her Majesty, in right of Her Duchy and County Palatine of Lancaster, as the nominee and for the use of Her Majesty. The law officers of the Crown appeared for the Appellant, and the Attorney-General of the Duchy of Lancaster for the Respondent. So it is, in this country: the Attorney-General, in all cases concerning property in India, appears and acts for the Crown. *The Mayor of Lyons v. The East India Company* [1 Moo. Ind. App. 175]; *Mitford v. Reynolds* [1 Ph. 193]. We [20] submit that the judgment of the Court below was erroneous; that the Court had jurisdiction, which, indeed, it originally exercised, by making the order we appeal from; and that the Advocate-General, representing the Government, had a right to be heard. We should not have objected to the order, if the Advocate-General had been a party to it. There is, however, a technical difficulty in this case: the information was filed in the name of the Attorney-General, and not of the Advocate-General; we submit, however, that it must be taken as if filed by the Advocate-General.—[Mr. Pemberton Leigh.—The Advocate-General might have filed the information, under the powers of the Act, 53 Geo. III., c. 155.]—In criminal cases, the prosecutions, when the Advocate-General takes proceedings, are in the name of the Queen. *The Queen v. Eduljee Byramjee* (3 Moore's Ind. App. Cases, 468);

The Queen v. Alloo Paroo (ib. 488). But they are always conducted by the Advocate-General, who exercises the same office in criminal trials, as the Attorney-General does.—[Lord Brougham.—Does the Advocate-General enter a *nolle prosequi*?]—Yes, and he controls the proceedings as he pleases.

Lord Langdale.—There are, no doubt, very curious and interesting matters which might be inquired into in this case; but if we are to investigate every curious point, which was not necessary for the purpose of a decision of the case, it would lead to a great deal of needless discussion. We apprehend there is no doubt that a jurisdiction over charitable trusts of this kind was exercised by the Court of Chancery, in this country, at the date of this Charter. The Court of Chancery has now, as it had [21] then, jurisdiction to take care that those charities are duly executed.

That being the case, then comes the Charter, giving to the Supreme Court at Madras the same jurisdiction as the Court of Chancery had here. The whole of the difficulty which had been raised in this case, is upon a supposition, on the part of the Court in India, that the Court of Chancery had not jurisdiction. It is most singular, certainly, that the Supreme Court at Madras should have come to the conclusion, that they could not hear the Advocate-General, and yet that they could make an order, in the case. Their Lordships have no doubt that the Court of Chancery here would have had jurisdiction, if the matter had arisen here, and that the Court in India had jurisdiction, the matter originating there. In this particular case, its jurisdiction has been already exercised. It does not seem to be very material to consider, whether it has been exercised with perfect regularity, or not. Upon an application in the name of the Attorney General, the trustees were ordered to attend, and did attend, and the money which accrued to them was brought into Court, and lodged in Court, and dealt with by the Court. That having been done, all matters of account, on the part of the trustees, have been executed. And the Court, by those proceedings, had become itself a trustee; and the question is, how that trust should be best executed. The relators are gone, they may be supposed to be dead, and the trustees may be taken to be dead. The Court is the trustee; and the question is, upon whose application, or in what form and manner, the trust is to be executed.

What has happened here, is, that a private individual comes into Court, and desires that this fund may be [22] applied in a particular way, which he says is the proper way. The question is, not whether that is the proper manner of proceeding, but whether he has a *locus standi* in the Court. Then arises the question, whether the Advocate-General ought to be heard.

Now it appears to us, if we are to rely upon the Statute [55 Geo. III., c. 155, s. 111] alone, the words of the enactment are quite sufficient, and the effect of them is not abridged by the statement of the particular purpose, which is set forth in the preamble.

There is an end of the matter. That is the whole case. The question is, whether this order has been properly made, after the refusal to hear, perhaps, the only person whose duty it was to see that the Court was duly informed of those circumstances, which it was important for the Court to attend to. It does appear to us, that that was an irregular course of proceeding. It is now stated on behalf of the Advocate-General, that if he had been present he would not have objected to the order. The order fails only on account of this irregularity. Therefore, we think it might be very well stated, that this appeal should be allowed, without prejudice to the like order being made, upon hearing the Advocate-General.

[Mews' Dig. tit. CHARITY, I. JURISDICTION AND POWERS, 1. *Of Court*, a. *Original*, i. *In general*; VII. PRACTICE, 4. *Parties*, c. *Attorney-General*. S.C. 4 Moo. Ind. App. 190. On point as to equitable jurisdiction of Indian High Courts over charities and the Advocate-General, see Cod. Civ. Proc. (Act XIV. of 1882), s. 539; Act XII. of 1891. The High Court of Madras is now constituted by letters patent of 28th Dec., 1865 (Stat. R. and O. Rev. iv. 96), made under the Indian High Court Act, 1861 (24 and 25 Vict. c. 101).]

[23]

ON APPEAL FROM BRITISH GUIANA.

NATHANIEL CHAPMAN,—*Appellant*; THE BRITISH GUIANA BANK,—
Respondents * [Dec. 16, 1846].

By the Dutch Roman law, in force in British Guiana, a joint action by the holder of a promissory note will lie against the maker and indorser of such note [6 Moo. P.C. 34].

What held to be a sufficient notice of dishonour to an indorsee of a promissory note [6 Moo. P.C. 35-37].

The British Guiana Bank (the Respondents), in the month of August, 1841, discounted for Julius Abrahams, his promissory note for 2800 dollars, bearing date the 10th of August, 1841, made by him payable to Robert Gray, or his order, three months after date, and bearing the respective indorsements, first, of Robert Gray, and secondly, of the Appellant, Nathaniel Chapman. The Respondents discounted the note for Abrahams, and paid him the proceeds, and were holders of the note at the time the same became due. The promissory note when due was dishonoured, and no payments were made in respect of it until the 23rd of January, 1843, when Abrahams paid 303 dollars on account of it.

On the 27th of May, 1843, the Respondents commenced an action in the Supreme Court of Civil Justice of the counties of Demerary and Essequibo, against Nathaniel Chapman, jointly with Julius Abrahams and Robert Gray; and, by their claim and demand, they stated and averred, that Abrahams, on the 10th of August, 1841, made his promissory note in writing, dated at Demerary on that day, whereby he promised [24] to pay, three months after the date thereof, to Gray, or his order, the sum of 2800 dollars, for value received. That Gray indorsed the note to the Defendant, Chapman, and that Chapman indorsed the note to the Plaintiffs. That payment of the note was duly demanded of the Defendant Abrahams, who neglected to pay the same, of which the Defendant Abrahams, and the Defendant Gray, and the Defendant Chapman, respectively had notice. That thereupon payment was demanded from the Defendant Gray, who neglected to pay the same, of which the Defendant Chapman had notice. And thereupon payment was demanded from Chapman, who also neglected and refused to pay the same. And the claim and demand further stated, that on the 23rd of January, 1843, the Defendant Abrahams paid the sum of 303 dollars in part of the money specified in the note, but that no further or other sum had been paid on account of the note, and demanded that the Defendants Abrahams and Gray and Chapman might be condemned, jointly and severally (*singuli in solidum*), to pay to the Plaintiffs, on restitution of the promissory note duly receipted, on cession of action to the one paying and entitled thereto, against the others in default of paying, the sum of 2800 dollars, after deducting the sum of 303 dollars so paid, as aforesaid, with interest on the balance of 2497 dollars, from the day of citation until payment and costs. All the Defendants were cited to appear to answer the claim and demand of the Plaintiffs therein, and they appeared accordingly.

The Defendants severed in pleading. The Defendant Abrahams did not plead to the action, but consented to judgment passing against him.

The Defendant Chapman, in his conclusions of ex-[25]-ception and answers, proposed the following exceptions: First, the *innominata* exception (as to the nature of this exception, see Van der Linden, p. 415, Edit. 1828, by T. Henry) of an absolution of the instance. Secondly, *Tibi adversus me non competit hæc actio*. Thirdly, exception of obscure and inept claim and demand. And, in addition to these exceptions, he alleged that, on the 13th of November, 1841, when the note became due, the Defendant Abrahams was solvent, and able to pay the note, but that the Plaintiffs, who were Abrahams' bankers, granted to Abrahams indulgence for the payment of the note until Abrahams became insolvent, and that property of Abrahams sufficient to pay the note was, on the 19th of June, 1843, sold at an execution sale by another creditor of Abrahams, and that the Plaintiffs did, by such indulgence to

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Abrahams, release Gray and the Defendant from all liability to pay the Plaintiffs the promissory note or any part thereof. And the Defendant further pleaded, that the Plaintiffs never gave to him, Chapman, and that he never received from any party to the note, any consideration whatsoever for indorsing the same, and that the note was indorsed by him solely for the accommodation of the Defendant Abrahams, to whom the Plaintiffs were bankers; and that the Plaintiffs took the note in part payment of the account of the Defendant Abrahams, with the Plaintiffs as bankers, and with the full knowledge that the note had been indorsed by Chapman solely for the accommodation of the Defendant Abrahams. And the Defendant also further pleaded, that on the 13th of November, 1841, when the promissory note became due and payable, another promissory note was on the same day drawn by the Defendant Abrahams, for 2500 dollars, in favour of the Defendant Gray, [26] and was by him indorsed, and by the Defendant Chapman subsequently indorsed to the Plaintiffs; and that on or about the 13th of November, 1841, the Plaintiffs received the note for 2500 dollars, in part payment of the promissory note for 2800 dollars; and that on the 23rd of January, 1843, the Plaintiffs received the further sum of 303 dollars from the Defendant Abrahams, in further satisfaction of the note for 2800 dollars, by means of which the note for 2800 dollars was fully satisfied, and the Defendant, denying all and singular the statements and averments in the Plaintiffs' claim and demand not thereinbefore expressly denied, except the payment of the 303 dollars on account of the note for 2800 dollars, concluded to a rejection of the Plaintiffs' claim, with costs.

The Defendant Robert Gray put in his answer in the same terms as Chapman.

The Plaintiffs filed their answer to the exceptions and replication on the main question, and, after rejecting the exceptions, denied all and singular the averments contained in the Defendant's conclusions of answer, and insisted that the same, if true, were not sufficient in law to bar or preclude their claim.

The pleadings being concluded by a *replicque in exceptionibus* on behalf of the Defendant, Chapman, witnesses were examined on the part of the Plaintiffs. Verbeke, one of the managers of the Bank, deposed as follows:—"Had seen Chapman on the subject-matter of this note, in May, 1843. Witness recommended Mr. Chapman to renew the note by paying a small sum, rather than the party should be sued. He stated that he would not do so. That when Mr. Robertson (who had been manager of the Bank from 1837 to February, 1843, and since dead) had asked him for payment when the note fell due, and was dishonoured by Abrahams, [27] and he wanted him to renew it, that he told Mr. Robertson, No, he would not; that he wanted him to sue for it: my positive instructions and orders to Mr. Robertson were to sue for the note. These were the words taken down by the witness at the time, 18th of May, 1843. He meant the then manager, Mr. Robertson. He said, he, Mr. Robertson, was bound to sue, and that he was exonerated because he did not sue." Another witness named Bonver deposed:—"When notes fall due, the managers demand payment, and give notice of dishonour. The note became due the 10th to the 13th of November, 1841: the notice of dishonour was written on the 13th."

The Defendant examined Mr. Manson, a teller in the British Guiana Bank, who deposed, that he knew the Defendant Chapman; had seen him several times at the Bank when Robertson was there; remembered Robertson asking him to take up a note on which his name was: the note sued on was produced; believed that to be the note; could not say how long after the note was due that Robertson asked him; must have been more than a week. Robertson said there was a note of his lying some time past due, and that he had better take it up. Chapman said he did not consider himself liable, as he did not receive any value for it. He told him if he wanted money to sue him for it immediately, as the parties were quite solvent; he meant Abrahams and Gray; that this was after Robertson went away in February, 1843. Wright, a marshal of the Court, was also examined by the Defendant, who proved that he had sold property of Gray and Abrahams on the 29th of June, 1843, the proceeds of which amounted to 2500 dollars.

The evidence being closed, the cause came on for [28] hearing before the Supreme Court, and sentence was given on the 13th day of June, 1844, whereby the Court condemned the Defendant Abrahams to pay to the Plaintiffs, upon restitution of the note for 2800 dollars receipted, the sum of 2800 dollars, deducting the sum of

303 dollars, with interest on 2497 dollars from the 27th of May, 1843, until payment, with costs; and did jointly and severally condemn the Defendant Gray and the Defendant Chapman, the one paying, to receive cession of action, to pay to the Plaintiffs the sum of 2800 dollars, under deduction of the sum of 303 dollars, with interest, as to the Defendant Gray, from the 27th of May, 1843, and as to the Defendant Chapman, from the 29th of May, 1843, until payment, with costs.

From this sentence Chapman brought the present Appeal.

Mr. Serjeant Byles, and Mr. Fitzherbert, for the Appellant.—The action being brought jointly against the maker and the indorsees of the note, is bad in form. In an English Court, a joint action would not lie against three persons liable in different characters; and the first question, is, whether, there is any difference between the Dutch Roman law in force in British Guiana, and the law of England. The old Dutch law of Holland, unaffected by the *Code de Napoléon*, is the law which prevails in the Colony. By the Ordinance of the 25th of June, 1834, which altered the law of evidence in civil cases, the law of British Guiana, with reference to bills of exchange and promissory notes, is made the same in regard to presentments for payment, days of grace, and notice of dishonour, as the law of England. A promissory note is nothing but a simple contract by the law of England. Byles, on Bills of Exchange, p. 4. The Statute, 3rd and 4th Anne, c. 9, which placed promissory notes and bills of exchange on the same footing, was introduced into the colony of British Guiana by an Ordinance, bearing date the 23rd of June, 1837; so that, from that time, the form of action there was to be precisely the same as in England. But the form of action in this case is wrong, both by the Dutch Roman as well as the law of England. The contract by the acceptor and indorsee are wholly different. The joinder of the three Defendants is contrary to the Dutch Roman law. Van der Linden, p. 693 (Edit. by Henry, 1828). Grotius, p. 468 (Introduction to Dutch Jurisprudence. Edit. 1845, by Herbert). It would also be a misjoinder by the law of England. The action being wrongly brought against the Appellant jointly with Abrahams and Gray, precluded the Appellant from calling Abrahams and Gray as witnesses on his behalf, who, if called, would have established a good defence to the action. They were competent witnesses under the Ordinance of the 25th of June, 1834. Secondly. The indorser should have had notice of the dishonour; and this notice should be an actual notification, that the note has been presented for payment, and that it was dishonoured when so presented. It is not sufficient to prove that the note was dishonoured.—[Lord Brougham: The object of notice is not merely to tell the indorser of the fact of dishonour, but that the party damaged by the dishonour intends to hold him liable. Has it ever been decided that, where the holder of the note says to the indorser, “I look to you, and you only, for payment,” it was insufficient notice?—Yes, in *Solarte v. Palmer* (7 Bing, 530. S.C. 1 Bing. N.C. 194), it was held that it was not sufficient notice of dishonour for the holder to say to the indorsee that he looked to him for payment. You must, in legal effect, say the bill has been presented and refused payment. *Strange v. Price* (10 Adol. and El. 125). There is no evidence of notice of dishonour. There is nothing which amounts to a waiver of notice. A promise to pay will not waive notice of dishonour. *Goodall v. Dolley* (1 Term Rep. 712). *Hopley v. Dufresne* (15 East. 275).

Mr. M. D. Hill, Q.C., and Sir John Bayley, for the Respondents.—First. The points now made by the Appellant were not raised in the Court below. The only question argued there was that of indulgence; but supposing the question, as to the form of action, to arise, we contend, that according to the *lex loci contractus*, all three parties may be joined in an action, and the *onus* is on the Appellant to show that such joinder is contrary to the law of British Guiana. We have the present proceeding as an authority for such a practice. Your Lordships are sitting as a Colonial Court. [Lord Brougham: There is great reason in the proposition, that the indorser and maker should not be sued together, for the indorser is only conditionally liable, but the maker is liable at all events. If time be given by the holder to the maker of the note, that lets off the indorser; therefore the two cases are totally different: if, therefore, you did not sue in the same action the maker and indorser, the maker might give evidence for the indorser to [31] prove that the holder had given time to the maker, which would let off the indorser.]—This joint action is more consistent with reason than to allow of three simultaneous actions:

it is so considered by the law in this Country in actions upon policies. But these are mere matters of regulation for the particular Courts: if a question of equity arose, it would be right, even in this Country, to have all three persons parties to the suit: but Foreign Courts do not recognise this difference between Courts of law and equity.—[Lord Brougham: There is no difference in the Dutch law between law and equity, neither is there any distinction in Scotland; such distinction is peculiar to this Country.]—Pothier, in his Treatise on Contracts (Vol. I. Pt. II. ch. 3, s. 271), lays it down, that the holder of a note can go against the maker and indorser at the same time. He says, “*Ou, s’il veut, les poursuivre tous en même temps.*” Secondly. We submit that the Appellant cannot go into the question of notice, on the ground, that the pleadings do not raise that point, and therefore do not let them into that question: but even if that question be open to them, the evidence is sufficient to satisfy the Court that sufficient notice was given.—[Lord Brougham referred to *Hartley v. Case* (4 B. and C. 339).]—It may be that a case may be good against the maker of a note and bad against the indorser; but they can make a different case. In the present case no injury could happen to the Appellant from the loss of evidence, because a party against whom judgment has gone by default may give evidence for another party.—[Lord Brougham: In the case of *Brown v. Brown* (4 Taunt. 752), it was decided by Lord Mansfield that, in an action upon a joint contract against two, one who had suffered judgment by default was not ad-[32]-missible as a witness against the other to prove that he had joined in the contract.]—It does not follow that the same rule prevails in British Guiana, and it lies on the other side to show that by the law of British Guiana the Appellant could not examine Abrahams or Gray.

Mr. Fitzherbert, in reply, referred to Grotius (Introduction to Dutch Jurisprudence, Edit. 1845, p. 468), B. iii., ch. xlv., sec. x. and xi.

Lord Brougham.—This case has been presented to their Lordships on two pleas upon both the points. First, upon the question, whether a joint action lies against the maker, together with the indorser; and secondly, whether there has been due notice given of the dishonour to the indorser, so as to make him liable upon the maker not paying. Both these questions have been presented to their Lordships in two shapes; first, upon the point, whether or not they are raised by the pleadings in such a way as to enable the Appellant to avail himself of them severally here; and, secondly, if he should so avail himself of them, whether they are with him, or against him, upon the merits. Consequently, this question respecting the pleadings rides over the whole case. Now, it is unnecessary to go into minute detail upon this subject; the more so, as we are of opinion, upon the merits of both questions, that we can see no reason for reversing the decision of the Court below. If, upon the merits of both or either of those questions, we could see good ground for reversing the decision of the Court below, then it would become much more material to enter into the other question; namely, the question [33] of pleading which rides over the whole case, and to say whether or not, be it with the Appellant ever so much, he has lost the right of availing himself of it here; but, upon the whole, their Lordships think that he is not shut out by the form of the pleadings. There is a general demurrer, which would raise the question with respect to the joinder of the parties. Upon the first it is not very clear to their Lordships what an *innominate* exception may be or import: we rather incline to consider it as in the nature of a general issue; but at all events, there is this, in part of the defence: “This Defendant avers that the claim and demand of the Plaintiff is informal and illegal,” and, therefore, he claimed to go free. That would rather seem to open the question of notice, and, being a demurrer, it would raise the question of joinder of the last together with the first. The paragraphs of *innominate* exception would raise the question of notice, and one is apt to think that notice ought to be proved, and that any Court ought to lean, in any form of the pleadings, to the doctrine contended for, that so material a fact as notice ought to be proved, because that is a material averment. The Appellant’s claim specifically sets out notice here; it pleads the notice particularly; the notice is pleaded, first of the dishonour to Gray, then Gray’s refusal to pay; it is pleaded also as to Chapman, and, consequently, that might be sufficient. But, as I said before, it becomes less material how we dispose of the question, whether or not these

matters were raised by the pleadings, because we are of opinion, that we see no ground upon the merits of either, or both taken together, to reverse the decision of the Court below. I need go very little into it, further than to remark, upon the subject of [34] non-joinder, that Engand has not the same law upon this subject as other countries. We know very well that it is not the law of France; they say that this proceeding has been borrowed from the *Code de Napoleon*. Be it so; that is at least an admission that what we reckon the law, which allows of no joinder of the parties subsidiarily liable with the party primarily liable, is not the law of every country, for it is not the law of France. That is one observation. Another is, that we have here a statement of the course of proceeding, in this instance, at least, taken as the ordinary cause of proceeding in the Court below, and not very specifically objected to, but only by the general demurrer. Are we then authorized, from what we have heard to be the Dutch law, to say that that is irregular and illegal, according to the Dutch law; and that the party has mistaken his way in making the subsidiary parties, parties to the suit against the Defendant Abrahams upon the non-payment of the promissory note? Their Lordships are of opinion, that they cannot see sufficient ground for any such course here, and for reversing the decision of the Court below, sitting in the Colony administering the Dutch law.

With regard to the authorities which have been cited, venerable as one from age and his great name may be, they are not very applicable to this question of mercantile law, as may be seen from the circumstance, that Grotius says, that the acceptor is not primarily liable, but that you go against the drawer, and if he does not pay, you go against the acceptor. It proves that in those days mercantile law was not as well worked out as it is now, two hundred and fifty years after that great authority. With respect to Van der Linden, he stands in a different position. On looking into the [35] authorities cited by him, it appears that he does not decide it either way; he does not say that you cannot join or you can join, and he does not give any distinct statement to bear out the proposition of the Appellant, that it is illegal so to join.

Upon the second point, the notice, which is a material point, it does seem to their Lordships, when they look into the evidence, that there would not be sufficient to satisfy them, were they called upon, in the first instance, to answer the question,—“Is notice of dishonour regularly given, proved or not?” But sitting here in appeal upon a judgment, given by the inferior Court or jury (for the Court here sit as a jury), they do not see sufficient ground for disputing the conclusion at which they have arrived, and for acting as if that Court ought to have arrived at the opposite conclusion. It is clear, from the evidence of Manson, the Appellant's witness, that Robertson went away in February, 1843. It is equally clear, from the evidence of the same witness of the Appellant, that Nathaniel Chapman had been several times seen at the Bank when Robertson was there: it does not follow that he is afterwards speaking, as to what passed with Robertson. Robertson had been there frequently; it was at the time in question, the time spoken to by the two witnesses for the Respondents, Verbeke and Bomver: it may have been at some other time at which he was present; and we really cannot hold it to be clear, that the Court below was wrong in concluding, in point of fact, that it was at another time, more than a week after, supposing that, by the law of Holland, a week would have been too late, as possibly it might be, to give notice of the dishonour. It is probable that it is nearer the time of the dishonour, because a Banker is [36] not very likely to lose his resource by not giving immediate notice, and accordingly you find that Bomver says that the course of the Bank is, that, when notes fall due, the manager demands payment of them, and gives notice of the dishonour immediately; the parties are clearly not inclined to wait. It is further proved by the same witness, that the notice of dishonour was written on the 13th of November; the promissory note, being payable three months after date, would bring it to the 10th of November; then add the three days grace, which are common all over the world, at British Guiana, as well as here, that would bring it to the 13th of November. This witness says the notice of dishonour was written out, and the probability is so, and so the Court seems to have thought; and though we might not have been bound by that; though we might have thought further evidence necessary, if it had stood alone; yet we are not prepared to say that it was not highly probable that it was the 13th. If it was dis-

honoured, the 13th, it would be sufficient, according to the strictness of English rules. One of these Books says three days, another more; be that as it may, the Courts have considered that sufficient. Now comes the material evidence of Mr. Verbeke. Hitherto I have spoken only of time; but what happened at that time, whenever it may have been, is the next material point. It appears quite clear that Robertson was not the person who was heard by Verbeke to go and speak to Chapman at all: that was not so, because it is perfectly clear that Verbeke is speaking of an interview after Robertson had gone away; for it was in May, and Robertson had gone away in February. According to Manson, the Appellant's witness, he is relating in a continuous statement, what passed between him [37] and Chapman, which is, and it is most material, that he, Chapman, should not pay a small sum, but that he should be sued. Mr. Robertson had asked for payment when the note fell due, and was dishonoured by Abrahams. He wanted him to renew it; he told Robertson he would not, but that he might sue him. "When" may mean, as the Court below appear to have thought, looking at the course of the Bank, and the probability of the notice of the dishonour being written upon that very day, and probably used that very day, that "when the note fell due and was dishonoured by Abrahams," meant on the day or about the day when the note was due, that is, about the 13th, when notice of dishonour was written at the Bank; and Bomver says that he was informed on that day, whenever it was, by Robertson, of the dishonour; that is sufficient to satisfy the law; if he was informed of the dishonour it is enough. Their Lordships think that they cannot consider this a matter made out to their satisfaction; and this it is incumbent upon the Appellant at all events to make out to their satisfaction, the judgment being in the possession of the Respondents. Their Lordships think the case is not sufficiently made out to their satisfaction upon this point, a point of fact; neither have their Lordships proof of the Dutch law, so as to enable them to say that the Court below mistook its way, and was wrong in the conclusion in point of fact to which it came; and, consequently, they see no reason for reversing the judgment come to under those circumstances by that Court. The appeal, therefore, must be dismissed, with costs.

[Mews' Dig. tit. BILLS OF EXCHANGE, L. ACTIONS ON, 1. *Parties*; tit. COLONY, II. PARTICULAR COLONIES, 3. *British Guiana*. S.C. 11 Jur. 25. On point (i.) as to joinder of parties to promissory note, see Rules of Court (British Guiana), 1900, Ord. 14, r. 16; Bills of Exchange Ordinance, 1891 (No. 13 of 1891), ss. 43, 47, and cf. R.S.C. 1883, Ord. 16, r. 6; (ii.) as to notice of dishonour, see Bills of Exchange Ordinance, 1891 (No. 13, 1891), s. 49, and as to promissory notes, ss. 83-89; and cf. Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), ss. 2, 48; (iii.) as to attitude of Judicial Committee to decision of Court below (6 Moo. P.C. 37), cf. *Petley v. Catto*, 1848, 6 Moo. P.C. 380; *Doe d. Seebkristo and Others v. East India Co.*, 1856, 10 Moo. P.C. 161.]

[38]

FROM THE ISLAND OF GRENADA.

In the Matter of THE REPRESENTATIVES OF THE ISLAND OF GRENADA AND THE
HON. JOHN SANDERSON, CHIEF JUSTICE * [Feb. 9, 10, and 11, 1847].

On a Memorial, presented to the Queen in Council, by the House of Assembly of the Island of Grenada, complaining of the judicial conduct of the Chief Justice of that Island, as illegal and oppressive; being referred to the Judicial Committee of the Privy Council; it appeared from the evidence, that during the fourteen years in which the Chief Justice had held office, he had displayed on the Bench, several instances of intemperate, and in some cases illegal, conduct, but these acts were committed many years before the presentation of

* Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. T. Pemberton Leigh.

the Memorial, without any complaint at the time of the Chief Justice's misconduct; the only act of recent date complained of, being the fining of two Magistrates for taking depositions in the third instead of the first person. In these circumstances, the Judicial Committee reported to the Crown, that, having regard to the length of time which had elapsed since all the acts complained of, except that of fining the Magistrates, (which, though erroneous and improper, had been committed by the Chief Justice in the execution of his duty,) they could not, sitting judicially, advise the Crown to remove the Chief Justice for misconduct.

This case came before the Judicial Committee, on a Memorial presented to Her Majesty by the Representatives of the Island of Grenada and its dependencies, in General Assembly convened, complaining generally of the conduct of John Sanderson, Esquire, in his office of Chief Justice of that Island. The Memorialists detailed various grounds of complaint against the Chief Justice, extending over a period of fourteen years, during which he had filled the office, and described his conduct as illegal and oppressive; praying the Crown, to whom they addressed themselves, to adopt such measures of relief to the inhabitants of the Colony as should seem expedient and [39] just. The Memorial was referred by Her Majesty to the Judicial Committee. The particulars of the charges made against the Chief Justice, as set forth in the Memorial, were, in substance, as follows:—

First. Exhibiting habitually on the Bench a harsh and offensive demeanour towards the Bar, the Magistracy, and the Grand Juries, and addressing them in intemperate and violent language, and using expressions unbecoming his dignity as a Judge.

Second. Denying the co-ordinate and co-equal jurisdiction of the Puisne Judges as established by Statute, and taking constant occasion to assume a superior and independent authority.

Third. Refusing to carry the Statute law into effect, for which he was suspended in the year 1836, and only restored upon his undertaking to enforce it.

Fourth. Disbarring Mr. Clement Thomas Richardson, a Barrister, in the month of April, 1838, without notice given to him, or any opportunity afforded to him of justifying or defending himself.

Fifth. Ordering, in the same month, Mr. Fielding Brown, another Barrister, to be committed for one month to gaol for two high contempts, viz., first, for moving to have the previous order of disbarment rescinded, notice of which had been given the Chief Justice; and secondly, for insisting upon his right, as a Barrister, to be heard, when desired by the Chief Justice to sit down, and keep silence: notwithstanding that the other Judge of the Court, who had co-ordinate jurisdiction, objected to such order being made.

Sixth. Procuring from the Governor of the Island the suspension of Mr. Justice Wells, for rescinding the above mentioned order of disbarment: a suspension which was revoked by Her Majesty, under the advice of the Law Officers of the Crown in England.

[40] Seventh. Making, without the knowledge or concurrence of the Puisne Judges, two rules of Court, by which the Puisne Judges were forbidden to transact any business at Chambers; rules which were rescinded by the Order of Her Majesty, under the advice of the Judicial Committee of the Privy Council (see case reported *nom.* In *re Wells*, 3 Moore's P.C. Cases, 216).

Eighth. Sentencing, at the April Sessions of the Supreme Court in the year 1839, summarily and without trial, one Andrew Lambie, a witness for the defence on the trial of an indictment to a month's imprisonment in gaol, and a fine of £10, for prevarication and falsehood; which fine was directed by order of Her Majesty's Secretary of State for the Colonial Department to be repaid to him, and the remaining portion of the term of imprisonment remitted.

Ninth. At an adjourned Session of the Court, on the 9th of May, 1839, illegally, and without trial, issuing a writ of attachment against John Ross McCombie, and imprisoning him for three months, and imposing on him a fine of £100, for advertising, in a newspaper, upon the committal of Andrew Lambie: an imprisonment

which was, likewise, in great part suffered before it could be remitted by the Governor, though the fine was, by his order, never demanded.

Tenth. Ordering, at the April Sessions of the Court in 1839, one Daniel McLean, a prisoner, on his trial for an assault, out of Court during the examination of the witnesses for the defence, and confining him in one of the upper rooms of the same building, whereby he was precluded from questioning his witnesses either by himself or by his Counsel, and was otherwise prevented from assisting his Counsel in his defence.

Eleventh. Fining, at the December Session of the [41] Supreme Court in 1841, in opposition to the opinion of the Puisne Judge sitting with him, Robert Gentle, Esquire, and Jonas Brown, Esquire, two Justices of the Peace, for the alleged irregularity of taking down in writing, certain depositions of witnesses in the third instead of in the first person, notwithstanding the previous custom had been to take such depositions in such form.

The Chief Justice also presented a Memorial to Her Majesty, in which he complained of the re-opening of by-gone matters, which had been disposed of by competent authority, and insisted, that the mode of proceeding was illegal and unconstitutional, more especially as a Judge was not legally liable for anything done in the exercise of his office unless chargeable with corrupt motives; and in such an extreme case, as the Privy Council is not a Court of First Instance, and as there was no matter of litigation depending between the House of Assembly and himself, whilst there was a legitimate mode of proceeding by impeachment before Her Majesty's Honourable Council in the Island, where both parties could be conveniently heard; he prayed that Her Majesty would refer the complaint of the Assembly against him to that constitutional tribunal.

Her Majesty referred both Memorials to the Judicial Committee of the Privy Council, and the case now came on for hearing.

Sir Frederick Thesiger, Q.C., and Mr. Wilde, appeared for the Memorialists, the House of Assembly of Grenada, and Serjeant Talfourd, and Mr. Shapter, for the Chief Justice.

The cases cited on the argument were—As to the [42] power of a Judge at *Nisi Prius* to fine a Defendant for a contempt committed by him in the course of addressing the Jury, *The King v. Davison* (4 B. and Ald. 329). And for punishing for disobedience in publishing proceedings pending a trial, *The King v. Clement* (4 B. and Ald. 218). On the question of fining the magistrates for taking depositions in the third person, *The Queen v. Roche* (1 Car. and Marsh, 341), Statutes 2 and 3 Ph. and Mary, c. x., and 7 Geo. IV., c. lxiv., s. 4, was also referred to.

No judgment was delivered in this case; but the report of the Judicial Committee, bearing date the 11th of February, 1847, which was affirmed by Her Majesty, was as follows:—

“The Lords of the Committee, in obedience to your Majesty's said order of reference, have taken the said petition into consideration, and having heard counsel on both sides, do this day agree humbly to report to your Majesty as their opinion, that in the course of the fourteen years during which the Chief Justice has held his office, several instances of intemperate, and in some cases illegal, conduct, appear to their Lordships to have been established against him; but having regard to the length of time which has elapsed since all such acts, except one, have been committed, without any allegation of misconduct on his part in the meantime, and considering that the last of such acts, *videlicet*, fining of the two magistrates in the year 1844, appears to their Lordships, though erroneous and improper, to have been committed in the execution of what the Chief Justice thought his duty, the Lords of this Committee do not think that, sitting judicially, their Lordships can say the Chief Justice ought to be removed for misconduct.”

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. *Judges*, e. *Amotion*. For cases of similar references to the Privy Council by the Secretary of State, see *Smith v. Sierra Leone (Justices of)*, 1841, 3 Moo. P.C. 361; *In re Bedard*, 1849, 7 Moo. P.C. 23; *D'Allain v. Le Breton*, 1857, 11 Moo. P.C. 64; *Bahama Islands (In the matter of a Special Reference from)*, (1893), A.C. 138; and cf. *M'Leod v. St.*

Aubyn (1899), A.C. 549. As to no judgment being delivered in the case of special references (6 Moo. P.C. 12), cf. *Willis v. Gipps*, 1816, 5 Moo. P.C. 392; *Montagu v. Van Dieman's Land (Lieutenant-Governor of)*, 1849, 6 Moo. P.C. 499; *Rainy v. Sierra Leone (Justices of)*, 1852-53, 8 Moo. P.C. at p. 63; *Jersey (In re the States of)*, 1853, 9 Moo. P.C. 262; *In re Pollard*, 1868, 5 Moo. P.C. (N.S.), 130; *In re Bahama Islands* (1893), A.C. 148.]

[43] ON APPEAL FROM THE SUPREME COURT OF MADRAS.

In re JAMES MINCHIN * [February 12 and 13, 1847].

Heard *ex parte*.

An order made by the Judges of the Supreme Court of Madras, dismissing the Master of that Court from his office, for alleged official misconduct, in the taxation of a bill of costs, reversed upon appeal, by the Judicial Committee of the Privy Council. Such an order, being made by the Court at its own instance, is not an appealable grievance, within the Madras Charter of Justice of December, 1800.

An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; which, on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them.

This was an appeal by James Minchin, Esquire, Barrister-at-law, late Master of the Supreme Court of Madras, against an order of that Court, bearing date the 11th of June, 1845, dismissing him from his office of Master, for alleged official misconduct in the taxation of a bill of costs, in a cause of "*Moottoo Ram v. Campbell*."

The particular facts and circumstances which led to the making of this order, are fully stated in the judgment of their Lordships.

[44] Mr. Bethell, Q.C., and Mr. Goodeve, for the Appellant, upon opening the appeal, were stopped.—[Lord Brougham: There is a defect in this case. If you come here under the Charter, you have no right to appeal. By the terms of the Charter, the appeal given, is confined to judicial acts, namely, "judgments or determinations" (a). No leave to appeal has been granted.] In *Morgan v. Leech* (3 Moore's

* Present: Members of the Judicial Committee,—Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Privy Councillors,—Assessors,—Sir A. Johnston, Knt., and Sir E. Ryan.

(a) The clause in the Madras Charter, relating to appeals, is as follows:—"And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person or persons shall find him, her or themselves aggrieved, by any judgment or determination of the said Supreme Court of Judicature at Madras, in any case whatsoever, it shall and may be lawful for him, her or them to appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned, that is to say, in all judgments or determinations made by the said Supreme Court of Judicature at Madras in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of such appeal." [See now arts. 39-42 of letters patent of 28th Dec., 1865, establishing High Court of Madras, Stat. R. and O. Rev. iv., p. 106; and Code Civ. Proc. (Act XIV. of 1882), ss. 597 *et seq.*] See also the 3 and 4 Will. IV., c. 41; 6 and 7 Vict., c. 38; and 7 and 8 Vict., c. 69.

P.C. Cases, 368), an appeal was allowed from an order of the Supreme Court at Bombay, admitting certain persons, who were not duly qualified, as attorneys. The order, removing Mr. Minchin, is in the nature of a punishment, which the Court has inflicted, *ex mero motu*.—[Lord Langdale: The Court judged in its own case: it was not an order made in the course of a judicial proceeding.]

The Appellant's counsel were then directed to argue the case upon the merits, and they contended that no [45] case of misconduct, to justify the removal of the Master, had been established.

At the conclusion of the argument, their Lordships gave Mr. Minchin liberty to present a petition for leave to appeal, which they would recommend Her Majesty to grant, and then give their judgment upon the merits.

In accordance with the leave thus given, Mr. Minchin, on the same day (13th of February), presented a petition to Her Majesty in Council, which after setting forth that he was advised that he had not a right of appeal against the order of the 11th of June, 1845, removing him from his office of Master, and that Her Majesty's most gracious leave was necessary to maintain such appeal, prayed that leave to appeal might be granted to him against such order of the Supreme Court at Madras, and that Her Majesty would be pleased to refer such appeal to the Judicial Committee of Her Most Honourable Privy Council for adjudication by them, and that the said petition of appeal so presented to Her Majesty might stand in the same plight and condition as the same then was.

The Judicial Committee, upon this petition being referred to them, reported to Her Majesty as their opinion, that leave ought to be granted to the petitioner, to enter and prosecute the appeal from the order of the 11th of June, 1845, the same not being an appealable order, under the ordinary provisions of the Charter of the said Court; and their Lordships did further recommend that the appeal should come on for hearing upon the petition of appeal, and the printed case already lodged on behalf of the petitioner, and that the appeal should be allowed to stand in the [46] same plight and condition as if the same had not been irregular.

Lord Langdale (4th March, 1847).—This is an appeal against an order of the Supreme Court of Madras, dated the 11th of June, 1845, whereby Mr. Minchin was dismissed from his office of Master of that Court, for alleged misconduct.

He was appointed to his office on the 2nd of February, 1841. His remuneration consisted of fees which he was entitled to charge and receive, and it was one of his duties to tax the bills of costs of solicitors.

A table of fees, to be allowed to the Master and other officers, and to the solicitors, was published in the year 1802; but after the publication of that table, it became the practice to allow some fees which were not distinctly specified in the table; and that which has commonly happened elsewhere, appears to have happened in the Supreme Court of Madras. The fees usually allowed in practice seem to consist in part of fees strictly lawful, and considered to be reasonable, and in part of fees neither lawful nor reasonable.

It appears that, at the time of his appointment, Mr. Minchin considered that he was entitled to receive all the fees which had usually been allowed to the Master, whether they were distinctly specified in the table or not; and his view of the subject was confirmed by a communication which he received from the Chief Justice, in the year 1842. At that time some reductions were contemplated, and, with respect to them, Mr. Minchin was asked upon what terms he had accepted the office; and after he had stated the terms, the Chief Justice, in writing to him, expressed himself as follows: [47]—"It is upon your successor, therefore, that our retrenchment must fall."

But, in 1845, the Judges of the Supreme Court, having again in view the very laudable object of diminishing the expense of proceedings, by a general reduction of fees, directed a circular to be sent to the solicitors of Madras, desiring information upon the subject of costs allowed on taxation: they were informed that some of the charges made in the Master's office were objected to, and complained of; and on the 22nd of March, 1845, the particulars of the various charges objected to, were communicated to Mr. Minchin, who, on the 26th of March, gave such explanation of those charges as he thought fitting; and on the 31st of the same month, the Chief

Justice informed him, by letter, that, with one specified exception, the charges objected to, were not consistent with the table of fees, and that the Judges would not be able to allow them in any future bill of costs. The Judges considered that Mr. Minchin was entitled only to such fees as were distinctly specified in the table. Mr. Minchin, on the other hand, considered that, in addition to those fees, he was also entitled to such fees as, previously to the time of his accepting office, and according to the supposed due construction of the table, had been received by his predecessors, without objection or question.

In these circumstances, Mr. Minchin desired to examine witnesses upon the usage, and to appeal from the disallowance, which had been announced; and on the 1st of April he informed the Chief Justice, that he should hold his office only until the question had been decided in England, upon appeal, from the decision, after an examination of the late Chief Justice, Sir Robert Comyn, and Mr. Savage, who was formerly [48] Master. On the following day, the 2nd of April, 1845, Mr. Minchin expressed his desire to return to England, and requested leave of absence, and that another person might be allowed to act for him. He further requested an expression of the opinion of the Chief Justice, upon his conduct.

In answer to that letter, the Chief Justice stated to the effect, that the Judges wish to effectuate the intention which Mr. Minchin had expressed, to carry the appeal up to the Privy Council, and in order to enable him to do so in the least circuitous manner, it struck them, that an order of Court, prohibiting the paying or receiving the fees which they condemned, would best answer this purpose; and the Chief Justice, after expressing the desire of both the Judges to comply with Mr. Minchin's request for leave of absence, proceeded as follows:—"I could, with perfect truth and with the utmost satisfaction, bear testimony to the zeal, energy and ability which you have displayed in the different stations in which I have seen you employed, whether at the Bar, or as Clerk of the Crown, or Master of the Courts; and this testimony I shall be happy to give under my hand, in the event of your departure, but it will be better to do so in a letter, which does not contain other matters." Mr. Minchin was thankful to the Judges for putting their construction of the table of fees, in a form to enable him to make it the subject of appeal, and expressed his intention to move for a commission to take the declaration of Sir Robert Comyn, and the affidavit of Mr. Savage, upon the subject. He intimated that the course pursued might prevent the necessity of his immediate departure for England, and hoped the Judges would not hesitate to give him copies of the [49] allegations made to them respecting the administration of his office.

To this the Chief Justice answered, on the morning of the 5th of April, as follows:—"The order to which you can refer, and against which you appeal, will, I think, be promulgated to-day. We are sorry we cannot comply with your request to have copies of the allegations which have been laid before us, in relation to your office and the charges made in it."

The order thus referred to, was, in fact, made on the 5th of April, 1845, and it prohibited the allowance of several fees, which Mr. Minchin and his predecessors had been accustomed to receive, and to which Mr. Minchin thought himself entitled.

Mr. Minchin thereupon petitioned the Court, for a commission to examine Sir Robert Comyn, Mr. Savage, the late Master, and Mr. Acworth, a former Registrar, touching the matters in question, and for copies of all letters, or other writings, containing representations, charges, or other informations respecting the office of the Petitioner, or to the office or charges thereof referred to, in and by the order of the 5th of April. That petition was, on the 18th of April, 1845, heard before Mr. Justice Burton, who refused to grant its prayer, and also refused to give leave to appeal from his decision. There is no appeal from that order, and therefore, we are not required to give any opinion upon it.

The endeavour of Mr. Minchin to obtain additional evidence, with a view to an appeal, was unsuccessful; after some delay, arising from the want of a Special Court, which Mr. Minchin had in vain requested, he moved to rescind the order of the 5th of April. A joint affidavit of himself, and Mr. De Silva, his chief [50] clerk, was sworn on the 9th of May, 1845. It is very long, and states, at length, the circumstances in which the fees in question had been charged, and the grounds and

reasons upon which Mr. Minchin considered himself to be entitled to them. The motion was made on Friday, the 16th of May, and was dismissed. As the order dismissing that motion was not made the subject of appeal, we are not required to express an opinion upon it, or upon the order of the 5th of April, or upon the authority of the Court, to disallow the fees claimed by Mr. Minchin. But it appears, that on the same day upon which Mr. Minchin's motion was dismissed, the Judges did, of their own authority, rescind the order of the 5th of April, as to two items of charge specified therein.

On the 19th of May, Mr. Minchin wrote a letter to the Registrar of the Court, as follows:—"Sir, I shall feel obliged by your communicating to the Honourable the Judges, that, feeling it impossible for me (after the observations made on Friday last, against my conduct individually, although the matters on which those observations arose, extended to the practice of the office, as established by my predecessors) to carry on the duties of the office of Master, with satisfaction to myself, and benefit to the suitors, I beg to resign the appointment."

It appears, that pending the discussion which had taken place, respecting the order of the 5th of April, certain bills of costs, which had been filed by the Master, in the cause of "*Mootee Ram v. Campbell*," had been laid before the Chief Justice, for his allocatur, and Mr. Minchin's resignation having been tendered on the 19th of May, Mr. Justice Burton, on the next following day, the 20th, directed his clerk, Mr. Carruthers, to write to Mr. Wilkins, Messrs. Rowlandson and Rose, and Mr. Crampton, the solicitors who had been employed in the case, and whose charges appeared in the bill of costs; for information respecting certain matters of business, in respect of which some of those charges purported to be made.

Answers to the letters of Mr. Carruthers were sent, partly on the 20th, and partly on the 21st, the next day following. The answers afford ground for believing that some charges were, or might have been, allowed for business not actually done, and Mr. Serle, the Registrar, by letter of the 21st of May, informed Mr. Minchin, that the Judges had directed him to say, that there were allegations then before them, which related to his conduct as Master and Taxing-officer, and that as these allegations, if unanswered, formed, in their opinion, good grounds for removing him from his office, they could not consent to accept his resignation.

On the 23rd of May, Mr. Carruthers, the clerk of Mr. Justice Burton, made an affidavit, setting forth the correspondence with the solicitors of the 20th and 21st; and on the 23rd, the same day, it was ordered, that Mr. Minchin should attend on Friday, the 30th of May, to show cause, if any he had, why he should not be removed from his office of Master of the Court, for misconduct, in the order mentioned.

The misconduct thus generally described, was particularized in no less than twenty-six distinct allegations, set forth in the order. Twenty-two of the distinct allegations related to affidavits of service of warrants to attend the Master, in cases where the parties did not really attend; the misconduct alleged was, that fees had been allowed for affidavits of service, [52] and for attendances to get them sworn, and for the attendances of the Master to receive the same, when such affidavits of service were wholly unnecessary. Two others, of the distinct allegations, related to the attendance upon warrants, stated to be not attendable warrants. The misconduct alleged was, that fees were allowed to the solicitor and Master for attendance thereon. The remaining two, of the twenty-six distinct allegations, related to copies of minutes, never made. The alleged misconduct was, that fees had been allowed to the solicitor for such copies, and for bespeaking the same, and to the Master, for making the same.

The time for showing cause against the order being enlarged, Mr. Minchin put in an answer, upon oath, on the 5th of June. As to the charges relating to the affidavits of service, he understood that the same, and the attendance thereon, had always been allowed without objection; and that if any objection had been made to the practice, he would have brought the same to the notice of the Court. As to the attendance on the warrants on leaving, which were alleged to be not attendable, he stated such warrants had been considered to be attendable, and had been attended, as any other warrants; and it had been the practice for a solicitor attending upon such a warrant, to receive on such attendance his copy of the paper left. And as to the attendance upon warrants to bring in papers, and which were alleged to be

not attendable, he contended, that they were strictly attendable warrants: and with respect to copies of minutes, the subject of the two last distinct allegations, he denied he had received the sums of money charged in respect thereof; but finding such charges had been made by his predecessors in his [53] office, and allowed without any objection, he had presumed that they were right and proper, and continued the same, and the same were inserted in the bill of costs presented to Mr. Justice Burton, for his final allowance in the cause of "*Mootee Ram v. Campbell*;" and he further stated that the copies had, in fact, been furnished to the solicitors up to the end of the year 1813: but in consequence of the severe illness of his chief clerk, the business of his office had in some degree fallen into arrear, and a portion of the subsequent minutes had not been actually furnished, and as that circumstance was not brought to his knowledge at the time of taxation, he was ignorant thereof, or he would not have allowed the same to be charged.

On the 11th of June, the Court made an order, reciting that, upon reading the order *nisi*, and the evidence upon which it was founded, and upon hearing the Counsel against the order, and upon reading the answer, sworn on the 5th of June, it appeared to the Court, that upon the several instances therein stated, Mr. Minchin had unlawfully acted, as therein mentioned. It was, therefore, ordered that Mr. Minchin be removed from his office of Master of the Court, for his misconduct as aforesaid, and the Court removed him from his office accordingly.

This was the order from which Mr. Minchin has appealed, and we are of opinion, and will so report to Her Majesty, that it ought to be reversed.

We undoubtedly consider it to be the duty of those who preside over the Courts and offices of justice, to use their utmost vigilance and endeavours, to prevent any extortion upon suitors, and to take care that every fee or sum of money, which is sought to be received by the officers and solicitors, has a legal sanction for its [54] receipt, and that no more than the sum legally sanctioned should be received; but in almost every Court it has happened that, in the progress of time, and unnoticed by the Court, the practice of receiving sums not legally sanctioned, but which in themselves are reasonable, and would have been sanctioned if duly noticed, has grown up, together with the practice of receiving sums which are both illegal and unreasonable, and which would have been forbidden if duly noticed. Such practice having been followed by one officer after another, who succeeded his immediate predecessor, becomes at length, in the absence of any reference to a duly established title, a sort of evidence of right, or supposed right, and the office is innocently accepted upon the notion, and on the reliance, that the right was established, by the usage which has been acquiesced in, and prevailed under the allocatur of the Judges.

Where a practice of this sort comes under observation, it is the duty of the Court to exercise, or procure the exercise of a legal authority to retrench fees, if not legal and reasonable, and to establish fees which may be reasonable and just though not legal, until duly sanctioned. But in consideration of such circumstances, it ought to be carefully observed, that an officer, following the steps of his predecessor, may have received fees, which ought not to have been allowed, or continued, may, nevertheless, not be justly chargeable with any corruption or moral guilt.

In the present case, Mr. Minchin appears to have followed the example of those who went before him, and under circumstances which might reasonably lead him to think, that the past allowance of such fees amounted to an authority to him, to allow, charge, and receive them. If they were improper, it was the duty [55] of the Judges to prohibit the allowance of them for the future, but in the absence of misconduct by corruption, or disobedience proved, it does not appear to us to have been their duty to have dismissed Mr. Minchin from his office. The Judges, in the reasons which they assign for the order of the 11th of June, state, that the taking of the fees complained of, had been of long practice in the Master's office, and was traced up through numerous bills in Mr. Minchin's time, and to a period before he held the office.

The like observations might have been fairly made upon the other matters complained of, and it appears to us, that there is no evidence before the Court, from which it could justly be inferred that Mr. Minchin was guilty of wilful corruption, or fraud, or grave misconduct.

If there had been evidence to warrant such a conclusion, it would have been right to dismiss him from his office: but in the absence of such evidence, such fees as were improper, might have been prohibited or disallowed for the future, by proper authority; but we think no officer, who was allowed to take them in the circumstances in which Mr. Minchin was placed, ought to have been dismissed.

The Judges, in giving their reasons for the orders they made, have made use of expressions affecting the moral and personal character of Mr. Minchin, which we deeply regret, as we do not think they were warranted by the facts of the case.

Lord Brougham.—It is to be distinctly understood that Mr. Minchin leaves the Court with his moral character perfectly untouched.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*, 6. *Practice*, o. *Other Matters*; tit. INDIA, 2. JURISDICTION—COURTS. S.C. 4 Moo. Ind. App. 220. As to appeal by special leave, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125, and cf. *Morgan v. Leach*, 1841, 3 Moo. P.C. 368; and *In re Grant*, 1850, 7 Moo. P.C. 141.]

[56] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

AMI BERNARD and Others.—*Appellants*: SAMUEL HYNE and FRANCIS CASEY,
—*Respondents* * [Feb. 15 and 16, 1847].

The Saracen.

Although in the decision of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have weight, yet that Court has not jurisdiction to do all that a Court of Equity might do, in suits instituted by persons, suing either for themselves or on behalf of themselves and others, for administration of assets or distribution of a common fund [6 Moo. P.C. 74].

Where, therefore, the owners of a vessel and part of the cargo, lost in a collision, brought an action in the Admiralty Court, against the damaging vessel, and obtained a decree for the condemnation of the ship, referring the amount of damages to the Registrar and Merchants who were to report them; and on the same day that the decree was pronounced, the owners of the remaining portion of the cargo brought an action against the damaging vessel, and applied to the Court to be let in to participate rateably in the proceeds of the condemned ship remaining in the Registry; it was held:—

First, that the Admiralty Court in such circumstances, had no jurisdiction to decree a rateable distribution, and thereby take away the priority of the *prior petens*; and [6 Moo. P.C. 75]

Secondly, that the decree for damage and reference to the Registrar and Merchants, was a definitive sentence [6 Moo. P.C. 75].

The Statute 53 Geo. III., c. 159, was passed for the protection of owners of ships, and applies only to Bills in Equity, and suits, or proceedings instituted by or on behalf of owners, and does not give equitable jurisdiction to the Court of Admiralty in a case where a proceeding is not taken under the Statute by the owners of the ship [6 Moo. P.C. 75].

Semble. That the 15th section of Statute 53 Geo. III., c. 159, may be applicable to suits for damage in the Admiralty Court, if accompanied by a proceeding on the part of the owners for their own protection, and may lead to a distribution *pro rata* of the proceeds of the ship among the claimants [6 Moo. P.C. 75].

This was originally a cause of damage, civil and maritime, in the High Court

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Sir H. Jenner Fust, and the Right Hon. T. Pemberton Leigh.

of Admiralty of England, [57] promoted by Samuel Hyné, the owner of the late vessel *Diligent*, and Francis Casey, owner of part of the cargo laden on board the same, against the ship *Saracen*, her tackle, apparel, and furniture, and the freight due for the transportation of the cargo laden therein : and against Messrs. Dinmock, Albra, and Bartlett, all of Boston, in the United States of America, the owners thereof intervening in the cause. The cause arose from a collision at sea between the *Saracen* and *Diligent*, occurring in the night of the 11th of February, 1845, in consequence of which the *Diligent*, with the whole of her cargo on board, was entirely lost.

On the 25th of February, 1845, an action was entered and a warrant issued to arrest the ship *Saracen*, her tackle, apparel, and furniture, and the freight due for the transportation of the cargo then or then lately laden on board the same, and cited all persons having any right or interest therein to appear on the default-day after Hilary Term, the 19th of March then next ensuing, to answer to Samuel Hyné, the owner of the *Diligent*; and also to Francis Casey, owner of part of the cargo lately laden on board the same, in a cause of damage, civil and maritime.

An appearance to the action was entered for the owners of the *Saracen*, and the warrant to arrest the ship having been duly executed, but no bail being given, the vessel continued under arrest.

On the 12th of March, another action was entered, against the *Saracen*, on behalf of two of the Appellants, owners of part of the cargo then lately laden on board the *Diligent*, in a cause of damages, etc., the action being for £1500. No further proceedings were had in this action.

The Act on Petition in the original suit brought by [58] the Respondents, and the answer thereto, having been brought in, and the usual proceedings had on both sides, the Judge of the Admiralty Court, on the 6th of May, 1845, assisted by two Trinity Masters, by an Interlocutory Decree pronounced for the damage proceeded for in the original cause, and condemned the ship *Saracen* and freight therein, and in costs; and referred the damage, together with all accounts and vouchers brought in, or thereafter to be brought in, relative thereto, to the Registrar and Merchants, to report the amount thereof; and also condemned the owners thereof in costs, and decreed a Commission of appraisement and sale of the ship, her tackle, apparel, and furniture.

On the same day that the Interlocutory Decree was pronounced, a fresh action was entered, and a warrant issued to arrest the ship *Saracen*, on behalf of the Appellants, the damages being laid at £2500. No appearance was entered on behalf of the owners (the Respondents) of the *Diligent*, to this action. On the 24th of June, the Commission of Sale, with the amount thereof, was duly returned, and the sum of £1037 15s. 6d., as the net proceeds of the sale, brought into the Registry of the Court.

On the 4th of November, the Respondents' Proctor prayed the Judge to decree the proceeds of sale of the ship remaining in the Registry of the Court to be paid out to the Respondents. But an appearance being made by the Appellants' Proctor, for the owners of part of the cargo laden on board the schooner *Diligent*, it was prayed that they might be heard on this, in objection to the prayer of the Respondents. The Judge assigned their Proctor to bring in their Act on Petition at next Court.

[59] On the 14th of November, an Act on Petition was brought in on behalf of the Appellants, which, after stating the original action and the proceeding thereon against the ship *Saracen*, and also the action brought by the Appellants, proceeded to allege, that the Appellants' Proctor distinctly ascertained from the Respondents' Proctor that no appearance would be given on behalf of the owners of the *Saracen* to any action entered by him on behalf of any owners of the lost cargo; and that no bail would be given for the ship *Saracen* then already under arrest at the suit of the Respondents; that it was then considered by him, and admitted, that the interest of both parties was identical and equal, and that under that impression he retained, on behalf of his parties, the Counsel who was already acting for the other side; that it was then well known to all parties that the value of the ship *Saracen* was not nearly sufficient to cover the amount of damage sustained by either of the said parties separately; that in consideration of what was thus alleged, and for the purpose of saving expense, and thereby of serving the interest of all the parties damaged by

the aforesaid collision, he, with the knowledge and consent of the other party and his Counsel, postponed arresting the ship *Saracen*, and taking the other necessary steps towards getting a decree of the Court, pronouncing for the damage sustained by his parties, until the sixth day of May last, when a fresh action was entered by him on behalf of the Appellants; and by virtue of a warrant from the Court, the ship *Saracen* was arrested, and kept under arrest until she was sold as aforesaid; and no appearance having been given to such action, the usual [60] defaults have been duly granted. He further alleged, that having been instructed to take the necessary steps to establish the claims of certain other parties, owners of portions of the cargo, against the *Saracen*, or the proceeds of the sale thereof, he, some time in the month of June last, with the view of still further saving expense, and also of saving the great delay which would otherwise necessarily occur in getting the proceeds of the sale paid out of the Registry, proposed that an arrangement should be made out of Court, whereby the proceeds might be paid out, for the purpose of being placed in the hands of some third party, and divided amongst all the owners of the schooner and her cargo, in proportion to the damage sustained by each of them respectively. That such proposal was agreed to, and was in the progress of being carried into effect by obtaining the necessary signatures to an agreement drawn up with that view, when the claim now advanced on behalf of the Respondents, for priority of payment out of the proceeds, was first made. And he lastly alleged, that neither he nor his parties, nor either of them, had, at any time, relinquished their claim for compensation, or their right of establishing the same against the *Saracen*; that they had not, nor had either of them, received any compensation whatever for the loss sustained by them, and that grievous injury and injustice would be sustained by them, unless they should be allowed to participate rateably with the other parties in the proceeds; that, by reason of his conduct in the premises, the fund now in Court had been saved from great and unnecessary diminution. He therefore submitted, that by reason of the premises, his [61] claim for participation on behalf of his several parties, had been well and duly made, and he was entitled to a decree of participation in the proceeds remaining in the Registry of the Court, and to the costs of that Petition; and he prayed the Judge to reject the prayer for payment of the proceeds to the Respondents, and to pronounce that his parties, the owners of parts of the cargo on board the *Diligent* when so sunk, were entitled to participate rateably with the Respondents in the proceeds of the ship, on proof being made by them of their ownership as alleged, and other necessary proceedings being first duly had and taken, and to condemn them in the costs of that Petition.

In reply, the Respondents' Proctor alleged, that in virtue of the action entered by him on the 25th of February last, against the ship *Saracen*, and the freight due for the transportation of the cargo on board the same (and which action was entered in the sum of £4000), the usual warrant of arrest, issued under Seal of this Court, and on the 26th of the same month, was duly executed on board the ship, at Liverpool, at which time her cargo had been discharged, the freight had been paid to the Master, and the ship was in the act of taking in ballast, and would, but for the arrest, have cleared outward and sailed on her voyage home to America. And he further alleged, that no action was entered against the ship on behalf of the Appellants until the 12th day of March, following (and was then entered by him on behalf of two only of the present parties, and in the sum of £1600 only), and was entered only, and not in any manner prosecuted or proceeded in. And he further alleged, that the Proc[62]-tor of the owners of the ship *Saracen* (and who duly appeared to the action by him entered as aforesaid), declined to give the usual bail for the release of the ship, but prayed an Act on Petition, which he was assigned to bring in, and afterwards brought in, and which was replied to by the Proctor of the owners of the ship, and concluded, when Samuel Hyné, the owner of the *Diligent*, and Francis Casey, the owner of part of the cargo on board the same, his parties, having, at considerable trouble and expense, procured the evidence of the master and crew of the schooner in support thereof, the cause came on to be heard on the third session of Easter Term last, to wit, on the 6th day of May, when the Right Honourable the Judge was pleased to pronounce for his prayer, and to condemn the ship *Saracen* and the freight in the damage proceeded for, with costs, and to decree the usual com-

mission for the appraisement and sale of the ship. And he further alleged that on the same day, but not until after the Court had pronounced and decreed as aforesaid, the Proctor for the Appellants entered the present action against the ship *Saracen*, in the sum of £2500, on behalf of his parties, the owners of parts of the cargo laden on board the schooner *Diligent*, and which action he admitted had been prosecuted in the usual manner; but he expressly denied that the non-prosecution in the usual manner of the action first entered by such Proctor as aforesaid was at the instance, or in any sort with the privity of him, the Respondents' Proctor. And he also expressly denied that he ever, at any time, recognised the claims of the Proctor of the owners' parties, or either of them, to participate rateably with his parties, [63] in the proceeds of sale of the ship *Saracen*, or that any proposals for the division of the proceeds amongst all the owners of the *Diligent*, and her cargo, in proportion to the damage sustained by them respectively, were ever made to him at any time prior to the month of June last, or that his parties ever entertained any such, or subscribed their names to any agreement to that purport or effect, or that he, or his parties, had done any act whatever whereby the prior claim of his parties to be reimbursed out of the proceeds, (so far as the same would extend,) under and arising out of the circumstances aforesaid, had been lost or forfeited. And he further alleged, that the schooner *Diligent*, with her tackle, apparel, furniture, and stores, at the time she was run down and sunk by the ship *Saracen*, was of the value of £1000 and upwards; and that the goods and cargo shipped on board the schooner by his party, Francis Casey, and which were on board at the period aforesaid, were of the value of £2250, or thereabouts; and he prayed the Judge that he would be pleased to direct the proceeds of sale of the ship *Saracen*, remaining in the registry of the Court, amounting to £1037 15s. 6d., to be paid out to him, in behalf of his parties, the claims of his parties, together with all accounts and vouchers relative to the same, being first referred to the Registrar and Merchants to report thereon as usual; and that he would be pleased to condemn the Appellants in the costs and expenses of the Petition.

On the 25th of March, 1846, the Judge of the High Court of Admiralty, by his Interlocutory Decree, rejected the Act on Petition on behalf of the Appellants, praying that they might be pronounced to be [64] entitled to participate rateably with the Respondents in the proceeds of the vessel the *Saracen*. From which sentence (see case reported, *nom.* The *Saracen*, 2 W. Rob. Adm. Rep. 451) this appeal was brought.

Mr. Roupell, Q.C., and Dr. Harding, for the Appellants.—This appeal raises two questions. First, whether the Interlocutory Decree of the 6th of May, 1845, pronouncing for damage, and condemning the ship, and referring it to the Registrar and Merchants to report the amount of such damages, was a definitive and final decree, so as to prevent the Respondents, the other part owners of the cargo, from coming in and claiming a rateable distribution in the proceeds of the vessel in Court; and, Secondly, whether the 15th section of the 53 Geo. III., c. 159 (*b*), does not give an equitable jurisdiction to the Court of Admiralty, on the application of the owners, to decree a distribution of the proceeds of the condemned ship, notwithstanding that the other part-owners may have previously obtained a Decree for damages.

I. The Interlocutory Decree of the 6th of May, was [65] not a definitive Decree, it was simply a reference to the Registrar and Merchants to ascertain the damage, and a report must be made by them before the Court would order the money to be paid out of the Registry. It was not, therefore, such a judgment as either in the

(*b*) An Act to limit the responsibility of ship owners in certain cases. Section xv. enacts, "That if any suit for any such loss or damage as aforesaid, shall be instituted or depending in any Court competent to act as a Court of Equity for the purposes of this Act, such Court shall, and is hereby authorised and empowered to proceed in such suit for such purposes, in the same manner, and under the same regulations, and with the same powers, as are herein given to Courts of Equity, so far as the same are applicable to the nature of such Court, and the forms of proceedings therein, and such Court shall use all such means as a Court of Equity is by this Act empowered to use for the purposes of this Act."

Court of Admiralty, or any other Court, could be considered as a final and definitive Decree. The warrant for the arrest of the ship amounts to nothing more than an injunction to detain the ship, and by the practice of the Admiralty Court the possession of the ship is then given to the party proceeding, when security to abide the result of the action is required by the Court. The Court never gives out the proceeds without taking security: there is, therefore, nothing in this proceeding which can bar the claim which the Appellants make, unless the Interlocutory Decree of the 6th of May, 1845, can have that effect. The practice of the Admiralty Court, upon the reference to the Registrar and Merchants, is, where there is no opposition, that the Registrar certifies the amount of sale, and upon his certificate the amount is paid. The form of a Bail-bond (*a*), commonly used in Admiralty proceedings, [66] shows, that the party is bound to bring back the money to answer any latent demands. In this case no Bail-bond has been given, because there has been no *ultimum decretum*.

II. The effect of the Statute, 53 Geo. III., c. 159, was to secure a rateable distribution of the proceeds of the ship and freight. We submit that Section vii. of that Statute (*a*), gives to the Admiralty Court a jurisdiction, similar to a Court of

(*a*) The following is the form of a bond to answer latent demands in a suit for wages:—

"The Proctor produced as sureties * * * * * who submitting themselves to the jurisdiction of Her Majesty's High Court of Admiralty of England, bound themselves, their heirs, executors and administrators, for * * * a seaman on board the ship, in the sum of * * * of lawful money of Great Britain, unto our Sovereign Lady the Queen, to restore the sum of £ * * * of like money pronounced to be due to the said * * * for his services on board the said ship * * * by decree of the said Court bearing date * * * and now about to be paid out of the proceeds arising from the sale of the said ship or vessel, remaining in the Registry of the said Court, to the said * * * in case any person shall come in for his interest in the said sum of £ * * * or any part thereof, and shall repay the contumacy fees as taxed in this cause, and shall put in sufficient security to answer the action commenced in this behalf, and for his personal appearance in judgment, at such times as the same shall be required, and to pay what shall be adjudged, with expenses; and they further bound themselves, their heirs, executors, and administrators, to bring into the Registry of the said Court the said sum of £ * * * whensoever the Court shall so order, and to save harmless the Judge, Registrar and Marshal, and all other officers of the said Court, as to the payment of the said sum of £ * * * or any part thereof: and unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs', executors' and administrators' goods and chattels, wheresoever the same shall be found, to the value of the sum of £ * * * before mentioned, which caution the said surrogate received, on the report of John Deacon, Deputy Marshal of the said Court, as to the sufficiency of the said sureties."

(*a*) Section vii., "That if several persons shall suffer any loss or damage in or to their goods, wares, merchandizes, ships or otherwise, by any means for which the responsibility of any owner or owners is limited by this Act as aforesaid, and the value of the ship or vessel with all her appurtenances, and the amount of the freight estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damages, it shall and may be lawful to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them, on behalf of himself, herself or themselves, and the other owner or owners of the same ship or vessel, to exhibit a Bill in any Court of Equity, having competent jurisdiction against all persons who shall have brought any such action or actions, suit or suits as aforesaid, and all other persons who shall claim to be entitled to any recompence for any loss or damage arising or happening by the same separate and distinct accident, neglect, or default, or on the same occasion, to ascertain the amount of the value of the ship or vessel, appurtenances and freight, and for payment or distribution thereof, rateably amongst the several persons claiming recompence as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompence as aforesaid, according to the rules of equity, as the case may require."

Equity, whereby an [67] equitable distribution would be insured. The Court below said, we came in after decree, but we submit that this Decree did not make the matter *rem judicatum*. [Sir Herbert Jenner Fust: The Interlocutory Decree condemning the ship, and ordering the sale, is a definitive sentence.] It has only fixed the liability of the ship to pay something; the Respondents only got a reference to ascertain the amount of damage; they have no right to any portion of the proceeds by virtue of that Interlocutory Decree, but only upon the certificate of the Registrar, and if that certificate be contested, the Court must again pronounce upon the question of amount. Cases have occurred where a Court of Equity has pronounced a Decree, but referred it to the officer of the Court to make inquiries, and a Court of Equity has held, that such judgment does not give priority, *Smith v. Eyles* (2 Atk. 385-7). In that case it was held, that a Decree *quod computet* does not pass in *rem judicatum*, till the final Decree. It is perfectly well settled, that where a single creditor files his bill for the recovery of his own debt only, the Court is under no disability of making a general Decree for administration. 1 Story's Commts. on Eq. Jur., p. 446. (2nd. Edit.) Ram. on Assets, ch. 8, p. 143. [68] It has been frequently decided that the Court of Admiralty is a Court of Equity, and is bound to administer equity broadly and equitably. *The Minerva* (1 Hagg. Adm. Rep. 357). *The Jacob* (4 Rob. Adm. Rep. 245). *The Harriett* (1 W. Rob. Adm. Rep. 192). *The Alexander Larsen* (1 W. Rob. Adm. Rep. 289, 297). *The Columbine* (2 W. Rob. Adm. Rep. 186). Indeed the Court has in two instances, *The Margaret* (not reported) and *The Richmond* (not reported), in circumstances similar to the present, decreed a rateable distribution. The 15th Section of the Statute, 53 Geo. III., c. 159, must be construed so as to give it some effect, and that cannot be done without extending its provisions to the Court of Admiralty. The learned Judge of the Court below, held, that the right of filing a bill in Equity is exclusively given by that Act to the owners, for their protection, and not to the claimants for their advantage (2 W. Rob. Adm. Rep. 157). Is the equitable distribution for which this Statute provides, to depend upon the circumstance of whether the owner files a bill under the Statute?

Assuming then that the Court of Admiralty founds its decisions upon equitable principles, can it be possible that where there may be many part-owners of a cargo, some in the country, others absent in different parts of the world, those absent parties are to be excluded from their rights in consequence of a *prior petens*, although those absent parties came to the Court as soon as they could? Can mere accident be a principle of Equity? Suppose the case of several actions, and no mode of consolidation, should not the Court have the power either of withholding its final [69] Decree, or advancing the last causes? The Court below in the present case, having had distinct notice of our claims by the commencement of the second suit, and sitting as a Court of Equity, should not have proceeded to a final judgment, which would bar the other parties, who had equal rights with those who obtained the judgment. The reason for the abandonment of the second suit is satisfactorily accounted for, by the agreement which has been come to by the Proctors for the Appellants, and the Respondents, and which is pleaded in our Act on Petition.

Dr. Addams, and Mr. Bovill, for the Respondents.—It is not denied that the Court of Admiralty may be, for some purposes, a Court of Equity; but this is not a case in which the Court of Admiralty could interfere, or was competent to order a rateable distribution after the Decree obtained by the Respondents. Here there is nothing whatever to justify the Court letting in the Appellants; they are entitled to no indulgence. They waited till we had obtained a Decree in our favour, and on the very day of the sentence they claimed to be let in, to share rateably in the proceeds of the condemned ship. Suppose the sentence had been against us, could we have claimed a share of the costs from the parties claiming to intervene? No authority has been cited in support of the Appellants' argument, that by the 15th section of the Statute, 53 Geo. III., c. 159, the Court of Admiralty, being a Court of Equity, was bound to do something which would compel a rateable distribution among the claimants. The case of *The Richmond*, referred to in support of this position, is not in point.—[Sir Herbert Jenner Fust, after referring to the Registrar's book, said, that [70] the question in that case, was, whether the owner was liable to the extent of the bail, or only to the ascertained value of the ship.]—Neither can the case of *The Margaret* be recognized as an authority. The argument from analogy, to the

decisions of a Court of Equity, is in favour of the Respondents. *Lee v. Park* (1 Keen, 714). 1 Story's Commts. on Eq. Jur., p. 443. (2nd Edit.). The doctrine of *prior petens* in the Admiralty Courts, is nothing more than a branch of the rule "*vigilantibus non dormientibus leges subserviunt*," as in the case of a judgment obtained at law. An executor has priority on a judgment. *Qui priore est in jure potior est in jure*.—[Lord Campbell: The principle of the common law is to give priority to the party obtaining a judgment.]—In the Ecclesiastical Court, a creditor taking the risk of administration where the intestate's estate is insufficient, has priority, and pays himself first. So in bankruptcy; if a party does not prove before a dividend is declared, he is excluded the benefit of the existing funds. The same rule applies on an attachment in the Lord Mayor's Court. Every principle is in favour of the Respondents. If the Appellants' argument was sound it would lead to great inconvenience. How long might a party lay by? when is he to be excluded? Is the fund to be distributed or kept?—[Lord Langdale: The form of the citation in this case is for all parties to come in. The practice in the Court of Chancery is to advertise to bring parties in, which is different from the practice in the Admiralty Court.]—The Admiralty Court has no power to bring in parties. There is no contract between the parties; and even if there was a contract, it is not such a one as the Court of Admiralty could enforce. The Appellants put their [71] case upon the 53 Geo. III., c. 159, which does not apply: that Statute was only passed for the purpose of limiting the liability of the owner of the ship proceeded against, and is in *pari materia* with the 7 Geo. II., c. 15, and 26 Geo. III., c. 86. No question can be raised upon the alleged agreement between the Proctors, as set forth in the Appellants' Act on Petition. If such an agreement exists, it ought to have been the subject of a distinct proceeding. The Appellants have not established anything like bad faith on the part of the Respondents.—[Lord Langdale: The Court is with you on that point.]—Neither can any question be raised upon the form of the Bail-bond, which only undertakes for payment of latent demands within a year and a day from the date of the bond.—[Lord Campbell: This appeal really resolves itself into the question, whether the Interlocutory Decree of the 6th of May, 1845, was a final Decree. The proceeds of the ship being in Court.]—That Decree had the force and effect of a definite sentence: the money would have been paid out under that Decree as a matter of course, if these other parties had not asked to be let in to share.

Mr. Roupell, in reply.—This is a case of extreme difficulty, and one *primæ impressionis*. Now what was the real effect of the Decree of the 6th of May, 1845? It only gives directions for the purpose of ascertaining the amount due to the Respondents. There is no order for payment. It gives an inchoate right only.—[Lord Campbell: There is a judgment, that damages are to be paid; does not that give a party a vested right? The Court below considered the ship and proceeds bound by the Decree, the same as the land would be by [72] a judgment at law.]—The party cannot get paid without the further order of the Court: the certificate of the Registrar and Merchants does not give the right to receive the amount until that is affirmed by the Court; and it rests with the Court as to what is to be the *quantum*. It cannot, therefore, be considered as a final Decree. The practice of the Admiralty is now to suspend the payment out of Court for a year and a day, and not to require a Bond for latent demands: there was nothing in the Bond which could exclude claimants of equal degree from coming in to participate. If equitable principles are to apply, what is there in this case to prevent equal distribution, which a Court of Equity would decree? The funds are in Court. Then why are not those principles of equitable distribution to be carried out in the Court of Admiralty? The suit might be altered so as to make it an action on behalf of all the injured parties; or the party might be compelled to limit his action for his proper proportion. There is nothing to preclude a Court of Equity in a case like this, where the fund has not been adjudicated upon, from distributing a fund; for it is a principle of Courts of Equity, that until the time of actual distribution, a party is not too late in making his claim unless estopped by other circumstances.

Their Lordships reserved judgment, which was now (19th Feb. 1847) delivered by

Lord Langdale.—This is a case of collision between the *Saracen* and the *Diligent*, in which the *Diligent* and her cargo were lost.

On the 25th of February, 1845, an action for damage [73] was commenced in the High Court of Admiralty against the owners of the *Saracen*, by the Respondents, the owners of the *Diligent*, and the owners of part of her cargo.

A warrant to arrest the *Saracen* (a foreign ship) was issued, and on the 19th of March was returned, duly executed.

On the 12th of March, another action against the owners of the *Saracen* was commenced by the owners of other parts of the cargo of the *Diligent*; but this action was afterwards abandoned, and no effective proceedings were had therein.

The action of the Respondents was duly prosecuted, and on the 6th of May, 1845, an Interlocutory Decree, having the force of a definitive sentence in writing, was made therein; and by such Decree the Court pronounced for the damage proceeded for in that cause; condemned the ship and freight therein, and in costs; referred the damages, together with the accounts, to the Registrar and Merchants; and decreed a commission for appraisement and sale of the *Saracen*, her tackle, apparel, and furniture.

On the same 6th of May, a new action for damage was commenced against the owners of the *Saracen*, by the Appellants, owners of part of the cargo of the *Diligent*.

The proceeds arising from the sale of the *Saracen* were brought into the Registry; and the Appellants, whose action was commenced on the 6th of May, claimed to be entitled to participate in the proceeds of the ship *Saracen* remaining in the Registry. After a full discussion, the Judge, on the 25th of March, 1846, rejected the claim.

[74] The appeal is from that decision; and in support of the appeal it was argued—

First. That the High Court of Admiralty has an equitable jurisdiction, in the exercise of which, in a case like the present, it ought to proceed in the same manner as a Court of Equity would proceed in the administration of assets, or in the distribution of any common fund which is to be distributed *pro rata*, among several persons interested in, or having claims upon it.

Second. That the Statute, 53 Geo. III., c. 159, confers on the Court a jurisdiction, which ought to have been exercised for the benefit of the Appellants. And,

Third. That the agreement between the parties precluded the Respondents from claiming the whole fund for themselves.

In the course of the argument we expressed our opinion, that no effect can, on this occasion, be given to the alleged agreement.

First. With respect to the equitable jurisdiction, it is true that in the decisions of cases, properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have their weight; but it does not thence follow that the Court of Admiralty has jurisdiction to do all that Courts of Equity may do, in suits instituted by persons suing, either for themselves, or on behalf of themselves and others, for the administration of assets, or the distribution of a common fund, in which several persons are interested, or upon which they have claims. No instance of the exercise of any such jurisdiction has been cited; and in the absence of any authority, it does not appear to us that there is any such jurisdiction.

[75] It was suggested that the Bail-bond, required on payment of money to a claimant for damage, shows that other claims than those upon which the payment is made have to be provided for; and perhaps it may be so; but there may be claims paramount; such as claims for wages; and at the time when the form of the Bond was settled, the claims of material men, etc., may have been considered to require attention. The Bail-bond may, therefore, be well understood as providing for paramount claims. There seems to be no reason to conclude that the Bond is applicable to claims merely co-ordinate with those of the party who obtained the sentence. Moreover, as no instance has been shown of the exercise of any such jurisdiction, it seems unreasonable to infer that there is such jurisdiction because such a Bond is taken.

Second. The Act, 53 Geo. III., c. 159, was passed for the protection of the owners of ships, and appears to apply only to Bills in Equity, and suits or proceedings instituted by or on behalf of the owners. The 15th clause may be applicable to

suits for damage in the Admiralty, accompanied by a proceeding on the part of the owners for their own protection, and which may lead to a distribution, *pro rata*, of the proceeds of the ship among the claimants. But there is no such proceeding here. The action of the Respondents was brought by them as individuals for their own benefit; there is no proceeding by the owners under the Statute, and the sentence was pronounced for their benefit, subject only to such claims as may be made thereon under the Bail-bond.

We are of opinion that the sentence of the 6th of May, 1845, is to be considered as a definitive sentence in favour of the Respondents; and that the Appellants, [76] whose suit was not commenced till after the sentence was pronounced, are not entitled to participate in the proceeds of the ship in common with the Respondents, by whose diligence, and at whose risk and expense, the damage has been pronounced for: the ship condemned, and the proceeds realised.

We shall, therefore, report to Her Majesty that, in our opinion, the appeal ought to be dismissed, and the sentence affirmed, with costs.

[Mews' Dig. tit. SHIPPING, A. XX. COLLISION, 13. *Jurisdiction and Practice*, k. *Generally*; XXVI. ADMIRALTY LAW AND PRACTICE, 22. *Practice*, f. *Bail*. S.C. below 4 N. of C. 498; 2 Rob. W. 451. On point (i.) as to priority of *prior petens* (6 Moo. P.C. 75), see *The Clara*, 1855, Swab. 1; *The Desdemona*, 1856, Swab. 158; *The William F. Safford*, 1860, Lush. 69; *The Markland*, 1871, L.R. 3 Ad. and E. 343; (ii.) as to owners of cargo being parties (4 N. of C. 498), cf. *The Minna*, 1868, L.R. 2 Ad. and E. 97; (iii.) as to limitation of shipowners' liability, see M.S.A. 1894 (57 and 58 Vict., c. 60), ss. 502, *et seq.* By s. 18 (i.) of the Judicature Act 1873 (36 and 37 Vict., c. 66), and s. 4 (3) of the Judicature Act 1891 (54 and 55 Vict., c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal].

ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLAND OF BERMUDA.

The MAYOR, ALDERMEN, and COMMON COUNCIL of the TOWN of HAMILTON in the ISLAND of BERMUDA,—*Appellants*; MARTHA HODSDON and ELIZABETH WASHINGTON,—*Respondents* * [Feb. 16, 1847].

The word "estate," when used in a Will, is *genus generalissimum*, and will, of its own proper force, without any proof *alivunde*, of an intention to aid the construction, carry realty, as well as personalty, and is not to be confined and restrained to personalty only, unless there is a clear intent expressed, in other parts of the Will; to be gathered either from the whole Will, or from the way in which the word is used in the particular part of the Will where the contested use of it arises [6 Moo. P.C. 82].

Testator, by his Will, devised to J. (his heir-at-law), part of his estate in fee, and also a life-estate, in another portion of his estate, named P.; and also gave to F. (his wife), a life-estate in part of P., during her viduity, with remainder to his other son N., in tail, remainder to his (the Testator's) daughters for life; and after giving certain specific chattels to F., the Will proceeds as follows:—"I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F. And it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together under the direction of my wife, F." N. died without issue, and F., the widow,

* Present: Lord Brougham, Lord Langdale, the Right Hon. Sir Herbert Jenner Fust, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

also died, unmarried and intestate. The heirs-at-law of J. sold the estate, P., to the Appellants, subject to the life-estate of the daughters. In a suit by the Appellants, against the daughters of the Testator, the co-heiresses of F., for a partition,—

Held by the Judicial Committee, affirming the Decree of the Court in Bermuda, that the remainder in fee, in the estate of "P.," passed to F., under the residuary clause, there being nothing in the context of the Will, to confine the natural and legal meaning of the word "estate" to personalty only.

Observations upon the mistake in the report of *Barnes v. Patch*. (8 Ves. 604) [6 Moo. P.C. 84].

This was an appeal from a Decree and Order of the Court of Chancery of the Island of Bermuda, [77] allowing a demurrer of the Respondents, to the Bill filed against them by the Appellants.

The suit was instituted under the following circumstances:—

Nicholas Albouy, of the Island of Bermuda, the Testator, being seised in fee simple, of, amongst other hereditaments, a parcel of land, called "Patton's Point," situate in the Island, made his Will, bearing date the 10th day of November, 1789. This Will consisted of nine separate clauses: those material to this appeal, were the first, third, sixth, and ninth clauses. The first clause was as follows: First:—"My will is, that all my funeral charges, and just debts, be paid, as soon as convenient after my decease; and if, at that time, I should own any part of a vessel, it is my will and desire, that such part be immediately sold, on the best terms that my executors and executrix may think most for the advantage of my estate." Third:

"I give my house and land in Devonshire Tribe, the which I recovered from my uncle, Barnard Albouy, [78] or where Mr. Charles Minors now lives, unto my son, John Albouy, and his heirs; I also give him, my son John, one lot of land in Pembroke Tribe, on a point, or piece of land, known by the name of Patton's Point, to be measured from the path, and easternmost line, to say 18 feet wide, and 32 feet deep." Sixth:—"I give my house, and lot of land, and all improvements in Pembroke Tribe, which I purchased from Mr. Patton's estate, at public auction, and known by the name of Patton's Point, unto my wife, Frances Albouy, so long as she liveth my widow, with this reserve, that my three daughters, Susanna, Sarah, and Rebecca, must live under her my wife, so long as they behave with prudence, and are single. I give, at my wife's death or marriage, the house heretofore mentioned, unto my son, Nicholas Albouy, and his heirs; but, in case he should die without lawful heirs of his body, then my Will is, that the said house and lot be divided equally among all my daughters, had by my wife, Frances Albouy." Ninth:—"I give my wife, Frances Albouy, a desk, one cedar chest, and one mahogany table, that she had from her father's estate. I give all the remainder of my estate, that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, Frances Albouy; and it is my Will, that whatever my estate may consist of, after debts and legacies are paid, that it be kept together under the direction of my wife, Frances Albouy, for the support of her and all my children, until my youngest child be of the age of eighteen years, except my wife should marry; then my will is, that my estate be equally divided between my said wife and her children. But if it please God that my wife lives until the limited time, as above mentioned, then what-[79]-ever my estate may be, and her children insist for a settlement, then my will is, that my wife, Frances Albouy, be entitled to one-third part of whatever my personal estate may be."

The Will was duly signed and sealed by the Testator, in the presence of three witnesses; and was, on the 7th of December, 1789, proved in the usual manner and accustomed in Bermuda.

The Testator died in the year 1789, leaving nine children. He had been twice married. By his first wife, Sarah, he left four children, John Albouy, his eldest son, and heir-at-law (who died intestate, and without issue, in the year 1802), and three daughters, Susanna, Rebecca, and Sarah, afterwards married to Thomas James. By his second wife, Frances, he left five children, Nicholas, Mary, Martha, afterwards the wife and widow of John Hodsdon, one of the Respondents; Elizabeth, afterwards the wife and widow of Archibald Washington, the other Respond-

ent; and Ann, afterwards the wife of one Miller. The Testator's second wife, Frances, died in the year 1835, without having re-married, intestate. The only issue of the Testator living at her death, were, Sarah James, John Albouy Hodsdon, the son and heir of Rebecca, Martha Hodsdon, and Elizabeth Washington.

By indentures of lease and release bearing date respectively the 11th and 12th days of March, 1839, Sarah James and John Albouy Hodsdon, sold, released, and assured the lands and tenements, in the Will, called "Patton's Point," with the appurtenances, unto and to the use of the Mayor, Aldermen and Common Council of the town of Hamilton, in the Island of Bermuda, and their successors and assigns, for ever, subject to the estate or interest of Martha Hodsdon, [80] in one undivided fourth part thereof, for and during her natural life, and also to the estate or interest of Elizabeth Washington, in one other undivided fourth part, for her natural life.

The property in question was in the possession of the Respondents. In the year 1844, the Appellants, the Mayor, etc., of the town of Hamilton, filed their Bill in the Court of Chancery of Bermuda, against the Appellants, Martha Hodsdon and Elizabeth Washington, praying for a partition of the lands, and for an account. The Defendants demurred to the Bill, insisting that all the estate and interest of the Testator passed under the residuary clause to Frances Albouy, the widow and relict of the Testator, and mother of the Defendants, and upon her death, intestate, the real estate descended to them and Ann Miller, as her heiress-at-law.

The Court, after argument, allowed the demurrer, and held, that the property in question passed under the residuary clause of the Testator's Will, and gave judgment for the Defendants, on the demurrer, and dismissed the Bill.

The present appeal was from this decision, and now came on for hearing.

Mr. Bethell, Q.C., and Mr. Stewart, for the Appellants.—The words "estate," and "remainder of estate," in a Will, cannot operate to pass a reversion in fee simple in realty, wherever the Testator had restricted their operation to personalty, either by a positive expression of his intention, or by an implication of it necessarily resulting from the language of the entire Will. Here such an implication necessarily results from the [81] language of the Will in question. The words "remainder of my estate," regard being had to the antecedent parts of the Will, show an intention to devise for a particular purpose, and a limited period only; namely, the support of the widow and her children, until the youngest shall attain the age of eighteen. If such words are to be held as intended to refer to, and to pass to the widow, a reversion of real estate, which is expectant on the death of the widow herself, and on the failure of an estate-tail in her son, and subject to the life estates of her daughters, the Will is repugnant and inconsistent, and the devise in effect becomes nugatory. By construing the word "estate" in the ninth clause, to mean personal estate only, the contradictions which will otherwise arise are avoided, the language of that clause is made consistent with the rest of the Will, and all the expressed intentions of the Testator will be found capable of being supported. They cited in support of their argument: 2 Powell "On Devises," p. 158 (edit. by Jarman). 1 Jarman "On Wills," p. 661. *Wilkinson v. Merryland* (Cro. Car. 447). *Marshant v. Twisden* (Gilb. Eq. Ca. 30). *Barnes v. Patch* (8 Ves. 604). *Church v. Mundy* (15 Ves. 396). *Chester v. Chester* (3 P. Will. 56). *Mostyn v. Champneys* (1 Bing. N.C. 341). *Doe d. Howell v. Thomas* (1 Man. and Gr. 335). *Pearce v. Vincent* (2 Bing. N.C. 328). *Roe d. James v. Avis* (4 Term Rep. 605). *Woollam v. Kenworthy* (9 Ves. 137), and *Bebb v. Penoyre* (11 East. 160).

Mr. Parker, Q.C., and Mr. Follett, for the Respondents.—By the residuary clause in the Will, the Testator [82] gave all the remainder of his estate to his widow, in such words as vest whatever part of his real estate, not otherwise disposed of by his Will, in her in fee. There is nothing in any other part of the Will which necessarily restricts the operation of those words. They cited: *Shaw v. Borrer* (1 Keen. 559). *Noal v. Hoy* (5 Madd. 38). *Doe d. Howell v. Thomas* (1 Man. and Gr. 335). *Woollam v. Kenworthy* (9 Ves. 137). *Saumarez v. Saumarez* (4 Myl. and Cr. 331), and *Davenport v. Coltman* (9 Mee. and Wel. 481; S.C. 12 Sim. 588).

Lord Brougham.—Their Lordships are of opinion, in this case, that there is no foundation whatever for the doubt attempted to be raised on the construction of

this Will, as regards the residuary clause, whether or not it passes the real estate. The principle is now (whatever it might have been anciently) perfectly recognised, nor do I understand it to be substantially disputed on the part of the Appellant at the Bar, that the word "estate" is *genus generalissimum*, and will, by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as personalty; and is not to be confined and restrained to personalty only, unless there is a clear intent expressed in other parts of the Will, to be gathered either from the whole Will, which (I agree with what Lord Eldon has said in one or two of the cases cited) you are always to look to, or from the way in which the word is used in the particular part of the Will, where the contested use of it arises; or in some other way it is shown to be re-[83]-stricted to mere personal estate, contrary to the strict, usual, and now established force, effect, and value of the word.

Now, that being the case, the only question is, whether, in this case, the natural force and effect of the word is restricted; for it is admitted on the part of the Respondents, in favour of the Judgment of the Court below, and not denied at all in that Judgment, that it may be so qualified and restricted, as not to have its proper and natural force; if I may so speak, that force which naturally and properly would belong to it, if not so restrained; or that it may be so restrained by matter showing the general intention to be to restrain it, or any words used in collocation; for instance, with the other words, or the particular mode in which it is used by the maker of the instrument. Now it is needless to cite cases upon this, either upon the legal force and effect of the word, if not restrained, or upon the power of circumstances to except it from that general rule, or to restrain its meaning; for it seems to be generally admitted. It must always be kept in view, that nobody here contends, nor does the judgment of the Court below require such contention, that the word "estate" should be here used to mean only real estate. It means both realty and personalty, and the fallacy of the argument for the Appellants throughout, appears to me to be this: they say, "How can this mean real estate, when you have the word 'effects,' which only applies to personalty?" The real meaning of the word "estate" is not "real estate," but "real" *plus* "personal," and so *reddendo singula singulis*, these words, which are to be restricted words, because they only apply to personal estate as they include future acquisitions, which would not, in [84] the case of lands, pass under such a gift. As the words are not intended to be used as excluding personalty, those words which are added here will apply to the personal part of the estate; and it does not follow on that account, that, because there is personalty whereon they can operate, therefore the realty is to be excluded.

Now, I might show by several cases which have been mentioned at the Bar, that that is the law upon the subject. Perhaps the only one which shows it most clearly, is *Barnes v. Patch* (8 Ves. 604), because there the Master of the Rolls, commenting on what is laid down by Lord Holt, in *The Countess of Bridgewater v. The Duke of Bolton* (1 Salk. 236), that the word "estate" is *genus generalissimum*, and includes all things real and personal, says, at p. 607, "I admit, that has been so qualified by the context as to bear a narrower signification; as in *Doe v. Buckner*; where the words were held insufficient to carry real estate; not as being of themselves insufficient to pass land; but upon the context of the Will, personal estate only being in contemplation of the Testator. In *Shaw v. Bull* (12 Mod. 592), Lord Chief Justice Trevor says, generally the words 'my estate,' 'the residue of my estate,' or 'the over-plus of my estate,' may pass an inheritance, where the intent is apparent to pass it." But that is no longer law. The law is not now that the word "estate" will not pass the realty, or realty together with personalty, unless there is an intent so to do; it is just the other way; it is that it will pass the realty as well as the personalty, unless there is matter apparent to show that the intent is, that it shall not pass the realty. The report is here very inconveniently loose, for it goes on as if the Master of the Rolls was arguing as [85] follows:—"but such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the Will and circumstances of the case; for if the words be indifferent to real and personal estate, or may be applied to personal alone, then the heir-at-law is not to be disinherited by the implication of such words, or any implication at all, but

what is a necessary one." When I read this first, seeing that it was not in inverted commas, I was astonished; for really, considering this decision was in the year 1803, it looked much more as if it was in the time of the early cases, when the law was not so settled as it is now. I will not say very different, but, at all events, not so settled; but when I came to the next sentence I saw it was a mistake of Mr. Vesey's, in not putting inverted commas; for there should be inverted commas, just as there is in the former part of it. This is Chief Justice Trevor's argument, not Sir William Grant's. Sir William Grant goes on as follows:—"But the doctrine of modern cases is, that, where there is nothing to qualify the word 'estate' it will carry real as well as personal estate, and the contrary intention ought to appear to induce the Court to put upon that word a less extensive signification than it naturally bears." So that he says, you must prove the negative in such a case, not regarding of course any thing dehors; but the words themselves proving the intent, the proof must be thrown on the other side, and the intent to restrain must be established by the context—the rest of the instrument, otherwise in a Will it would pass the realty. Then he quotes Lord Hardwicke's observations in the case of *Tilley v. Simpson*, and Lord Mansfield in *Hogan v. Jackson* (Cowp. 306), who says, "It is now clearly settled, that the words 'all his estate,' will pass everything a man has. But, if the word [86] 'all' is coupled with the word 'personal,' or a local description, there the gift will pass only personalty, or the specific estate particularly described." You will find old cases, in which they go so far as to say, that the word "lands" do not pass real estate. There is a case, *Pigott v. Penrice* (Pre. Ch. 471, 1 Eq. Ca. Ab. 209, c. 13), which was cited by Mr. Jarman, "On Wills," Vol. I., p. 672, which was with respect to leaseholds. "I make my niece executrix of all my goods, lands, and chattels," he having no leaseholds: which did look like an infraction. But, however that might be disposed of now, whether "lands," in either of these cases, would be held to be confined to personalty, is another question. There is a much more recent case than that, *Doe d. Gillard v. Gillard* (5 B. and Ald. 785), which came before the King's Bench; and the devise was this: "I do make, constitute and appoint R. G. my whole and sole executor, of all my lands for ever, and leasehold property, here or at B., or money that shall become due for the same, paying certain annuities thereout, by half-yearly payments:" and it was held, that by this Will, the executor took a fee in the freehold lands in the parish of W. So that, properly speaking, the cases of *Doe d. Gillard v. Gillard*, and *Pigot v. Penrice*, must be held not to be reconcilable, the one with the other: but that we have nothing to do with; the law is clearly laid down by that learned Judge, whose judgment I have quoted.

Now, then, the question really is, upon the facts, whether (for that is the whole issue between the parties) there are words in this residuary gift which limit it, and take it out of the clear rule—out of the simple rule—that the word "estate" will pass the whole estate, real as well as personal, unless restricted to the personalty. Now, what do the words say? First, [87] it is taken for granted by all, that we are to look at the Testator's vocabulary, and take the words according to the sense he has given them in his own vocabulary. Now, I do not think that the first clause in the Will proves he used the word "estate" to mean "personalty." No such thing. "My Will is, that all my funeral charges, and just debts, be paid, as soon as convenient after my decease; and if, at that time, I should own any part of a vessel (that is, personalty, no doubt), it is my Will and desire, that such part be immediately sold, on the best terms that my executors and executrix may think most for the advantage of my estate." That means, my whole estate, real as well as personal. Part, no doubt, is "personalty," but it goes into the fund designated by the word "estate." He uses the word "estate," there, most accurately, to mean, "all my estate, real and personal." He is there directing the sale of any share he may have of a ship, which is personalty, and which is to go to increase his estate; the personal part of it, no doubt. If he had said, "The plantation I have, shall be sold, on the best terms, for the advantage of my estate," it would have gone, not to the personalty, but realty; and nobody could doubt, the word "estate," there, would include realty as well as personalty, although the devise would have been to sell the plantation for the advantage of that estate, realty *plus* personalty. Then comes this: "I give my wife, Frances Albouy, a desk, one cedar chest, and one mahogany

table, that she had from her father's estate;" that is to say, his whole estate, "the fund" which her father left, which consisted of realty as well as personalty, from which she had the cedar chest, and so on, which was part of his personal estate—his estate, [88] real and personal, but the personal portion of it. Then comes the clause in question, "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away." Very well: he has particularly given away part of the personalty: he now is giving away the remainder of the estate, consisting of realty and personalty together. Accordingly, he does not mean to revoke the gift he had made, of part of the personalty, when he is giving away the personalty and realty both. But, he says he is giving all the residue of that estate, which means realty *plus* personalty (that must always be kept in view); and he excepts from the gift of the residue what he had given away previously, leaving the residue of the personalty and realty to pass. Then it is objected, "that is now in my possession, or may hereafter be mine." Well, that does not operate on the realty, except what is in possession; but it operates on the personalty, "that may hereafter be mine:" and can anything be more consistent with that construction, than that he should say, "I give the residue of my estate, real and personal?" Though he does not say, "real estate," he means it; and the law means it for him: "I give all the remainder of my estate, that is now in my possession, or may hereafter be mine"—as far as the law will allow me to give it—I cannot give the real estate, after acquired, but I may give the personal estate after acquired. Undoubtedly, the words do not apply to the real part of the estate, but to the personal part of the estates: "and it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together under the direction of my wife, Frances Albouy, [89] for the support of her and all my children, until the youngest child be of the age of eighteen." That is clearly applicable to real estate, as well as personalty, and these words do not, in the slightest degree, tend even towards restraining them: "then my will is, that my estate be equally divided between my said wife and her children." That is equally capable of the construction which the law puts upon it; "but if it please God my wife lives until the limited time, as above mentioned, whatever my estate may be," (*genus generalissimum* again,) "and her children insist for a settlement, then my will is, that my wife be entitled to one-third part of whatever my personal estate may be." No doubt that means personal estate, but why does it mean personal estate? Not from implication; not from any insufficiency of the word "estate" to mean real estate, but that there is the restriction, the word "personal," which excludes realty, just as the word "real" would exclude personalty. If the word real had been there, without personal, no question could have arisen; but the word is estate, and when he means real and personal estate, he does not add the word personal: but when he means the estate shall be personal only, he adds the word personal, which limits and restrains the sense of it.

Their Lordships are, therefore, clearly of opinion, that this case, which has been argued with great learning at the Bar, and very carefully considered by the learned Judge of the Court below, must be affirmed with costs.

[As to meaning of "estate," cited with approval in *Harter v. Harter*, 1873, 3 P. and D. 21; and see *Hawksworth v. Hawksworth*, 1858, 27 Beav. 1; *In re Smart's Estate*; *Fox v. Shipman*, W.N. 1882, 77; *In re Heginbotham*, W.N. 1884, 179; *per con.*, *D'Almaine v. Moseley*, 1853, 1 Drew., 632.]

[90] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

RICHARD SHERSBY and Others. *Appellants*; SAMUEL HIBBERT and Others.
—*Respondents* * July 1, 1847].

The DUKE OF MANCHESTER.

A sailing vessel, having a licensed pilot on board, got on the Goodwin Sands, but was rescued by a steam-tug, which after rendering her salvage services, was employed to tow the vessel to the Downs, but in consequence of the misconduct of the pilot, and the negligence of the master of the steam-tug, the vessel was run ashore on the Sandwich Flats: Held, in such circumstances, that the steam-tug had no claim for salvage, as the master of the steam-tug was not released from all responsibility respecting the direction of the vessel towed, by reason of a licensed pilot being on board, and that it was the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship [6 Moo. P.C. 100].

Held also, that the master of the steam-tug could not separate the towing of the vessel, from his claim for salvage services for getting her off the sands, as it was one transaction of salvage [6 Moo. P.C. 101].

This was originally a cause of salvage civil and maritime, brought by the Appellants, the master and owners, and crew of the steam-tug *Copeland*, against the ship *Duke of Manchester*, her cargo and freight.

The circumstances which gave rise to the appeal were these:—

On the 13th of December, 1845, the barque, *Duke of Manchester*, belonging to the Respondents, outward bound, from London to the West Indies, with a general cargo, in charge of a licensed pilot, got upon the Goodwin Sands midway between the North Sand Head, and the Gull Light-vessel, at forty minutes past 3, P.M.; the wind was moderate, the weather hazy; and it was [91] then within about an hour of low water. All proper precautions were immediately taken; the larboard bower anchor was let go; the barque lay quiet as the tide fell, though she had struck heavily at first; she had thirteen feet water on the starboard, and ten feet on the larboard side. A galley which came alongside was sent off to Ramsgate for a steamer, and arriving there about 8, the steam-tug *Copeland*, of one hundred horse power, and eight men, which was lying in Ramsgate Hole, with her steam up, immediately put to sea, and discovered the *Duke of Manchester*, about half past 9, P.M. On getting near her, about half an hour afterwards, two hawsers and also the barque's steam chain were passed from the barque to the steamer, and the steamer attempted to tow her off: at first by steady pulling, and then by jerking with the full power of her engines. Both the hawsers and also both the chains parted, or were carried away, and about half-past 10, the barque came off the sand. Upon the barque's coming off the Goodwin Sand, the pilot in charge of her hailed the *Copeland* to "go to the Downs and tow a-head." The *Copeland* accordingly towed the barque a-head for about an hour and a half; they passed the Gull Light-vessel about 11 o'clock, and the south buoy of the Brake about twenty minutes past 11, and between 12 and 1, A.M., of the 14th of December, the barque was suddenly hailed from the *Copeland* to "starboard her helm" (*i.e.* to turn her head in-shore), which she immediately did, and again got hard aground on the Sandwich Flats, when it was nearly the top of high water. On the barque's thus grounding for the second time, it being nearly high water, and the tide falling, it was found impossible to move her; further assistance was obtained from Ramsgate; the *Copeland* made two abortive efforts to get her off [92] in the course of the 14th of December; part of her cargo was then discharged into small craft, and on the 15th of December, she was again got afloat, and it being impossible to continue her voyage without discharge and repair, was towed by the *Copeland* to the Downs, to Southend on the 16th, and to the West India Docks on the 17th.

* Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. T. Pemberton Leigh.

The Act on Petition on behalf of the *Copeland*, after setting forth the above facts, alleged, that it was with great difficulty and exertion, and with imminent risk of life and property, that the vessel was dragged off the sands, into deep water; that the pilot of the ship then hailed the master of the *Copeland* to tow her to the Downs, which he did, by keeping as nearly as possible directly ahead of the ship, so as to have her masts in one, according to the invariable custom of steam-tugs, in towing vessels in charge of a pilot; and that the steam-tug was proceeding to tow her to the Downs; but that in consequence of the damaged condition of her rudder, the *Duke of Manchester* would not answer her helm, and again took to the ground on the Sandwich Flats.

The answer of the Respondents, the owners of the *Duke of Manchester* alleged, that the vessel was extricated from the Goodwin Sands, not by the exertions of the *Copeland*, but by the influence of the tide; that the vessel, whilst upon the sands, was in no danger of being lost; and that no risk, or loss of life, or property, was incurred by the master or crew of the *Copeland*; that when she got off the Goodwin Sands, the *Duke of Manchester* had sustained no damage, and that her consequent injuries were occasioned by the gross negligence and misconduct of the steamer, in towing her out of her proper course to the Downs, and running her aground on the Sandwich Flats.

[93] In the surrejoinder, filed by the Respondents, it was stated, that one William Wells, the master of one of the small craft employed, who had remained on board the steam-tug from the time of going to the assistance of the *Duke of Manchester*, until the ship went aground the second time, had informed the master of the steam-tug, shortly before the ship ran on the Sandwich Flats, that he was steering too much to the westward, but that the master, nevertheless, refused to alter his course. Wells made an affidavit of this fact, and it was admitted by the Appellants, in their rebutter, wherein they alleged, that such intimation could not have justified the master of the *Copeland* in altering his course of the ship, directed by the pilot in charge of her; and that the master took every precaution that could be required of him; and it further alleged, that an inquiry had been instituted by the Trinity Board, into the conduct of the pilot in charge of the *Duke of Manchester*, on that occasion, and that the result of that inquiry was, that he was dismissed from their service, and forbidden to pilot vessels in future.

The Judge of the Admiralty Court was assisted by two Elder Brethren of the Trinity House, who were of opinion, "that the vessel going on the Sandwich Flats was not occasioned by the state of the weather, or the rudder being disabled, and that the stranding might have been prevented, with ordinary care and skill; and that there was, on the part of the *Copeland*, gross and culpable negligence, and a disregard of duty." The learned Judge of the Admiralty concurred in this opinion, and by his Interlocutory Decree, bearing date the 10th of June, 1846, pronounced against the Appellants' claim for salvage with costs (reported, *nom.* The *Duke of Manchester*, 2 W. Rob. Adm. Rep. 470).

[94] From this sentence, this appeal was brought by the Appellants, who prayed that it might be reversed, for the following reasons:—

First: Because it appeared, from the proofs in the cause, that the services rendered by the steam-tug *Copeland*, to the *Duke of Manchester*, were of a most important nature; that they were attended with danger to the steam-tug herself, and to the lives of those on board her; and that they were continued during a considerable time, and were the means of rescuing the *Duke of Manchester* from impending peril, if not from total loss.

Second: Because, it clearly appeared, by the evidence, that the subsequent grounding of the *Duke of Manchester* on the Sandwich Flats, and any damage consequent thereon, was imputable entirely, and was at the time so imputed by the master of the *Duke of Manchester*, to the pilot on board of her, whose license to act as a pilot had since, after inquiry, been taken away by the Trinity Board, in consequence of his misconduct on the occasion; and that even if the subsequent grounding of the *Duke of Manchester* had been occasioned by the negligence of the crew of the steam-tug, it would not deprive the Appellants of their right to salvage, unless (and which could not be pretended) the damages arising therefrom, exceeded the benefit derived from their previous services.

Third: Because the opinion of the most competent judge (the master of the *Duke of Manchester*) as to the *Copeland* not having been in fault, was apparent, from the fact of his continuing her in his employ after his ship had been a second time run ashore, and from his afterwards engaging her to tow the ship up, from the Downs to London.

[95] The Respondents, on the other hand, relied, in support of the Decree appealed from, upon the following reasons:—

First: Because, after the most careful consideration by a most competent tribunal, of all the facts in dispute (which were chiefly nautical), the decision of that tribunal had been, on every point, distinctly in favour of Respondents; and it was humbly submitted, that, without new evidence, their Lordships would not reverse such decision.

Second: Because, upon the whole matter, the *Duke of Manchester* was not salvaged, but injured; and Respondents, instead of having derived any benefit from the pretended services of the Appellants, had thereby suffered serious loss and damage.

Third: Because the *Copeland* did not tow the *Duke of Manchester* off the Goodwin Sands, nor did she incur any danger in attempting to do so.

Fourth: Because the *Copeland* did, by the grossest and most culpable negligence and misconduct, tow the *Duke of Manchester* ashore on the main land (on Sandwich Flats), in an easy and well-known channel, at nearly high-water, in calm weather, having shortly before seen the Gull Light: having been previously warned that she was going too far to the westward; and after having just before hailed the *Duke of Manchester* to put her helm to starboard (*i.e.*, her head inshore).

Sir Frederick Thesiger, Q.C., and Dr. Addams, for the Appellants.—The stranding of the *Duke of Manchester*, on the Sandwich Flats, was solely the fault of the licensed pilot, and any damage occasioned by it is imputable [96] entirely to him, and not to the *Copeland*; but even if the subsequent grounding of the *Duke of Manchester* had been occasioned by the negligence of the master and crew of the *Copeland*, it would not deprive the Appellants of their right to salvage for getting the *Duke of Manchester* off the Goodwin Sands, unless the damage arising therefrom exceeded the benefit derived from their previous services.—[Lord Campbell: It was a continuous transaction; the service was not completed by getting the vessel off the sands; she was to be got to a place of safety.]—That was a subsequent transaction: the services consisted of two separate transactions, and the two claims may be distinguished. Suppose the vessel was got off the Goodwin Sands by the *Copeland*, but for whose aid she would have been lost, and afterwards, by the gross negligence of the *Copeland*, she stranded on the Sandwich Flats, and received a very slight injury; would that annihilate the claim for a very meritorious prior service? The claim for salvage attached when the vessel was rescued from the imminent peril on the sands. The damage sustained by grounding on the Flats was very trifling. It is an invariable rule, that it is the duty of a tug-steamers to obey the directions of the vessel in tow, more especially when in charge of a licensed pilot. He is released from all responsibility respecting the direction of the vessel; all he has to do is to keep her masts in a line with his own. It would be dangerous to allow a tug to interfere with the pilot on board the vessel towed, whose duty it is to direct the course. See what the consequence would be if the master of the tug was to exercise his discretion: he would, in effect, depose the pilot from his authority. In the case of the *Duke of* [97] *Sussex* (1 W. Rob. Adm. Rep. 270), a steam-tug employed in towing a vessel having a licensed pilot on board, was held not responsible for a damage occasioned by the vessel coming in contact with another vessel. Upon the principle there laid down, we contend, that the towed and towing vessels are to be considered as one, that the licensed pilot on board the former is to be considered in charge of both, and that the responsibility attaches solely to him.—[Lord Campbell: Is there not a distinction between the case of a tug, employed to tow a vessel, and a tug which is a salvor? This is a claim for salvage.]—We submit that the principle is the same.

The Queen's Advocate (Sir John Dodson), Mr. Bethell, Q.C., and Dr. Harding, for the Respondents.—The steam-tug *Copeland* is not entitled to salvage. We do not question the rule laid down by the learned Judge in the case of the *Duke of Sussex* [1 W. Rob. 270]; which casts the responsibility of directing the course of a vessel in tow, upon the pilot on board, which is very wholesome and proper in the case of

towage; but in a case of salvage, different duties are imposed upon a steamer, when she is the salving vessel. The getting the vessel upon the Sandwich Flats must have arisen from the negligence or misconduct of some person; it must be either wilful or through gross and culpable negligence. If it be said that the steam-tug must steer as the vessel was steered, that involves the proposition that the vessel could be steered freely without impediment; now the case of the Appellants, as raised by the pleadings, is, that her rudder was damaged, [98] and that she could not answer her helm. If so, then when she got off the Goodwin Sands, on whom lay the duty to shape her course? It must have been on the steamer, which was the salving vessel, as the vessel could not answer her helm. Here is a steamer towing a disabled vessel, to whose assistance she had come, along a channel familiar to the steamer, and permits the vessel which could not guide herself, to get on shore.—[Lord Brougham: Is the steamer answerable for the damage?—When a steam-vessel takes a disabled vessel in tow, she is bound to exercise a careful and watchful superintendence; and if the disabled vessel gets into danger whilst being towed, the steamer is answerable; and if a salvor, she forfeits her claim to reward. The damage occasioned by getting on the Sandwich Flats cancels the merit of the prior service.

Lord Campbell (July 19, 1847).—This is an appeal, in a cause of salvage, by the owners and crew of the steam-tug *Copeland*, against the ship, the *Duke of Manchester*, her cargo and freight. The learned Judge of the Court of Admiralty, having been assisted by two Elder Brethren of the Trinity House, by his Decree disallowed the claim, and condemned the claimants in costs.

Their Lordships cannot accede to the first reason for affirming the Decree pronounced by the Respondents, namely, that all the facts having been considered by a competent tribunal, its decision ought not to be reversed without new evidence. We are bound to see whether, in our opinion, the Decree appealed from, is well supported in point of fact, as well as in point of law.

[99] In the first place, their Lordships entirely approve of the law as laid down by Dr. Lushington. The question of law is, whether in case of salvage, where a tug is towing a ship that is in peril, to a place of safety, the ship being under the command of a licensed pilot, the master of the tug is released from all responsibility respecting the direction of the ship, and is merely to keep her masts in a line with his own. The learned Judge below repudiated the doctrine, that under no circumstances was it the duty of the master of the tug to interfere, and that the pilot was, under all circumstances, the only person to blame, and he laid down, that the master of the tug watching the course which the licensed pilot pursues, if he finds that this course will lead the vessel into danger, is bound to interfere, and make a communication to the master of the ship, instead of making himself instrumental to the destruction of life or property. Their Lordships are entirely of the same opinion, and consider it the joint duty of the licensed pilot, and of the master of the tug, to do their utmost for the safety of the ship. Therefore, however much the licensed pilot may misconduct himself, if the master of the tug, through gross negligence, omits to do what was in his power to keep the ship in a proper direction, that she may reach a place of safety, and thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. This is not a claim for ordinary work or labour, but for salvage. The very notion of saving a ship, supposes that the salvor, instead of merely executing orders, shall perform some extraordinary service, and exert himself to the utmost for the safety of life and property.

In this case, the Elder Brethren of the Trinity [100] House, found "that the stranding on the Sandwich Flats might have been prevented by ordinary care and skill, and that there was on the part of the *Copeland*, gross and culpable negligence." The damage occasioned by this stranding appears to have been greater than that occasioned by the stranding on the Goodwin Sands; and therefore, if the finding was justified by the evidence, the claim to salvage was properly disallowed.

Now, although the pilot clearly was guilty of negligence, and was very properly dismissed from the service, the master and crew of the tug were likewise guilty of gross negligence, and their conduct even raises a suspicion that they had some ill design. Belonging to Ramsgate, they must have been familiarly acquainted with the ground, and the course taken by the ship after she was got off the Goodwin Sands

was clearly not the course to the Downs, whither they were told the ship was to be carried. But further, it is expressly alleged in the pleadings by the Respondents, and not denied by the Appellants, that "William Wells, not long before the ship was towed ashore on the Sandwich Flats, told the master of the *Copeland* that he was steering too much to the westward, but that the said master refused to alter his course." Indeed, the learned Counsel for the Appellants, in their arguments at the Bar, relied upon the doctrine that the ship being under the care of a licensed pilot, the master of the tug had nothing whatever to do with her direction, beyond keeping her masts always in a line with her own. Looking to the state of the wind and weather, there seems not to be the smallest doubt that, by a reasonable exertion of care and skill on the part of the tug, the ship might easily have been brought to [101] a place of safety in the Downs, and enabled to pursue her voyage to the West Indies, instead of being again stranded, and obliged to be brought back to port to refit. There has, therefore, been no meritorious service in respect of which salvage ought to be decreed.

An attempt was made to separate the towing of the ship from the operation of getting her off from the Goodwin Sands; but their Lordships are of opinion that they cannot be severed; that there was no fresh engagement, and that the whole forms one transaction of salvage. When the ship had been got off, there was reason to apprehend that her rudder had been injured, and without forfeiting right to salvage the tug could not then have deserted her. The claimants, in their pleadings, describe the whole of their services as of the same character, and claim extraordinary remuneration for the whole, on the principle of salvage.

Their Lordships will, therefore, advise Her Majesty, that the Decree appealed against, should be affirmed with costs, to be paid by the Appellants.

[Mews' Dig. tit. SHIPPING; A. XVIII. SALVAGE: 4. *Misconduct or Want of Skill*; XX. COLLISION; 10. *Compulsory Pilotage*; e. *Duties of Shipowner, Master, and Crew*. S.C. 10 Jur. 863; 5 N. and C. 470; 2 Rob. W. 470; 4 N. of C. 575. On point as to effect of negligence of salvors (6 Moo. P.C. 100), followed in *The Yan-Yean*, 1883, 8 P.D. 150; and see s. 633 of the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60); *Hammond v. Rogers*, 1850, 7 Moo. P.C. 160.]

[102] ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SAINT HELENA.

OUR SOVEREIGN LADY THE QUEEN.—*Appellant*: JOZE ALVES DIAS.—

Respondent * [Feb. 19, 1847, and June 22, 1849].

The AQUILA.

By the 35th section of the rules respecting appeals from the Vice-Admiralty Courts abroad, made under the authority of the Statute, 2nd and 3rd Will. IV., c. 51, all appeals are to be asserted within fifteen days after the date of the Decree appealed from. In March, 1846, a Decree was pronounced by the Vice-Admiralty Court at Saint Helena, restoring a vessel seized by a British cruiser for an alleged infraction of the Slave Trade Act [5 Geo. IV. c. 113], and referring the amount of costs and damages to the Registrar. No appeal was asserted by the seizer's Proctor, who attended before the Registrar under the Decree. In the month of December of that year, a petition of appeal was brought in by the Queen's Proctor, on behalf of the seizer, which the Registrar (in consequence of the appeal not having been asserted within fifteen days) refused to receive. On an application made *ex parte*, supported by affidavits stating that it was the seizer's Proctor's ignorance of the rule for asserting the appeal, which alone prevented him from appealing, leave was given to appeal, subject to a counter-petition being presented by the Respondent to

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

dismiss the appeal [6 Moo. P.C. 107]. Upon an Act on Protest against the right of appeal by the Respondent:

Held by the Judicial Committee that there was no sufficient ground to enable them to allow the appeal.

This was originally a cause instituted in the Vice-Admiralty Court of Saint Helena, by Henry Layton, Esquire, Commander of Her Majesty's sloop *Cygnet*, against the schooner *Aquila*, seized by the sloop, as having been at the time of the seizure thereof equipped for, or engaged in, the slave-trade, or employed in the illegal traffic of negroes and others for the purpose of consigning them to slavery, and as such, by virtue of the Statute, liable to forfeiture and condemnation. [103] All due and legal proceedings were had in the Vice-Admiralty Court at Saint Helena, and on the 19th of March, 1846, the Judge and Commissary of that Court, by his Interlocutory Decree, pronounced, that the Proctor on behalf of the seizer, has failed in proof of the contents of the libel given in and admitted, and decreed the schooner to be restored to the claimant for the use of the owners and proprietors thereof, and condemned the seizer in costs and damages.

No appeal from this Decree was asserted or interposed, in the Vice-Admiralty Court of Saint Helena. The amount of costs and damages having been referred to the Registrar and Merchants to report thereon, and the Registrar and Merchants held meetings upon the subject, when the Proctor for the seizer was heard in objection to the amount claimed on account of such costs and damages. On the 5th of June, 1846, the Registrar and Merchants made their report, wherein they reduced the amount originally claimed, from the sum of £8,799. 17s. 11d. to the sum of £2,318. 15s. 0d. This report was confirmed on the 2nd of July, 1846.

On the 4th of December, 1846, Her Majesty's Procurator-General, under the direction of the Lords of the Treasury, presented his Petition of Appeal on behalf of Her Majesty, from the above decree of the Judge of the Vice-Admiralty Court of Saint Helena; but in consequence of the Appeal not having been asserted within fifteen days, and an entry made of that fact in the Court of the Vice-Admiralty at Saint Helena, as required by the 35th section of the Regulations made pursuant to the Statute 2 and 3 Will. IV., c. 51, for the Vice-Admiralty Courts abroad, the Registrar declined to receive the appeal, when the Queen's Proctor prayed that his Petition and Appeal might be referred to the Judicial Committee of the Privy Council.

[104] The Queen's Advocate (Sir John Dodson) now moved (Dec. 15, 1846 *) on behalf of the Crown, that the appeal might be received: he referred to the 35th section of the Regulations for Vice-Admiralty Courts abroad, and the Act to Amend and Consolidate the Laws relating to the Abolition of the Slave Trade, 5th Geo. IV., c. 113, which, by section 29, fixes no limit for the time of appeal, if the inhibition is decreed within twelve months from the date of the Decree. The vessel having been seized under the 8th and 9th Vict., c. 122, he contended brought the case within the provision of the former Statute.

Lord Brougham:—The Regulation referred to is made, among others, under the authority of an Act of Parliament, the 2nd and 3rd Will. IV., c. 51, and is similar to the Rules in the Court of Chancery under various Statutes: they would be of no value if they are to be dispensed with on any cause. No merits are shown; but the matter may stand over to enable the Crown, if there are merits, to bring them properly before us.

In pursuance of the leave thus given, the Queen's Proctor filed two affidavits; the first by Lewis Gideon, of the island of Saint Helena, stating that he was one of the partners in the house of trade carrying on business under the firm of Gideon and Son, of Saint Helena, merchants, and that to the best of his recollection and belief, in the month of November, 1845, instructions were received by his Deponent's son, Henry Hamer Gideon, from Henry Layton, the Commander of Her Majesty's sloop *Cygnet*, to take the necessary pro-[105]ceedings for obtaining

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

a sentence of condemnation against the Brazilian schooner called the *Aquila*, whereof Joze Alves Dias was master, which had been captured by Layton, as liable to forfeiture, for having been equipped for, or engaged in, the slave-trade, or employed in the illegal transport of negroes or others, for the purpose of consigning them to slavery. That about three years ago, as near as he could recollect, the Deponent's son and partner were admitted a Proctor of the Vice-Admiralty Court at Saint Helena without having been articulated to any Proctor or Solicitor, or without having had any legal education, and had since carried on his proctorial business on his own account, and totally independent of the Deponent, and in which the Deponent had no interest whatever. That his son commenced proceedings in the Vice-Admiralty Court at Saint Helena, against the Brazilian schooner, for the purpose aforesaid; and on the 19th of March, 1846, the cause came on for hearing before his Honour, the Judge of the Court, when he, by Interlocutory Decree, admitted the claim of Joze Alves Dias, and pronounced that this Deponent's son had failed in proof of the libel and exhibits given in and admitted in the cause, and decreed the schooner and her cargo to be restored to the claimant, and condemned the seizer, in costs and damages. That there are only five Proctors practising in the Vice-Admiralty Court, three of whom were merchants; one a military officer in the East India Company's service; and the other an assistant in a mercantile house; and that none of the five persons, to the best of Deponent's knowledge or belief, ever had any legal education; and he was confident his son would have entered an appeal from the Decree, had he known it was necessary to have given a formal notice thereof [106] within fifteen days from the date of the Decree, and that he acted entirely from ignorance of the law in not doing so, there never having been, so far as this Deponent knows or believes, any precedent of an appeal from that Court. That the Judge of the Court is the only lawyer on the Island; and consequently there was no legal person with whom his son could advise on the subject. That from the conversations which passed between the Deponent and his son, they both felt satisfied the schooner would have been condemned, and consequently were much surprised when the Decree was pronounced by the Judge aforesaid. That his son attended the meetings of the Registrar and Merchants for the purpose of ascertaining the amount of such damages, as the Deponent's son acted under the impression that no appeal could be prosecuted, unless the damages and costs were ascertained to exceed a given sum; because it is provided in the Order in Council for establishing the due administration of justice on the Island, that no appeal should be allowed, except where the sentence pronounced for or in respect of any sum or matter at issue above the amount of £500. But the Deponent has, since his arrival in this country in the month of November last, been informed that such Order in Council does not apply to the Vice-Admiralty Court, but only to the Supreme Court.

The second affidavit was made by Henry Layton, the Commander of the sloop "*Cygnat*;" and, after stating the circumstances of the capture, and the proceedings taken against the vessel, he further stated, that during the whole time the proceedings were being carried on, he was cruising off Benguela for the suppression of the slave-trade, and consequently had no opportunity of communicating with Hall, the prize-officer, and Gideon, his Proctor: and being fully assured in his own mind that the vessel would be condemned, his orders to Hall were to return to the "*Cygnat*," with the least possible delay, the Deponent having only one officer left on board to do the duties of his ship. And he said, that if he had been at Saint Helena when the Judge of the Vice-Admiralty Court restored the vessel, and condemned the seizer in costs and damages, he would undoubtedly have appealed to the Judicial Committee of Her Majesty's Most Honourable Privy Council, and he thought that his Proctor ought to have preserved the right to appeal until his directions could have been taken on the subject.

The Queen's Advocate [Sir John Dodson], moved (Feb. 19, 1847 *) for leave to prosecute the appeal upon the above affidavits.

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Lord Brougham:--If the Act of Parliament authorizes rules to be made, those rules are part of the Act. There is no limitation as to the time to appeal, under the Act, 2nd and 3rd Will. IV., c. 51; but by the rules made under its authority, an appeal must be asserted within fifteen days from the sentence. Under the circumstances, leave will be given to lodge this appeal, but the other side may present a counter-petition to rescind the leave thus given. The leave to appeal is, therefore, subject to the right of the Respondents to present a petition to dismiss.

[108] In consequence of the leave thus given, Her Majesty's Proctor brought in and filed his Petition and Appeal, and obtained the usual inhibition.

The appeal was in the ordinary form, and was supported by the affidavits above mentioned.

To this appeal the Respondents' Proctor objected, and brought in an Act on Protest, wherein he alleged, that by the rules and regulations touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty established in Her Majesty's possessions abroad, it was, among other things, ordered, that all appeals from Decrees of Vice-Admiralty Courts be asserted within fifteen days after the date of the Decree, in manner as therein ordered, and that the party so appealing shall give bail, within fifteen days from the assertion of the appeal, in the sum of one hundred pounds sterling, to answer the costs of such appeal, after which only, by the rules and regulations, the Judge and Registrar can be duly served with an inhibition from the superior (the Appeal) Court, and a monition for the transmission of the process. And he expressly alleged, that in the present instance, the rules and regulations aforesaid had not been complied with, nor had any or either of them; on the contrary, that the schooner *Aquila* and her cargo having been decreed to be restored to their owners, and the seizor condemned in costs and damages, on the 19th day of March, 1846, the only pretended appeal from such Sentence or Decree was that of the 4th of December in that year: on that day, Her Majesty's Proctor had lodged a Petition of Appeal on behalf of Her Majesty and the captor, in the registry of the High Court of Admiralty and Appeals, and in virtue of which pretended appeal had in [109] fact issued, and been served, the inhibition and citation, to which latter his Proctor had appeared for his party under protest. And he further alleged, that after the Sentence or Decree, for the restitution of the schooner and her cargo to their owners, with costs and damages against the seizor, (being the sentence appealed from,) the amount of such costs and damages was referred, at the instance of the Proctor of the seizor, to the Registrar and Merchants, who after repeated meetings on such reference, whereat the Proctor of the seizor attended and was heard in objection to the amount claimed on account of such costs and damages, made, on the 5th of June, 1846, a report, wherein they reduced such amount from the sum of £8799. 17s. 11d., the original claim made in respect thereof, to the sum of £2318. 15s., which sum only they considered should be allowed, instead of that claimed; and which Report was afterwards, on the 2nd of July, 1846, confirmed by the Court, without objection on the part of the Proctor for the seizor. Wherefore he prayed the Judicial Committee to pronounce for the protest in this case, and relax the inhibition issued and served in virtue of the appeal as aforesaid, and that otherwise right and justice in the premises might be done to him.

To this Protest, Her Majesty's Procurator-General replied, and after admitting the facts as stated in the Protest, alleged, that although under the circumstances thereinbefore stated, it was the duty of the Proctor engaged, by and on behalf of Our Sovereign Lady the Queen, to have immediately asserted an appeal from the Decree, yet by way of explanation of his having omitted so to do, he stated and submitted the circumstances deposed to, and detailed in the affidavits, setting forth in detail the facts constituting the merits of the case, that there were only five Proctors practising in such Vice-Admiralty Court, two of whom were merchants; one a pensioned military officer of the East India Company's Service; one a pensioned market-master of the East India Company's late establishment at the Island of Saint Helena; and the other an assistant in a mercantile house; and that none of the five Proctors had any legal education, and that there has not been any precedent of an appeal from that Court. That the Judge of the Court is the only lawyer on the Island; and there was no person conversant with the law and

mode of proceeding with whom the aforesaid Proctor could advise on the subject of an appeal: and that he acted through ignorance in not doing so. Wherefore, he prayed their Lordships to overrule the protest of the Respondent, and to assign him to appear absolutely.

To this reply such parts as sought to put in issue the merits of the case, the Respondent's Proctor objected to, and on the 4th of July, 1818,* such objection was argued before their Lordships, when the reply was directed to be reformed by striking out the part objected to.

To the reply thus reformed the Respondent rejoined, and alleged, that of the five Proctors, or persons acting as Proctors, in the Vice-Admiralty Court at Saint Helena, at the time of the sentence being given, in the case of the schooner *Aquila*, in that Court, one then was, and had been for many years before, the coroner of that Island; two others then were, and had been for [111] some time before, practising as attorneys in the Supreme Court of the Island; and a fourth, the Proctor of Layton, then was, and had been for many years before, an assistant to, and partly conductor of, the business of the sole or only notary public in the Island. And he further alleged, that the rules and regulations touching and concerning the practice to be observed in suits and proceedings, in the several Courts of Vice-Admiralty established in Her Majesty's possessions abroad, and in appeals therefrom, were and must be well known to all the Proctors, or persons practising as Proctors, in the Vice-Admiralty Court at Saint Helena, inasmuch as a printed copy thereof, accessible to, and constantly referred to by, all such Proctors, or persons acting as Proctors, in the said Court, is always kept in the registry of such Court; another printed copy thereof (belonging to the Judge of the Court) being also usually kept in the said Court, or in the Judge's chamber adjoining thereto; and whose clerk is ready to lend, and, on their application, frequently did lend, such copy to such or any of such Proctors of the Court, or persons acting as such, as chose to apply for the same. And he moreover alleged, that the suit in the Vice-Admiralty Court at Saint Helena, touching or concerning the schooner *Aquila*, was conducted (in common with all suits in that Court) in conformity to the rules and regulations; and that the Judge of the Court, in the course of giving sentence in the suit, or at the conclusion thereof, intimated to, or reminded the Proctor of, Layton, that if dissatisfied with such sentence, it was open to him to appeal therefrom, within the time prescribed by the regulations, and which the Proctor of the said Henry Layton, at one time, said that it was [112] his intention to do. And he lastly alleged, that on the 19th day of August, 1846, Layton, being then at Saint Helena, himself ordered his Proctor to pay, and who, accordingly, paid to the Proctor of the master and claimant, in the Court of Vice-Admiralty at Saint Helena, of the schooner *Aquila*, a certain supplementary bill of costs of his, incurred in the cause relative thereto, then lately depending in the Court.

The facts thus alleged were verified by affidavit.

The various proofs alluded to have been brought in, the cause came on to be heard before the Judicial Committee, on the protest against the appeal.

The Queen's Advocate (Sir John Dodson), and the Attorney-General (Sir John Jervis), for the Crown, submitted that from the circumstances disclosed in the affidavits there had been no neglect in prosecuting the appeal.

Dr. Addams, in support of the protest.—The rules and regulations touching the practice of appeals, to be observed in suits and proceedings in the Vice-Admiralty Courts established in Her Majesty's possessions abroad, have not been complied with in this appeal.—[Lord Langdale: Have these rules any more force than as rules of Court? If there had been a right of appeal from the Interlocutory Decree, it is perempted by the reference to the Registrar and Merchants to take accounts.]—Yes, that would be a desertion of the appeal, and the right of appeal would be wholly perempted by the acts done by the seizer in furtherance of the Interlocutory Decree or sentence. The fact of the Crown being interested can [113] make no difference. In *Laing v. Ingham* (3 Moore's P.C. Cases, 26), this Court held, that the Crown was perempted from appealing, as an appeal had not been

* Present: Lord Langdale, Lord Campbell, Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

interposed within the time required by the Mauritius Charter of Justice, and that the Crown had no greater right than a subject, in such circumstances, to be let in to appeal.

The Right Hon. Dr. Lushington.—The facts of this case lie in a small compass. A Brazilian vessel was captured on the 11th of November, 1845, by one of Her Majesty's sloops, the *Cygnet*, as liable to forfeiture, for having been equipped for, and engaged in, the slave-trade. The vessel was proceeded against in the Vice-Admiralty Court of Saint Helena, to which port, as the nearest, she had been taken. On the 19th of March, 1846, the Judge and Commissary of that Court, having heard the proofs, and the Proctors on both sides, admitted the claim of the master for the vessel and cargo, and decreed the same to be restored to the claimant, and condemned the seizer in costs and damages, and the usual reference was directed to the Registrar and Merchants to ascertain and report the amount of such costs and damages. Various meetings were held before the Registrar and Merchants for this purpose, at which the Proctor for the seizer attended and took an active part, and succeeded in reducing the amount originally claimed from £8799 17s. 11d., to £2318 15s., being one third of the original claim, which reduced sum was reported to be due from the seizer, and that report was duly confirmed on the 2nd of July, 1846. Now from the Decree pronounced on the 19th of March, 1846, up to [114] the 4th of December, 1846, no appeal was interposed or asserted, and the fifteen days limited by the thirty-fifth of the Rules established under the 2nd and 3rd Will. IV., c. 51, for regulating the practice of Vice-Admiralty Courts for interposing an appeal, have expired long since, even if the right had not been altogether waived, by the seizer's conduct in attending and taking the active part he appears to have done, in the reference to the Registrar and Merchants. In these circumstances the case stood, when, in December, 1846, Her Majesty's Proctor presents a petition for leave to appeal. That petition having been referred to this Committee, and a motion made by the Queen's Advocate to admit the appeal, their Lordships directed the matter to stand over, with liberty to the Queen's Proctor to verify the facts stated in his petition, and show merits, if there were any, for being let in to appeal. Two affidavits having been filed, this Court was again moved on the 19th of February, 1847, when leave was given to the seizer's Proctor to bring in his appeal, subject to the same being dismissed on a counter-petition being presented by the Respondent. The appeal having been brought in pursuant to this leave, no counter-petition to dismiss, was presented; but the Proctor, on behalf of the master of vessel and cargo, brought in an Act on Protest against the admission of the appeal, stating circumstances why he should not be compelled to appear, and alleging, that the appeal was not duly prosecuted according to the Rules of the Vice-Admiralty Court within fifteen days, and that any right which the Appellant might have had, was effectually perempted by the course adopted by the Appellant in submitting to, attending and taking an active part upon the reference made to the Registrar and Mer-[115]-chants. Now with the merits of the case, their Lordships in this stage of the proceedings have nothing whatever to do; it is admitted on all hands that this is an application to the indulgence of the Court, and the question their Lordships have to decide is, whether they have the power to dispense with the rule limiting the period for appealing to fifteen days, and if so, whether there is such a case shown, as entitles the Crown to this indulgence. The ground insisted on, is, the ignorance of the Proctor for the seizer in Saint Helena; but their Lordships remark, that all the proceedings taken by him are strictly regular, and according to the rules of practice in all Vice-Admiralty Courts, and they cannot think that upon the single point, namely, the right of appeal, he was alone ignorant. It is in evidence that the Book of the Rules and Regulations made under the Act, is in the Court at Saint Helena, and was accessible to the seizer's Proctor, and surely if he could conduct the case as he has done there, with strict regularity in the proceedings, even if he did not know that he was at liberty to appeal, he ought to have ascertained the fact by referring to the Rules and Regulations; instead of which, he not only neglects to assert an appeal in due time, but actually assents to the Decree, and acts under it, by attending and taking part before the Registrar. Under such circumstances, their Lordships think there is no case which entitles the seizer or the Crown to any special indulgence, and without giving any opinion upon the merits, their Lordships are

of opinion that no sufficient grounds have been stated to enable them to allow the appeal, and they, therefore, pronounce for the Protest, and dismiss the Respondent from all further process.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3 *Leave to Appeal*. On point (i.) as to leave to appeal (6 Moo. P.C. 107), cf. *Cremidi v. Parker; the Aspasia*, 1856-57, 11 Moo. P.C. 79; (ii.) as to peremption of appeal by act under decree, see *Loughnan v. Haji Joosub Bhulladina*, 1851, 7 Moo. P.C. 373. See also O. in C. of Dec. 11, 1865 (Stat. R. and O. Rev. iv., 403) as to appeals in maritime causes; Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27); rules as to such Courts, Aug. 23, 1883 (Stat. R. and O. Rev. i., p. 631); and list of Courts (up to Dec. 31, 1899), as to which they have been superseded by rules made by the rule-making authorities of such Courts and confirmed by O. in C. under s. 7 of the Colonial Courts of Admiralty Act, 1890, in Pulling's *Index to the Stat. R. and O.*, 3rd edition (1899), p. 106. The Slave Trade Act, 1824 (5 Geo. IV., c. 113), s. 29, was repealed by the Slave Trade Consolidation Act, 1873 (36 and 37 Vict., c. 88) s. 30.]

[116] ON APPEAL FROM THE PROVINCIAL COURT OF APPEALS
FOR THE PROVINCE OF LOWER CANADA.

JAMES LOGAN and HART LOGAN,—*Appellants*; HENRY LE MESURIER, HAVILAND LE MESURIER, ROUTH, and WILLIAM HENRY TILSTONE,—*Respondents* * [Dec. 6 and 7, 1847].

Messrs. H. L. and Co., of Montreal, entered into a written contract with Messrs. L. and Co., for the sale of a quantity of red pine timber, then lying above the Rapids, Ottawa River, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June, then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off: if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by Messrs. L. and Co., according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L. and Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L. and Co. against Messrs. H. L. and Co., to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference between the contract price of 9½d. per foot and 10½d. per foot, the market price when the timber was to have been delivered:—

Held by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada,—

- I. That the action was maintainable.
- II. That, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers.
- III. That the taking possession of a part of the timber by Messrs. L. and Co.,

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

after the day mentioned for the delivery thereof, in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission, that the property in the timber passed to them before the storm which broke up the raft.

The old French law in force in Lower Canada, grounded on the civil law, is in substance the same as the law of England, upon this point [6 Moo. P.C. 131].

This was an action brought in the Court of King's Bench at Montreal, in which the present Respondents [117] sought to recover the sum of £1979 3s. 4d., which had been paid by them to the Appellants as the price of a raft of red pine timber, sold by the Appellants to the Respondents by a written contract dated 3rd December, 1834, and which raft of timber was wrecked and dispersed at Quebec, on the 20th June, 1835. The Respondents also claimed by the action, damages for the non-delivery of timber.

The contract was as follows:—"Hart Logan and Co. of Montreal, sell, and Le Mesurier, Routh, and Co., of the same place, buy, a quantity of red pine timber, the property of Thomas Durrell, of Hull, L.C., but under control of the sellers, now lying above the Rapids, near the Chaudière Falls, Ottawa River, and stated by the said Thomas Durrell to consist of 1391 pieces, measuring 50,000 feet, more or less, deliverable at Quebec, on or before the 15th of June next, and payable by the purchasers' promissory notes at ninety days' date from this date, at the rate of 9½d. per foot, measured off. Should the quantity turn out more than above stated, the surplus to be paid for by the purchasers at 9½d. per foot, on delivery; and should it fall short, the difference to be refunded by the sellers. Signed in duplicate Montreal, 3rd December, 1834. Hart Logan and Co. Le Mesurier, Routh, and Co. To be delivered at M. B. Farlin's booms, at Sillery Cove, Quebec."

[118] On the 5th of December, 1834, the Respondents' promissory notes for the sum of £1979 3s. 4d., at 90 days, were delivered to the Appellants, in terms of the contract.

The timber thus purchased was not delivered on the 15th of June, 1835, the day specified in the contract; but late in the day of the 19th of June a raft floated down to Quebec, under the charge of one Ostrom, and arrived at the part of the river nearly opposite to the appointed place for delivery,—viz., Farlin's booms, at Sillery Cove, Quebec, which purported to consist of the timber so purchased. The booms at Sillery Cove being full, the raft was, at the instance of Farlin, removed to a short distance from the spot and properly secured. In the course of the following night, before the raft was or could be received within the booms, it was broken up and dispersed by a violent storm, wherein the greater part of the timber was wholly lost. After the dispersion, the Respondents collected all the timber that they were able to recover, and paid salvage for it, and dressed and shipped on their own account what had been so saved. They also purchased other timber at the rate of 10½d. per foot, the then market price, to fulfil certain contracts they had made upon the presumption that the timber would be delivered to them according to the terms of the contract.

The Respondents afterwards brought an action in the District Court of Montreal, to recover back from the Appellants the above sum of £1979 3s. 4d., the amount of the promissory notes, which had been paid at maturity, and also for damages, laid at £400, for the non-delivery of the timber according to the contract. The Appellants resisted this demand, and at the same time, by incidental or cross suit, claimed to recover [119] from the Respondents the residue of the price, amounting, as was alleged, to £197 18s. 4d.

The declaration consisted of two counts: the first count set forth the above contract: it then averred payment of the price, according to the contract, by making and delivering promissory notes of the Plaintiffs, and satisfying the same when due; and assigned for breach, that the Defendants had not, on the 15th of June, or at any time since, delivered to the Plaintiffs, at the booms of Farlin, at Sillery Cove, nor elsewhere, the said quantity of timber, or any part thereof, but had therein wholly made default. It was further averred, that on or about the 19th of June, the timber, then being in the possession of the Defendants, was by the force and violence of the winds and waves wrecked, scattered, destroyed, and wholly lost, without any

default on the part of the Plaintiffs: and that the Plaintiffs were thereby not only deprived of the above sum of £1979 3s. 4d., so paid by them as the price of the timber and of the interest thereon, but had suffered damages to the amount of £100, by reason of their being obliged, through the Defendants' default, to purchase other timber at a higher price, to enable them to fulfil certain contracts which they had entered into upon the faith of the due performance of their contract by the Defendants. The second count differed from the first only, by setting forth, that the timber was deliverable at the city of Quebec generally, without specifying the booms of Farlin, and the breach was assigned in respect of the non-delivery at the city of Quebec. The Defendants pleaded to the first count, First, that on the 15th of June, 1835, they did deliver the timber at the booms of Farlin, at Sillery Cove, and that the same was then received by the Plaintiffs. Second, that [120] on the 19th of June, 1835, they delivered the timber at the booms, etc., omitting the allegation that it was received by the Plaintiffs, and averred performance of their contract generally. Third, that on the 19th of June, 1835, and before they, the Defendants, had been placed *en demeure*, they delivered the timber at the booms, etc., according to their contract. Fourth, that on the 19th of June, 1835, and before they had been placed *en demeure*, they delivered the timber to Farlin, the agent of the Plaintiffs in that behalf. Fifth, that on the 19th of June they delivered the timber at the booms of Farlin to the Plaintiffs, and that it was then in the power of the Plaintiffs to take and receive the same into the booms, but that the Plaintiffs, although requested, neglected and refused so to do; and that on the 20th of June, 1835, there arose a storm of unusual violence, by which the timber was broken away from its moorings, and was broken up, dispersed, and carried away; and the pieces composing the raft were lost, except 500 pieces, which it was averred the Plaintiffs succeeded in saving and recovering for themselves, and which came into the hands of the Plaintiffs, and were used and appropriated by them: that if the timber had been received into the booms, the whole would have been saved; and that the loss was attributable to the storm, and to the negligence of the Plaintiffs in leaving the timber exposed, and not to any want of due care on the part of the Defendants. Sixth, that after the making of the promise, and before the Defendants had been placed *en demeure*, to wit on the 19th of June, 1835, the Defendants delivered the timber at the booms, etc., to Farlin, the agent of the Plaintiffs. That it was incumbent on Farlin and the Plaintiffs to receive the timber into the booms, and that they were requested [121] to do so, but that neither Farlin nor the Plaintiffs would receive the timber into the booms; that on the contrary, the booms, by the act of Farlin, were so completely filled with timber, that neither he nor the Plaintiffs could receive the timber into the booms. That the booms could not have admitted the timber at any period of time between the earliest moment of the 19th of June and the latest hour of the 20th; that, in consequence, the timber remained out of the booms; that afterwards, and whilst it was so lying out of the booms, a storm arose, by which it was broken away from its moorings, and dispersed, and carried away, except 500 pieces saved and appropriated as before mentioned by the Plaintiffs. That if the timber had been received into the booms on the 19th of June, when so delivered thereat, the pieces would have been measured off, and no part would have been lost; and that but for the negligence and refusal of the Plaintiffs and Farlin, the timber would have been measured off and saved. Seventh, that on the 19th of June, 1835, the Defendants did deliver the timber at the booms, etc., and that they could not deliver the same at an earlier day, by reason of the unusual lateness of the spring of the year 1835. To the second count the pleas were in all respects similar, except as to such slight variations as were rendered necessary by the difference in the statement of the place where the timber was deliverable.

In addition to these pleas, the Defendants pleaded also the following peremptory exceptions to both counts of the declaration: First, that on the 19th of June, 1835, and before they had been placed *en demeure*, they did deliver the timber to the Plaintiffs at the booms of Farlin, and the same was then and [122] there received by the Plaintiffs. Second, that on the 19th of June, 1835, and before they had been placed *en demeure*, they did deliver the timber at the City of Quebec. Each of these exceptions and peremptory exceptions concluded with an averment, that in fact the timber contained 50,000 feet, at the least.

The incidental demand (or declaration) in the cross action of the Defendants, consisted of three counts; the first of which, after setting forth the contract, averred a delivery of the timber at the booms, etc., and that the same turned out to contain 55,000 feet; and assigned for a breach, the non-payment, by the incidental Defendants, of the price of the surplus 5000 feet, amounting to £197 18s. 4d. The second count alleged a delivery on the 19th of June, before the incidental Plaintiffs were placed *en demeure*. The third count, after setting forth the contract and the delivery on the 19th of June, before the incidental Plaintiffs were placed *en demeure*, and averred that the quantity delivered was 55,000 feet, proceeded to allege, that after the timber had been delivered at the booms, it was allowed by the incidental Defendants to remain outside, and insecure against accidents of weather; that a storm arose, whereby it was broken away and dispersed, except 500 pieces saved and appropriated as before; that if the timber had been received into the booms and secured, the number of feet contained in it could have been measured off by the incidental Defendants, and no part would have been lost; and concluded with a similar breach as to the non-payment of the sum of £197 18s. 4d. currency, the price of the surplus quantity above 50,000 feet, at 9½d. per foot.

The issues were completed by general replication [123] and answers to the pleas and exceptions of the Plaintiffs, and by general pleadings to the incidental demand, whereby the whole of the material facts averred on the one side, and on the other, were respectively denied.

Evidence was then taken on both sides, and the cause having been heard on the merits, the Judgment of the Court of King's Bench was declared in the following terms:—"The Court having duly deliberated, proceeding firstly to adjudicate upon the principal demand, and considering that the Defendants, incidental Plaintiffs, have established in evidence a good and sufficient offer and tender to make a true and legal delivery to the said Plaintiffs of a quantity of red pine timber, in conformity with the contract or agreement *sous seign privé* entered into between the parties, and dated Montreal, the 3rd day of December, 1831; which offer being refused by the Plaintiffs, incidental Defendants, the quantity of red pine timber was immediately afterwards dispersed, and the actual delivery of it prevented by *force majeure*, and that the Defendants and incidental Plaintiffs are not guilty of any breach of the contract. It is adjudged that the principal demand be, and the same is hereby dismissed with costs to the Defendants, incidental Plaintiffs. And the Court proceeding to adjudge upon the incidental demand made in this cause, it is considered and adjudged that the incidental Plaintiffs in this cause do recover from the incidental Defendants the sum of £140 10s. 5d., being the balance remaining due upon the price and value of 53,560 feet of red pine timber, the quantity sold by the incidental Plaintiffs to the incidental Defendants, under the contract or agreement above mentioned, of the 3rd day of December, 1831, and of which the delivery was as aforesaid tendered by the incidental [124] Plaintiffs to the incidental Defendants, and by them refused; and the same was dispersed, and the actual delivery thereof was prevented by *force majeure* as aforesaid, the timber being calculated at the rate of 9½d. per foot, with interest thereon from the 1st day of December, 1835, date of the filing of the incidental demand, until actual payment, and costs of the incidental demand, to which the Court condemns the incidental Defendants."

From this judgment the present Respondents appealed to the Court of Appeals for Lower Canada, assigning error in the general form. And the appeal having been heard, Judgment was, on the 10th day of November, 1845, pronounced by that Court, reversing the Judgment of the Court below; the material part of which was in the following terms:—"This Court, considering that it appears from the evidence adduced in the cause, that on or about the 19th of the month of June, at a place called Convent Cove, near Quebec, the aforesaid quantity of red pine timber then and there being in possession of the Defendants, and of their agents and servants, unmeasured and undelivered to the Appellants, was, by the force and violence of the winds and waves, wrecked, scattered, destroyed, and lost, without any default on the part of them, the Appellants, whereby they were deprived of the sum of £1979 3s. 4d., so by them paid to the Respondents, as and for the price of the quantity of red pine timber so to be delivered, and of the lawful interest of that sum from the 6th of March, 1835, when the same was paid; and considering, likewise,

that the Appellants were compelled and obliged to buy and purchase, and did buy and purchase, other red pine timber, at a greater and higher price, to wit, at and [125] after the rate 10½d. for each foot thereof, to enable them, the Appellants, to fulfil and perform certain contracts and promises by them entered into and made in the way of their business as merchants at Quebec aforesaid, under the presumption and belief that the Respondents would have delivered to them the quantity of red pine timber, according to the tenor and effect of the said contract or agreement, for the sale and delivery thereof at Sillery Cove, near Quebec, on or before the 15th of June, 1835. And this Court, considering further that upon the sale of goods by admeasurement, which may happen to be destroyed before measurement, the loss is cast upon the seller, that the stipulations of admeasurement and of delivery at a particular place, rendered the sale conditional and incomplete until the occurrence of those events, and that in the meantime the risk '*periculum rei venditæ*' is not to be borne by the purchasers; that after the expiration of the time fixed for the delivery, the purchaser was not bound to receive the property, the contract having been determined by the sellers' breach of its conditions, and that in the performance of all commercial contracts punctuality is required, the rule of the civil law '*dies interpellat pro homine*' being strictly applicable to them, it is, therefore, by the Court now here considered and adjudged, and the Respondents are hereby adjudged and condemned to pay and satisfy to the Appellants—First, the sum of £1979 3s. 4d., with interest thereon, from the 13th of July, 1835, the day of the service of the judicial demand in this cause, till paid. And secondly, the sum of £312 10s., being the difference in value of the quantity of 50,000 feet of red pine, between the market-price thereof in the [126] month of June, 1845, and the price of 9½d. per foot, being the contract price for which the Respondents were to have delivered the quantity of red pine timber to the Appellants, with interest on the sum of £312 10s. from this date, till paid. And this Court hereby dismisses the demand of the Respondents as incidental Plaintiffs in the Court below, reserving to them, the Respondents, nevertheless, all such recourse as they legally may have and take for the value of such quantities or parcels of the red pine timber, as may have come into their hands and possession, belonging to the Respondents, subsequent to the 19th of June, 1835. And lastly, this Court doth adjudge and condemn the Respondents to pay to the Appellants as well the costs of the suit or action as of the incidental demand in the Court below, together with the costs of the Appeal. It is ordered, that the record and proceedings in this cause be remitted to the Court of Queen's Bench for the District of Montreal."

From this Judgment the present Appeal to Her Majesty in Council was brought.

Sir Frederick Thesiger, Q.C., Mr. Greenwood, Q.C., and Mr. Benson, for the Appellants.—This contract of sale was an absolute, and not a conditional contract.—[Lord Campbell: What law is to govern this case; the old French law, in force in Lower Canada, or the law of England?—A conflict of laws cannot arise in this case, as the old French law, in force in Lower Canada, and the law of England, upon this question, are the same. We submit that the property vested, on the execution of the contract, in the purchasers. Nothing further was requisite to be done by the vendors; and, therefore, any loss which [127] might occur subsequently was at the risk of the purchasers. 1 Pothier, Tr. du Cont. et de Vent., Part IV., pp. 579, 584. It was the sale of a certain thing, assumed to contain a certain quantity. To the same effect are the English authorities. Thus in *Tarling v. Barter* (6 B. and Cr. 365), Mr. Justice Holroyd says, "In the case of a sale of goods, if anything remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller." And this case has been followed by *Swanwick v. Sothorn* (9 Ad. and Ell. 895), *Zagury v. Funnell* (2 Camp. 240), *Hanson v. Meyer* (6 East, 614), *Martindale v. Smith* (1 Q.B. Rep. 389), *Dixon v. Yates* (5 B. and Ad. 313, 313), *Alexander v. Gardner* (1 Bing. N.C. 671), *Gillett v. Hill* (2 Cro. and Mee. 530), *Clarke v. Spence* (4 Ad. and Ell. 448). —Lord Brougham: the case of *Simmons v. Swift* (5 B. and Cr. 857), is an authority against you. There it was held that where the quantity had to be ascertained before the price could be fixed, the contract was not complete until delivery. It is on all fours with this case.]—That case is distinguishable from the present. The judgment there proceeded upon the circum-

stance that the vendor was to weigh the goods. Here is a sale of a specific article, assumed to contain a certain quantity, which is to regulate the price. If any step was to be taken to ascertain the price, we admit that the contract is not complete, *Simmons v. Swift* [5 B. and C. 857].—[Lord Campbell: How can you show the exact amount of the price? The timber was to be paid for at the rate of 9½d. per [128] foot measured off.]—That might refer to a former measurement; we admit that there was to be a future measurement. The Appellants, after execution of the contract, and payment of the stipulated price, became mere bailees and agents of the Respondents, and were only bound to use the same diligence, and to take the same care of the timber as they would have done if the property had been their own, *Fragano v. Long* (4 B. and Cr. 219), *Kent's Comms.*, vol. ii. 491, *Smith's Mercantile Law*, p. 399 (2nd edit.); they were not responsible for any loss which might arise, without wilful default of their own, and which would have arisen from the act of God, and *vis major*.

By the terms of the contract of sale, the goods were to be delivered at Farlin's boom, on or before the 15th of June. Supposing the delivery, at that time, was a condition precedent, and that the delivery did not take place till the 19th, instead of the 15th of June, for there was a delivery and acceptance by Farlin, who must be treated as the authorised agent of the purchasers; still, if time was a condition precedent, if there was a breach of the contract in that respect; the breach was waived, by the acceptance, by the purchasers, of the remainder of the timber, after the breaking up of the raft. *Hothan v. East India Company* (1 Term Rep. 638). *Graham v. Hays* (2 Man. and Gr. 257). *Bornmann v. Tooke* (1 Camp. 377). *Havelock v. Geddes* (10 East. 555). *Ritchie v. Atkinson* (10 East. 295). *Clipsham v. Vertue* (5 Q.B. Rep. 265). *Alexander v. Gardner* (1 Bing. N.C. 671). *Porter v. Shephard* (6 Term Rep. 665). *Portage* [129] v. *Cole* (1 Saund. 320). Abbott on "Shipping," p. 251. (2nd Edit.). The purchasers, after the loss, treated the property as their own. It is clear that the Respondents took a great part of the timber under the contract.—[Lord Brougham: The Respondents say that the contract was at an end, and that the timber came to their hands irrespective of such contract.]—A party cannot repudiate part of a contract. The vendors might have their cross-action for damages for non-performance of the entire contract. *Davidson v. Gwynne* (12 East. 381). *Marshall v. Lynn* (Palm. 397). *Constable v. Cloberie* (6 Mee. and W. 109). Even if the delivery, on the 19th, instead of the 15th of June, was not sufficiently excused, the Appellants, though liable to damages, if sustained by the purchasers, by reason of the delay, were not compellable to refund the price of the timber; but the damage which they have sustained was not caused by the non-delivery on the 15th of June, but by the Respondents not having taken proper measures to have Farlin's booms ready, when the timber was delivered and accepted by them. The judgment of the Court of Appeals is, at all events, erroneous, in not having allowed, in reduction of damages, the value of the timber, of which the Respondents had obtained possession.

Mr. Crowder, Q.C., and Mr. Martin, Q.C., for the Respondents.—The cause of action is for the non-delivery, on the 15th of June, according to the terms of the contract. The only answer that could be made to that, was accord and satisfaction, or release: waiver could have nothing to do with it. The sale in question, was a sale by [130] admeasurement, and not *per aversionem*; consequently, the risk of the loss by *casus fortuitus*, or *vis major*, remained with the seller, until either admeasurement had taken place, or the purchaser was in default. Where the thing sold is not ascertained, or the price is not ascertained, the risk remains with the vendor. *Pothier*, Tr. du Cont. de Vent., Pt. IV., B. 308, *et seq.* *Vinnius* (Arnoldus), lib. iii., tit. 24 (Edit. Amst. 1655. 4to.). 2 Burge's "Comms. on Confl. of Laws," 535. Voet, lib. 18., tit. 5, n. 4. "*De periculo et Com.*" And the English authorities, *Simmons v. Swift* (5 B. and Gr. 857), and *Swanwick v. Sothorn*, [9 Ad. and E. 895], are consistent with the principles of the Civil Law. The delivery and the measurement had not taken place at the time of the loss, which was occasioned without any default on the part of the purchasers. But even if the sale had been such as to transfer to the purchasers the risk, intermediate between the sale and the delivery, the sellers not having delivered, or being ready to deliver, at the time and place appointed in the contract, the risk, from the time of such default, reverted to them; the rule of the

civil law, "*dies interpellat pro homine*," or, that the lapse of the time specified, alone, without any interpellation, is sufficient to place the party in default, is applicable, and that the sellers not having delivered the timber on or before the 15th of June, the time specified in the contract, were *en demeure* accordingly. There is nothing to excuse the breach: the one alleged, namely, the lateness of the season, is no excuse. This was a breach, which nothing but a waiver on the part of the purchasers could satisfy. To enable the sellers to take the benefit of the waiver, they must show that Farlin was the purchasers' agent for receiving the timber on the 19th of June. This was not so, therefore the whole loss [131] falls on the Appellants, and the Respondents had a right to succeed in their action. Pothier, Tr. du Cont. de Vent., Pt. IV., n. 312. The case of *Swanwick v. Sothorn* (9 Ad. and Ell. 895), relied on by the Appellants, is against this proposition, but its authority is impeached, and not to be supported; there is some doubt whether the facts of the case correspond with the judgment: and the taking possession of the timber saved, after the raft was broken up, was not a waiver, it only created a new contract. The Appellants set up a right to the value of the timber, but seek to have it allowed in reduction of damages. But if the contract has not been performed, an action on the contract will not lie, though sustainable for the value. They could not have both remedies by an action of damages and an action upon the new contract. Story "On Bailments," p. 4611. *Mondel v. Steel* (8 Mee and Wel. 858). No injustice can be sustained by carrying out the judgment of the Court below in holding, that the Appellants are entitled to recover the value of the timber saved, and the Respondents are entitled to recover the amount of the promissory notes and the damage for non-delivery.

Lord Brougham (13th Dec. 1837).—In this case, there was no contest between the parties, as to the law which should govern the decision of the question, because it appears, when the matter is duly considered, that the old French Law, administered by the Courts of the Province of Lower Canada, and grounded on the Civil Law, is, in substance, the same with our own, touching the subject-matter of the case now before us. The application of that law to the facts of this case, remains alone to be considered.

[132] We have here, not an agreement to sell, but a contract of sale, with certain terms adjoined; and the main question is, whether or not, that contract was completed, and passed the property to the buyer, before the accident happened which partially destroyed the subject-matter of the contract.

Now, to constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, should be ascertained in the first instance, and that there should be a price, either ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale, or upon a *quantum valeat*: or, they may agree that the sale shall be complete, and the property pass in the specific thing, chattel, or other goods, although the delivery of possession is postponed, and although something shall remain to be done by the seller before the delivery; or they may agree, that nothing remains to be done for ascertaining the thing sold; yet, that the sale shall not be complete, and the property shall not pass, before something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done. It is unnecessary to go through the cases relating to these positions. None of them will be found at all to impugn them. Indeed, [133] taken together, they clearly support it, as does the old French, and the Civil Law.

In applying this doctrine to the contract before us, there may be some doubt raised by the peculiarity of the terms, inasmuch as, on the one hand, a certain chattel is sold, and a price fixed in reference to an assumed measurement, the statement of which is a parcel of the contract, and the price is to be paid immediately, with a reserved right for the one party to recover part of that price, and for the other party to receive more, in case that assumption shall prove to have been

incorr et; while, on the other hand, the seller is to retain possession, to carry the chattel to a certain place, there to deliver it at a certain time, and to make the measurement before the delivery. But, taking the whole of these terms together, it appears to us, that, until the measurement and delivery was made, the sale was not complete, there being nothing in the terms to show an intention that the property should pass before the measurement: but, on the contrary, the intention rather appearing to be, that the transfer should be postponed until the measurement at the delivery.

The timber is fully specified by the description, and the place where it lay; it is further said to be the property of Durrell, but under the control of the sellers. Durrell's statement of the quantity is given, that it measured "50,000 feet, more or less;" it is to be delivered on or before a certain day, the 15th of June, at Farlin's Boom, Quebec, and the payment, to be made by a promissory note immediately, is to be at the rate of 9½d. per foot, measured off, that is, when measured off; and, as the seller is to carry and to deliver it at Quebec, he is the party to measure it there, at or before [134] the delivery. Then, should the quantity be found, when measured, to exceed the estimate, an additional sum is to be given; if it fall short, a part of the sum paid is to be returned. Taking the whole of the terms together, it appears to us, that the first part of the contract, selling an ascertained chattel for an ascertainable sum, (and which, if it stood alone, would pass the property,) actually paid upon an hypothesis or estimate, is controlled by the subsequent part of the contract providing for the possession, carriage, measurement, and delivery, all by the seller, with the readjustment of the price by repayment or increase of the sum paid upon estimate, in the event of the estimate proving erroneous, and that so the property did not pass before the measurement, and delivery at Quebec. If, again, it be said that the measurement was not to be made by the seller, but in the manner alleged by the Appellants, this can make no difference in the result of the agreement, because in what way soever, and by whatsoever mode, the measurement was to be after the delivery at Quebec. Instead of a sale, then, which the first part of the contract would import, if standing alone, it is only a contract to deliver at a certain place and time, and the property did not pass before that delivery.

That the timber was not delivered at the place prescribed by the contract, we take, upon considering the whole of the evidence, to be sufficiently clear, and that it was not delivered anywhere at the time prescribed is undisputed. The taking possession of a part of the timber after the day, not at the place, and when the storm had broken up the raft, cannot of course be considered as a delivery, nor can it be con-[135]-sidered as an acceptance of the whole, nor as showing by the party's admission, that the property passed before the accident, when the terms of the contract show that it did not pass.

It follows, from the whole, that the action is maintainable for recovery of the price paid, and for the difference between the contract price of 9½d. per foot, and 10½d., the market price at the time when the timber ought to have been delivered. But from the sum of £1979 3s. 4d. and the sum of £312 10s. must be deducted the value of the timber taken possession of by the Respondents at 10½d. per foot, less the sums paid by them for salvage and other charges. With respect to the quantity which they might have received on demand, a further sum may be deducted if the quantity can be agreed on; and if no such further deduction be made, then the property in that timber remains with the seller. Our desire is, that the parties should come to an understanding upon these deductions, in order that the sums may be inserted in the Judgment, and all further proceedings in the Province become unnecessary.

The following report was made by their Lordships, which was duly confirmed by an Order in Council, bearing date the 11th of February, 1848:—

"The Lords of the Committee, in obedience to your Majesty's said Order of Reference, have taken the said appeal into consideration, and having heard Counsel on both sides, their Lordships do this day agree humbly to report to your Majesty as their opinion, that the said Judgment of the said Court of Appeals rendered in the said cause, or action, on the 10th of November, [136] 1845, ought to be varied, by reducing the amount of the said sums of £1979 3s. 4d., and £312 10s., making

together £2291 13s. 4d., thereby adjudged and ordered to be paid by the said Appellant, James Logan, to the said Respondents, Henry Le Mesurier Haviland, Le Mesurier, Routh, and William Henry Tilstone, to the sum of £1200 sterling, to be paid with lawful interest thereon, according to the law of Canada, from the 6th day of March, 1834, until the time of payment; and their Lordships are further of opinion, that such part of the said Judgment of the Court of Appeal as relates to the costs of the said suit or action ought to be affirmed, and that each party do pay their own costs in this appeal to your Majesty in Council."

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America*; tit. SALE OF GOODS, C. WHEN PROPERTY PASSES, 7. *Ascertaining quantity or quality*. S.C. 11 Jur. 1091. See *East India Co. v. Oditchurn Paul*, 1849, 7 Moo. P.C. 103; *Acraman v. Morrice*, 1849, 8 C.B. 449; *Boswell v. Kilburn*, 1862, 15 Moo. P.C. 309; *Seath v. Moore*, 1886, 11 A.C. 370; Sale of Goods Act 1893 (56 and 57 Vict., c. 71), s. 18, rule 3.]

[137] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM MITCHELL, *Appellant*: ELIZABETH THOMAS,—*Respondent* *
[Dec. 10, 1847].

Where a testamentary disposition is propounded under circumstances of suspicion; as where the party propounding it was the drawer, and was benefitted by it, and it was executed at a time when the Testator was of doubtful capacity; without any evidence of instructions previously given, or knowledge of its contents; the party propounding it must prove that the Testator knew and approved of the contents of the instrument [6 Moo. P.C. 150].

A Codicil, which varied the bequests contained in the Will of the Testator, to the benefit of the drawer, and executed at a time when the Testator was supposed to be dying, in the absence of proof of the knowledge, by the Testator, of its contents, pronounced against.

Proof of the actual reading over of the instrument to the Testator, before execution, is not necessary [6 Moo. P.C. 150-151].

This was an appeal from a Decree of the Prerogative Court of Canterbury, made in a cause of proving the last Will and Testament of William Mitchell, late of Comprigney, near Truro, in the County of Cornwall, bearing date the 9th of December, 1841, and a first Codicil thereto bearing date the 19th of January, 1845, and of proving in solemn form of law a second Codicil to the Will, bearing date the 22nd of January, 1845, whereby the Court pronounced against the force and validity of the second Codicil. The suit was promoted by the Appellant, William Mitchell, son of the Testator by his first wife, the sole executor [138] named in the Will, against the Respondent, Elizabeth Thomas, wife of Richard Thomas, the daughter of the Testator, by his second wife, a legatee named in the Will.

The Testator, by his Will, devised and bequeathed certain freehold and leasehold property, to his wife, (which had formerly belonged to her father and mother,) with a legacy of £500, and an annuity of £100: he also bequeathed to her his dwelling-house at Comprigney, with the furniture, linen, and books therein, for life, and at her death or second marriage he devised the dwelling-house to the Respondent, for her life, and at her death to her eldest son, in fee; and if no son, to her daughter or daughters, if more than one, as tenants in common; and if no child, then to the Appellant, in fee; and he also bequeathed to the Respondent, for her separate use, the household furniture, after his wife's death; with a legacy of £3500, and one third part of ten one hundred and twenty-eighth parts or shares, and two-fifths of a share in the East Wheel Rose Mine; he also bequeathed to his

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

other daughter, by his first wife, Mary Testrail, an annuity of £20 for life, for her separate use, and to her six eldest children the sum of £250 each, to be paid to them when they attained the age of twenty five years; and he gave the residue of his real and personal estate to the Appellant, whom he appointed sole executor.

By a Codicil, dated the 19th of January, 1845, he made a small bequest in favour of the children of his sister, and increased the annuity which he had previously given to his daughter, Mary Testrail, from £20 to £50. This Codicil was attested by Richard [139] Thomas, the husband of the Respondent, and Mary Clatworthy, the Testator's servant.

The Codicil in question was dated the 22nd of January, 1845, and was as follows:—"In my Will I have given to each of the six children of my daughter Mary, £250, to be paid to them when they attain the age of twenty-five years; and if any of them should die under the age of twenty-five years, then that the share or shares of the children so dying under that age should go over and belong to the survivors and survivor of them, to be paid to them, or him, or her respectively at the same age; and I have directed that the moneys so given to the said children, amounting to £1500, shall be invested in Government Securities by my executor. Now I revoke so much of my said Will as requires my said executor to invest the said sum in Government Securities, and I hereby declare that he shall be at liberty to invest the same in Government or other securities, or keep the same in his own hands, as he shall think fit; and that the interest, as stated in my Will, shall be duly paid as therein directed: I revoke my bequest to my daughter Elizabeth relative to East Wheal Rose Mine, and in lieu of it I now bequeath to her two one hundred and twenty-eighth parts or shares of and in the said mine. All my other shares in the said mine I give to my son William, absolutely." This Codicil was signed by the Testator, and attested by two witnesses, James Hicks and Mary Clatworthy.

The Testator died on the 5th of February, 1845, at the age of sixty-nine years.

The Appellant propounded the Will and first Codicil for probate in common form; and as to the second [140] Codicil, he propounded an allegation, wherein after pleading the making and execution of the Will and first Codicil, he pleaded, that the Testator having a mind and intention to make and execute a second Codicil, gave directions for the preparations thereof: and that pursuant to such directions and instructions, the Codicil, bearing date the 22nd of January, 1845, was drawn up and reduced into writing, and that after it was so drawn up and reduced into writing, it was read over audibly and distinctly to or by the Testator, who well knew and understood the contents thereof, and liked and approved of the same, and that in testimony of his approbation he duly executed the same in the presence of witnesses, at a time when he was of sound and disposing mind, memory, and understanding.

The second Codicil was opposed by the Respondent, Mrs. Thomas.

Two witnesses only were examined, on this allegation; James Hicks and Mary Clatworthy, the attesting witnesses to the Codicil in question. Hicks, the groom and coachman of the Testator, deposed, that, for three weeks or so preceding his death, he had been confined to his bed; that he saw him two or three times whilst so confined, when he was very ill—too weak to get out of bed himself; he did not speak, and his breath was very short. The second time he saw him, Mr. William Mitchell came to the witness's bed-room, about five o'clock in the morning, and called him out of bed. He had a paper in his hand, and told witness to get up as quick as possible, to come to his master's bed-room, to sign a paper; the witness asked him how his master was, and he said, [141] "Very ill." The witness got out of bed immediately, and followed Mr. William Mitchell to the room of the Testator, who was sitting up in his bed, propped up with pillows. There was in the room, besides Mrs. Mitchell, Dr. Thomas (Mr. Richard Thomas), the Testator's son-in-law, who had been at the house attending him the whole time he had kept his bed. When the witness and Mr. William Mitchell entered the room, the latter went up to the bed, and gave the Testator the paper into his hand to read, and held a candle for him to see; but he did not say anything then, nor did the Testator, who held the paper up before him for about a minute, and looked as if he was reading it. He then put it before him on the bed, and Mr. William Mitchell gave him a pen into his hand. The Testator made a kind of motion with his hand, as if to ask for the pen,

and Mr. William Mitchell gave him a pen. The Testator did not say anything, nor did Mr. William Mitchell, in giving the pen. The Testator appeared to write upon the paper, and Mr. William Mitchell then told him to say some words, and he said something. His voice was very weak. Mr. William Mitchell then took the paper, and brought it to a little table at the foot of the bed, and told witness to put his name to it, which he did. He did not notice what the Testator had written on the paper, whether he had signed his name, or what. When witness had signed, Mr. William Mitchell told the housemaid, Mary Clatworthy (who had come into the room with the witness, and had been present all the time), to sign her name to the paper, and she did so. Mr. William Mitchell then told him and his fellow-witness they might go, and they left the room. He did not know what paper it was. "Whether master [142] at the time the paper was signed was sensible or not," the witness continued, "I cannot say: his appearance, I thought, was very wild; his eyes looked very glassy, and his breath seemed very short, but still he seemed to know how to put his name to the paper very well. He seemed to me to ask for the pen, not, I think, by word, but by making the motion with his hand; and when he got the pen in his hand, he wrote on the paper of his own free will: nobody assisted him to write. Whether he knew the contents of the paper I cannot tell. He could not have read it in the time he held it before him; indeed, he could not read by candle-light without his glasses; I have heard him say so many times, and I have been into the room of an evening and seen him reading with glasses on, and at the time I have been speaking of he had not his glasses on." The witness further deposed, upon interrogatory, that the Testator was a person of peculiar temper and eccentric habits, and of an excitable and irritable disposition; that Mr. William Mitchell was educated for the law, and had been in practice as a barrister; that he (witness) had frequently heard the Testator express dissatisfaction with Mr. William Mitchell, and had very often seen him show resentment towards him by his talk to and of him, though Mr. William Mitchell was a good deal more with the Testator during the last three weeks than he had ever before been in the witness's time; that Mrs. Thomas was the favourite child of the Testator, who, up to the time of his death, treated her with the greatest affection, and he evinced a strong partiality and regard for Mr. Thomas, her husband. The Testator was subject to attacks of difficulty of breathing, which generally seized him about two o'clock in the afternoon, and about the same hour in [143] the morning. When the paper was signed, the Testator was in a state of great exhaustion; his eyes were fixed and glassy, and his whole countenance was changed, and it was generally supposed he was dying: before the paper was signed, he sent for his wife. He was evidently suffering from the effects of some very bad attack at the time his signature was affixed to the paper. Whilst the witness was in the room, the Testator did not say one word the witness could understand. His eyesight was much impaired; he was not much in the habit of reading by candle-light; it was with difficulty he could do so. He had not time to read the paper, for he had it in his hand about a minute only.

Mary Clatworthy, the other witness, deposed that about five o'clock in the morning of the 22nd of January, being sent for by Mr. William Mitchell, she entered the Testator's room, where Dr. Thomas and Mrs. Mitchell were: Mr. William Mitchell entered the room at the same time, and James Hicks. Mr. William Mitchell having a paper in his hand (which the Testator afterwards signed), went up to his bed-side, and gave it to the Testator, who took it in his hand. Neither, as far as she recollects, said anything. The Testator looked at the paper while he held it in his hand, which was not more than a minute, and then Mr. William Mitchell gave him a pen to sign it, and the Testator put the paper down before him on the bed, and signed his name to it. She thinks Mr. William Mitchell named to him to sign it; he pointed out the place for him to put his name, and held the candle to him while the Testator had the paper. The witness and Hicks stood at the foot of the bed as the Testator signed the paper; Dr. Thomas, who stood there also, told them to "come [144] forth;" that was about the time the paper was given to the Testator. Mr. William Mitchell told the Testator some words, which he repeated, just as he was going to sign the paper. She and her fellow witness then subscribed the paper (not knowing what it was) and left the room. The Testator looked at it apparently as he held it in his hand, but she does not think he read it; he could not, she thinks,

have read it all, as he had it in his hand not a minute before he signed it: whether he was of sound mind or not at the time, she could not tell; he did not say or do anything from which she could tell whether he was or not. He was very weak, very much more weak than when she saw him sign the paper which she had previously attested, and he had been getting worse and worse all the time; his eyes were glazy. His attacks were very much of a night, and they left him weak and exhausted.

On the 15th of May, 1846, the learned Judge of the Prerogative Court, (Sir Herbert Jenner Fust,) by his Decree, pronounced against the force and validity of the second Codicil, there being, in his opinion, no proof of instructions, or reading over, or of knowledge of the contents by the Testator.

From this Decree Mitchell brought the present appeal, which now came on for argument.

Sir Frederick Thesiger, Q.C., and Mr. M. Smith, for the Appellant. The Codicil of the 22nd of January was made by the Testator, when of competent and disposing mind and understanding. It was duly executed and attested in the manner required by the Statute of Wills, 1 Vict., c. 26, and ought to have been admitted by the Court below, to probate. The Statute, 1 Vict., c. 26, does [145] not require a party propounding a Will, to prove the Testator's knowledge of the contents. In *Croker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339), this Court held, that the rules relating to Wills of personal estate, since that Statute, were identical with the rules relating to real estate prior to the Statute. Now what was a party claiming real estate, under a Will, bound to prove prior to that Statute? A Will devising real estate might be established without proving that the Testator was cognizant of its contents. The rule is thus laid down in Williams "On Executors:" (3 edit., p. 262) he says, "Where there is proof of signature, every thing else is implied till the contrary be proved; and evidence of the Will having been read over to the Testator, or of instructions having been given, is not necessary: for when an instrument has been executed by a competent person, it must be presumed that the party so executing knew the contents and effect of the instrument, and that he intended to give effect to it;" and he cites in support of this rule, *Billinghurst v. Vickers* (1 Phil. 191). *Rodd v. Lewis* (2 Cas. Temp. Lee, 176). *Fawcett v. Jones* (3 Phil. 476). *Wheeler v. Alderson* (3 Hagg. 587).—[Dr. Lushington: *Henshaw v. Atkinson* (2 Ves. and B. 85) decided, that there was no difference in the rules of the Courts of Common Law and of the Ecclesiastical Courts.]—A devisee bringing ejectment was only bound to prove that the Testator was of sound mind, and that the Will was executed according to the solemnities required by the Statute of Frauds. So far from it being necessary to prove that the Testator was aware of the contents of the Will, it has been held, that even when a Testator delivered the [146] Will as a deed, that that was sufficient publication of the Will under the Statute of Frauds. If then the same rules and principles are to be acted upon, in respect of Wills of personal property since the Statute, 1 Vict., c. 26, the case is placed beyond a doubt. In *Brooke v. Kent* (3 Moore's P.C. Cases, 334), this Court decided, on the question of the validity of certain obliterations and alterations by the Testator, in his Will, made subsequent to the passing of the Statute, 1 Vict., c. 26, that the fact of such obliterations and alterations was to be ascertained by the rules of evidence applicable in similar cases under the Statute of Frauds.—[Lord Campbell: The Statute of Wills, 1 Vict., c. 26, has nothing to do with this case. Neither is there such distinction between Wills of real, and Wills of personal property, as you contend for. Take, for instance, the case of a Will devising real property: if there be circumstances of suspicion, it would be left to the jury to say, whether the Testator knew the contents of the Will. *Raworth v. Marriott* (1 Myl. and K. 643).]—It is not alleged, or proved, that any fraud was practised upon the Testator by the Appellant with reference to this second Codicil.—[Dr. Lushington: Where there are circumstances of suspicion attending the making and execution of a testamentary paper, the Court requires more or less proof as to the knowledge of the contents, according to the degree of suspicion about the case.]—If the evidence of the witnesses, that the Testator knew the contents of the Codicil, is not satisfactory, we can establish that fact by a *viva voce* examination of the attesting witnesses, if leave be granted, under the Privy Council Act, 3 and 4 Will. IV., c. 41, s. 7.

[147] Mr. Bethell, Q.C., and Dr. Addams, for the Respondent.—It is a well-known

rule both at law and in the Ecclesiastical Courts, that a party propounding a Will, which he has either written, or procured to be written, in his favour, is bound to furnish the Court with satisfactory evidence *aliunde*, of the Testator's knowledge of the contents of the instrument. *Baker v. Batt* (2 Moore's P.C. Cases, 317). *Barry v. Butlin* (2 Moore's P.C. Cases, 480). *Paske v. Ollatt* (2 Phil. 323). And this Court will hesitate in doing anything to impeach such rule. The sole question is, whether there is here satisfactory proof, either direct or circumstantial, of the specific fact, that the Testator was cognizant of the contents of this Codicil. We submit that there is no proof in the cause, adequate to the exigency of the case, of the Testator having signed the Codicil in question, knowing and approving of its contents, and meaning by his signature to give force and effect to the Codicil.

Sir Frederick Thesiger, in reply.—There is no rule to be collected from *Barry v. Butlin* [2 Moo. P.C. 480], and the other authorities referred to by the Respondent, that the mere circumstance of a Will having been prepared by the party benefitted, is sufficient to throw the *onus* upon that party, to prove that the Testator had a knowledge of its contents. Those cases only decide this, that where the circumstances altogether cause a degree of suspicion in the mind of the Court, the Court will require that suspicion to be removed. In this case there is nothing to make the [148] Court jealous, there was nothing clandestine.—[Lord Campbell: I do not think there is any presumption of fraud; it amounts only to a presumption of invalidity.]—If circumstantial evidence be sufficient, the probability is here in favour of the Testator's knowledge of the contents of the Codicil; by requiring too much evidence the Court may defeat the Will of the Testator.

The Right Hon. Dr. Lushington.—This is a question respecting the validity of a Council bearing date the 22nd of January, 1845, called a second Codicil to the Will of William Mitchell, of Comprigney, of the parish of Kenwyn, Cornwall. It appears that the Testator had executed a Will on the 9th of December, 1844, and on the 19th of January, 1845, he had executed a first Codicil thereto. Neither of these instruments is disputed. The sole question is, whether the execution of the second Codicil, by the Testator, early in the morning of the 22nd of January, 1845, was proved in the manner required by law.

Their Lordships do not think it necessary to go into the contents of this paper, further than to say, that it purported to make a very material alteration in the bequest to one of the Testator's daughters, greatly to her prejudice, and to the benefit of the party propounding this paper. This Codicil was attested by two witnesses, both of whom were in the service of the Testator; and it was executed in the morning of the day on which it bears date. It was propounded by William Mitchell, the son of the Testator, and was opposed by Mrs. Thomas, the daughter of the Testator, and her husband. It was propounded in what is technically called, in the Ecclesiastical Courts, a common *condidit*, with this exception, namely, that the [149] first and second articles simply state the making and execution of the Will of the 9th of December, 1844, and first Codicil of the 19th of January, 1845; and the third article pleads more formally the directions for, and preparations of, the second Codicil of the 22nd of January, 1845, the reading over to, and approval of it by, the Testator. It was perfectly competent to Mitchell, if so advised, to have pleaded all the circumstances attending the making and execution of the last-mentioned Codicil, in the manner in which they took place, and he might have pleaded any reason, or cause, which led to an alteration of the Will of the 9th of December. But for some reason, not explained to the Court, he has confined his plea to a *condidit*, on which no witness could be examined but the attesting witnesses, the persons present at the execution, and the drawer of the Codicil. The drawer of the Codicil being Mitchell, he could not be produced as a witness. But for the purpose of adducing facts subsidiary to the execution, and from thence of satisfying the Court which was to decide on the validity of the instrument, that it was duly executed with a full knowledge and approval of the contents, they might, as I have said, have pleaded them in the original plea, or, as suggested by the Counsel of the Respondent, they might have brought in additional articles in the Court below, or they might have pleaded in this Court (in which an allegation was asserted and abandoned) all the circumstances, necessary to be brought forward, as to the

preparation and execution of that Codicil. As they have not done this, the necessary conclusion of their Lordships must be, that there were no previous instructions and no declarations, and that no evidence of recognition or knowledge of the contents of the Codicil [150] could be produced on the part of the Appellant. The result is, that the case is in precisely the same state in which it was argued before the Court below, namely, whether the evidence of the two subscribing witnesses to the Codicil is sufficient in law to satisfy their Lordships that the judgment of the Court below was erroneous, and that the Codicil was duly executed. When I use the term "duly executed," I do not mean merely the technical sense of it, the fact of execution by the signature of the Testator and the subscription of two witnesses, as required by the Statute; but I mean, by the term "duly executed," proof of execution which carries with it a conviction that the Testator knew, and approved of, the contents of the instrument.

Now with respect to the law upon this point, as to what proof is necessary in a case of this kind, I apprehend that no question has undergone so much argument, and so much consideration, as the nature of the proof which is required, where the drawer of a Will is a person materially and principally benefitted by it. Their Lordships are unanimously of opinion that the law as laid down by Mr. Baron Parke, in the case of *Barry v. Butlin* (2 Moore's P.C. Cases, 480), is the law that they ought strictly to adhere to; and that law appears to be this,—that, wherever an instrument has been prepared by a person interested under it, you must give some evidence, of some description or other, to satisfy the mind of the Court that the Testator knew and approved of the contents. There may, perhaps, have been some notion in former days that the evidence must have been of some peculiar description; such as of reading over the Will to the Testator: but this is not the law as laid down by Mr. Baron Parke, in *Barry v. Butlin* [2 Moo. P.C. 480]: provided you can satisfy the Court by any evidence that the Testator knew and approved [151] the contents of the instrument, it is perfectly sufficient for the effect to be wrought out.

Then what is this case? Here is no previous declaration, nor the slightest recognition; here is not one atom of evidence of any instructions ever been given by the Testator himself: and, therefore, the Court is to extract from what passed at the time of execution, as deposed to by the witnesses, whether or not the Testator knew the contents of the paper, and adopted and approved of them. Now there is not one single expression deposed to by the witnesses, as far as I can find in their evidence, as coming from the Testator himself. If, therefore, the evidence is sufficient, it must be sufficient on the ground that he had the Codicil in his hand, and had the opportunity of reading it, and that he did read the Codicil, and afterwards approved of the contents, by the execution of it. But it does not appear to their Lordships that the Testator ever did read the Codicil, as far as they can judge from the evidence in the cause. It must be proved to their Lordships' satisfaction, by some evidence that would lead them to the conclusion, that the Testator did know and approve the contents of the Codicil; but from the evidence before us there is no *medium concludendi* that he did know and approve the contents. Such cases have occurred over and over again, and it is not a case in which the Court is called upon to say, or would presume to say, that the person propounding the Codicil has been guilty of any offence, moral or otherwise; but, unfortunately for himself, he has not produced the proof which the law requires, and such as their Lordships are all of opinion is demanded by the rule we are bound strictly to adhere to. That being so, we are under the necessity of affirming the judgment of the Court below.

[Mews' Dig. tit. WILL; I. TESTAMENTARY CAPACITY; g. *Soundness of mind*. On point (i.) as to burden of proof (6 Moo. P.C. 150), see note to *Barry v. Butlin*, 1838, 2 Moo. P.C. 92; (ii.) as to reading over instrument to testator before execution being unnecessary (6 Moo. P.C. 150-151), see *Parker v. Felgate*, 1883, 8 P.D. 171; and *Perera v. Perera* (1901), A.C. 354.]

[152] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

THE BANK OF AUSTRALASIA,—*Appellants*; THOMAS CHAPLIN BREILLAT, Chairman of the Bank of Australia,—*Respondent* * [Dec. 10, 11, 13, and 14, 1847].

If an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are legal, and some illegal at common law; the performance of those which are legal may be enforced, though those which are illegal cannot [6 Moo. P.C. 201].

By a Deed of Settlement, a Joint Stock Banking Company, called "The Bank of Australia," was established as a Bank of issue and deposit, at Sydney, in New South Wales. The deed contained clauses conferring powers upon the Directors, "For the better management of the concerns of the said Company, etc.," whereby it was declared that they shall have, and be expressly invested with, "full power and authority to superintend, order, conduct, regulate, and manage all and singular the affairs and business of the said Company, to the best of their discretion and judgment, under and subject to the provisions thereafter contained." Such Board of Directors were further empowered to "devise and make such provisions, rules, orders and regulations, touching the government, carrying on, and management of the affairs of the said Company, the same not being repugnant to the general rules and regulations therein contained, as they should think expedient." In the year 1843, the Bank of Australia became involved in pecuniary difficulties, whereupon the Directors at Sydney applied to the Bank of Australasia for a loan, and borrowed from that Bank, at various times, the sum of £154,000, for which the Directors gave their promissory note. Upon the negotiation of this loan, the Directors of the Bank of Australia entered into an agreement with the Bank of Australasia, whereby they stipulated that the Bank of Australia should cease to be a Bank of issue, deposit and discount, and should become a Loan Company; and that no transfer of shares or stock should be made without the consent of the Bank of Australasia; they also agreed to wind up and get in their capital as a Loan Company. Payment of the note for £154,000 was refused by the shareholders of the Bank of Australia, on the ground that the stipulations contained in the agreement were *ultra vires* the Directors. On an action brought by the Bank of Australasia on the promissory note against the Chairman of the Bank of Australia, the Supreme Court at New South Wales, at a trial at bar, found for the Defendant. Upon appeal,—Held by the Judicial Committee (reversing the verdict and judgment of the Supreme Court),—

1st. That the Directors of the Bank of Australia had the powers of managing partners in an ordinary banking partnership, and that, amongst these, was the power of borrowing money for the purpose of discharging the existing liabilities of the Bank till the assets should be realised, and of discontinuing the Bank if they thought such conduct essential to the interests of the shareholders [6 Moo. P.C. 195].

2ndly. That the circumstances of the engagements of the Directors to repay the loan being accompanied by other stipulations, some of which were *ultra vires*, did not discharge the Bank from liability to repay the loan, as the only effect of those stipulations was, that they could not be enforced [6 Moo. P.C. 201].

Held also, that the proceeding before the Judicial Committee from the verdict of the Supreme Court was in the nature of an appeal and not a writ of error, and that this Court has power, under its common-law jurisdiction, to give subsequent interest upon the judgment debt [6 Moo. P.C. 206].

Although no power is given by the Charter of Justice, or the Act of Parliament

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

creating the Supreme Court at New South Wales, to allow an appeal to the Queen in Council from that Court; yet, to prevent a failure of justice, this Court will, upon a special Petition for that purpose, grant leave to appeal from a judgment of that Court [6 Moo. P.C. 169].

This was an Appeal from a judgment of the Supreme Court at New South Wales, in an action of assumpsit on three promissory notes, and on the com-[153]-mon money counts, on a trial at bar in that Court, in which the Appellants were Plaintiffs, and the Respondent, the Chairman of the Bank of Australia, was sued as a nominal Defendant under the provisions of an Act of the Local Legislature (Col. Act, 4th Will. IV., 28th Aug., 1833).

The Appellants were partners, carrying on the business of bankers, at Sydney, in New South Wales, under the title of "The Bank of Australasia." The Respondent was the Chairman and partner of a joint stock company, who also carried on business as bankers at Sydney, by the name of "The Bank of Australia," under the provisions of a deed of settlement, dated the 1st of May, 1833.

This deed, after reciting a previous deed of settlement, of the 22nd of May, 1826, recited, among other things, that it had been deemed expedient for pro-[154]-moting the agriculture, trade and commerce of the colony of New South Wales, that a Bank should be established and founded in Sydney, as well for the purposes of discount and issuing of notes and bills, and lending monies on securities, and cash accounts for the safe custody of monies and securities for monies, for the general public accommodation and benefit, as also for transacting and negotiating all such other matters and things as are usually done and performed, relating to, or connected with, the ordinary business of banking: and that the several persons, parties thereto, had agreed to establish such Bank, and to raise up a joint stock or capital of £120,000, in shares of £100 each, and to carry on the same in copartnership together, under the name of "The Bank of Australia," for the term of seven years. The Deed of Settlement further recite that the parties to the Deed were the holders of the whole capital stock of the Bank, and that it had been agreed to carry on the business for the further term of 100 years, with a capital of £200,000. It was then witnessed that the parties to the Deed mutually covenanted and agreed with each other that they and the persons who should thereafter be or become parties thereto should and would be, remain and continue, copartners and joint stock proprietors of and in the said capital stock of £200,000, or so much thereof as should, from time to time, be paid in or actually form the capital of the said Company, in proportion to the number of shares set against their respective names and seals, for the purpose of carrying on the business of the said Company, under the title, denomination or firm of "The Bank of Australia," for the term of 100 years, determinable, nevertheless, as hereinafter-mentioned, and [155] subject to, and under the rules and regulations, and covenants, conditions, clauses and agreements thereinafter or thereafter to be agreed upon and established in the manner and form hereinafter provided in that behalf.

The Deed contained seventy-three distinct clauses; but it is only material to the present case to notice the following:—

Clause 2. That the business and concerns of the said Company should continue to be carried on and conducted at Sydney, where the same was then carried on, and such other places as the Proprietors should thereafter agree upon.—C. 3 and 4. That the capital should be £200,000, in shares of £100 each.—C. 10. That the capital might be increased beyond £200,000, if the major part of the Proprietors, for the time being, should think fit, and be raised by the issue of new or additional shares to the then Members, or in such other form and manner as the Proprietors at a General Meeting should deem expedient.—C. 17. That every shareholder should have a distinct interest in his share of the stock, so as to be assignable and transferable, under the restrictions and in manner therein mentioned.—C. 38. That for the better management of the concerns of the said Company, under and in conformity to the provisions thereinafter contained, or to be thereafter provided for, and for securing the observance thereof, the same should be confided to the care, superintendence, and management of eleven Directors, to be so qualified, elected and appointed, and with such authorities and powers as are hereinafter declared, which

said Members should be and act as Directors of the concerns of the said Company. C. 48. That not less than four Directors should form a Board for the management and direction of the affairs [156] and business of the said Company. C. 51. That such Board of Directors should have, and they were thereby expressly invested with, full power and authority to superintend, order, conduct, regulate, and manage, all and singular the affairs and business of the said Company, to the best of their discretion and judgment, under and subject to the provisions thereafter contained. —C. 53. That such Board of Directors might make provisions, rules, orders, and regulations touching the government, carrying on, and management of the affairs of the Company, the same not being repugnant to the general rules and regulations therein contained, as they shall think expedient.—C. 54. That such Board of Directors should have the entire management and control of the lending of money on bills, notes, bonds, mortgages, and other securities, and of the purchase and sale of bullion, gold and silver, and such coins and monies as they might consider necessary for carrying on the business of the said Company, or as they should think advisable and advantageous for the general interests thereof, and should have the uncontrolled right of calling in, receiving, and enforcing payment of all monies due to the Company however secured.—C. 55. That such Board of Directors should, from time to time, settle and determine in whose name or names all securities that should be required to be entered into, by and on behalf of the said Company, or by or on behalf of any person or persons transacting or negotiating any matter or business whatsoever therewith, should be taken and given, and by whom and in what manner and form, and for what amount, the several cash notes of the said Company should be drawn, signed, given and issued, and from time to time [157] alter and vary the same as they should think proper.—C. 56. That the Board of Directors might call Special General Meetings of the Proprietors to consider the propriety of making further calls.—C. 64. That a General Meeting of the Members of the Company should be convened, and held at the house where the business of the Bank should be carried on and managed for the purpose of transacting and considering the general business and concerns of the said Company, on a day to be appointed by the Board within three weeks after the first of January and first of July in each year.—C. 67. That the Directors might call Special General Meetings by a newspaper advertisement or by circular in case of emergency.—C. 68. That any eleven Members entitled to vote might at any time when they should see occasion or deem the same expedient, by writing addressed to the Directors, and stating the reason of such occasion or expediency, require a Special General Meeting to be convoked upon the concerns of the Company, and that the Directors should within ten days or as soon thereafter as circumstances would permit, convoke such meeting for considering the subject mentioned in such notice.—C. 69. That fourteen days notice of all General and Special General Meetings (except in emergencies) should be given in one or more newspapers.—C. 73. That the term of 100 years thereby agreed upon, might be determined by a General Meeting of the Members of the Company, not being less than eleven, at the expiration of the first ten years, and every succeeding ten years of the said term.

The business of the Bank was managed by Directors, chosen from time to time, in pursuance of the deed, and acting by Boards of not less than four.

[158] In the beginning of the year 1843, the Bank of Australia having become involved in difficulties, the Directors resolved on applying to the Appellants for assistance in the way of a loan, to enable them to meet the engagements of the Bank, and to give them time for the realization of their assets without sacrifice; and accordingly, on the 21st of February in that year, a deputation from the Board, consisting of the Chairman and two other Directors, accompanied by the Secretary and Cashier, waited upon the Superintendent and Sydney Manager of the Bank of Australasia, for the purpose of negotiating such loan on behalf of the Bank of Australia, on which occasion they submitted a statement of their affairs to the Appellants.

After some negotiation, it was ultimately agreed by the Appellants' Bank to lend to the Respondents' Bank, for the purpose of meeting its engagements, the sum of £150,000 upon the direct engagements of the borrowing Bank; and by the managing officers of the Union Bank of Australia, to lend for the same purpose the

sum of £60,000, upon the endorsement by the Bank of Australia of bills in their hands. A resolution agreeing to the loan by the Appellants was passed by the Respondents' Board of Directors; and on the 27th of February, the Bank of Australia, by their Secretary and Cashier, addressed to the Appellants' Superintendent the following letter:—

"Bank of Australia, Sydney.—Sir, In reference to the communications which have taken place between the Directors and Cashier of this Institution and the Bank of Australasia, relative to the intended alteration in the business of this Bank, and the assistance it will require, for the purpose of meeting its immediate liabilities, I am directed by the Board [159] to communicate to you their resolution of calling a meeting of the Proprietors for the 16th of March next, for the purpose of making the necessary arrangements for terminating the business of this Bank, and converting it into a Loan Company, with a view to the security of its outstanding debts, and to enable the Bank, in the meantime, to liquidate its engagements without inconvenience to the public. I am desired by the Directors to acknowledge and thank you for your tender of assistance, and to accept of the advance of the Bank of Australasia of the sum not exceeding £150,000, in such sums as may from time to time be required on the security of the acceptances of this Bank, at three months date, at an interest of ten per cent. per annum, and subject to the following conditions:—1st. That, on or before the 31st March, this Bank shall cease to be a Bank of issue, and in winding up its affairs all future payments shall be made through the Bank of Australasia. 2nd. That no bills shall be discounted by the Bank after that date, except such as may be required to renew bills now held by the Bank. 3rd. That no transfer of shares or stock shall be made without the consent of the Bank of Australasia. 4th. That the liabilities incurred by this Bank for Messrs. Hughes and Hosking, and for Mr. J. T. Hughes, be covered by the execution by them of such trusts to the Bank of Australia, as may be necessary to place the control of the affairs of the firm and of Mr. J. T. Hughes under this Bank, to meet their existing obligations, and to prevent them from contracting new ones without the consent of this Bank, and that the whole of their future business during the continuance of the trusts be transacted through the Bank of Australasia. 5th. That the Bank of Australia shall not incur new liabilities without the consent of the Bank of Australia. [160] I have the honour to be, Sir, your most obedient servant, W. H. Mackenzie, Cashier. To the Superintendent of the Bank of Australasia, Sydney."

On the 2nd of March, 1843, the Appellants' Superintendent addressed to the Respondents' Cashier and Secretary, the following answer:—

"Bank of Australasia, Superintendent's Office, Sydney, 2nd March, 1843.—Sir, I beg to acknowledge the receipt this morning of your letter of the 27th ult., communicating the resolution of your Board to call a Meeting of Proprietors for the 16th instant, for the purpose of making arrangements to terminate the transaction of business by your establishment as a Bank, and to convert it into a Loan Company, and intimating the intention of your Directors to avail themselves of the assistance of the Bank of Australasia in liquidating their current engagements, to an extent not exceeding £150,000, in such sums as may, from time to time, be required, on the security of the acceptances of the Bank of Australia, at three months date, at an interest of ten per cent. per annum, and subject to the conditions therein detailed. And, in reply, I beg to state that this establishment is prepared to meet the requisitions of the Bank of Australia, to the extent and on the conditions which you have specified. I am, Sir, your most obedient servant, William Hamilton Hart, Superintendent. W. H. Mackenzie, Esq., Cashier of the Bank of Australia, Sydney."

In furtherance of the arrangements agreed to by these resolutions, notes were accepted and discounted by the Bank of Australasia, in favour of the Respondents' Bank, between the 29th of March, 1843, and the 30th of October in the same year, on which day, pursuant to a resolution, the then existing securities [161] were cancelled, and in lieu of them the following promissory note, signed by the Chairman, Mr. Norton, on behalf of the Bank of Australia, was delivered by their Cashier and Secretary to the Appellants' manager:—"Sydney, 30th October, 1843. £154,000 sterling. On demand, I promise to pay to the Bank of Australia, or order, the sum

of £154,000 sterling, with interest from this date, for value received, for and on behalf of the Bank of Australia. J. Norton, Chairman. Payable at the Bank of Australia."

The amount due for principal and interest on the existing notes, was calculated by the Cashier and Secretary, with the Manager, and found to be £151,480 19s. 11d.; and upon the delivery of the last mentioned promissory note, the balance of £480 19s. 11d. was settled between the two Banks in account, the Bank of Australia being credited with the full sum of £154,000, upon the new note.

In all the communications which took place between the Directors and officers of the Bank of Australia and the officers of the Bank of Australasia, up to the month of August, 1844, the latter was treated as an acknowledged creditor of the former to the amount of the notes and acceptances of the Cashier or Chairman, for the time being, in its favour.

At a Special general meeting of the Proprietors of the Bank of Australia, held on the 6th of August, 1844, it was resolved, by a majority of the Proprietors there present, as follows: "That the loan negotiated between the Bank of Australasia, the former Directors of this Bank, and Messrs. Hughes and Hosking, is not binding on the proprietary of this Bank, and that the Board of Directors be hereby [162] instructed to defend any action that the Bank of Australasia may bring for the recovery of the same."

Upon the expiration of the twelve months from the 24th October, 1843, payment of the amount due for principal and interest on the promissory note for £154,000 was demanded at the Bank of Australia, on behalf of the Appellants, and refused.

About this time Mr. Norton resigned the office of Chairman of the Bank of Australia, and was succeeded by the Respondent, Thomas Chaplin Breillat, who was duly appointed and registered as such Chairman.

On the 26th of November, 1844, the Appellants commenced their action in the Supreme Court of New South Wales, against Thomas Chaplin Breillat, as the nominal Defendant, for and on behalf of the Company of the Bank of Australia, to recover the amount of the promissory note for £154,000 and interest, and also the amount of two other promissory notes for the respective sums of £3480 12s. and £2854 0s. 10d., which had been endorsed and delivered by the Respondent's cashier to the Appellants, and had been discounted by the Appellants for the Bank of Australia in the usual course of business.

The declaration contained seven counts: By the first and second counts, the Appellants claimed, upon the endorsements of the cashier of the promissory notes for £3480 12s., and £2854 0s. 10d., as upon the endorsements of the Bank of Australia; by the third count, the Appellants charged the Bank of Australia as makers of the promissory note for £154,000 and interest; and by the fourth, fifth, sixth, and seventh counts, the Appellants charged the Bank of Australia in the nominal amount of [163] £350,000, as for money lent, money paid, interest, and on an account stated, in the usual form.

The Defendant pleaded to the first two counts of the declaration, in the whole six pleas, denying the material allegations contained in those counts. To the third count, he pleaded, seventhly, that the Bank of Australia did not make the note mentioned in that count. And to the last four counts he pleaded, eighthly, that the Bank did not promise *modo et forma*; and ninthly and tenthly, pleas of payment and of set-off.

The Appellants joined issue upon the first eight pleas, and traversed the ninth and tenth pleas. The Defendant joined issue on the replication to the ninth and tenth pleas.

The cause was set down for trial, and came on to be heard before John Nodes Dickinson, Esquire, one of the Judges of the Supreme Court, and a special jury, on the 27th, 28th, 29th, 30th, and 31st days of March, and the 1st, 2nd, 3rd, 4th, 5th, and 8th days of April, 1845. The jury being unable to agree to a verdict unanimously, within six hours after the close of the Judge's charge, or by a majority of nine to three, within twelve hours after such charge, were at the end of twelve hours discharged by the learned Judge from giving any verdict, under the authority of an Act of the Colonial Legislature.

The cause was again set down for trial, and was ordered to be tried at the bar of the Supreme Court, on the 23rd of June, in the same year, and so from day to day until it should have been fully disposed of. It was accordingly heard on the 23rd of June, and on various other days, ending on the 4th of August fol-[164] lowing, before the Chief Justice, Alfred Stephen, and their Honors, John Nodds Dickinson and William A'Beckett, Esquires, Puisne Judges of the Supreme Court.

The Plaintiffs at the trial abandoned the first and second counts, and the evidence on both sides was confined to the issues on the seventh and eighth pleas. The effect of the evidence on the trial, and the purport of the documents produced, so far as they affected the point under consideration in the present appeal, are particularly stated in the judgment of their Lordships.

The Defendants resisted the claim, on the ground that the sum demanded, was for money borrowed by the Directors, without authority, and he contended that the power of the Directors to bind the Company by borrowing money must depend entirely upon the Deed of Settlement, and could only be supported by an express authority to that effect, and that the Deed of Settlement of the Bank of Australia gave the Directors no power to contract for the Company, as they had done in this case, although he admitted that a borrowing by re-discount would have been legitimate. And he further contended that, even if such power existed, the contract was so vitiated by the conditions stated in the letter of the 27th February, 1843, as to disentitle the Plaintiffs to recover the money advanced. The Defendant also attempted to show by evidence that the loan had been contracted for the purpose of supporting the firm of Hughes and Hosking, and the individual members of that firm, by the unfair procurement, and for the real benefit of the Plaintiffs, and he contended that on this ground also the Plaintiffs could not recover.

[165] Upon the evidence given at the trial at bar, the two Puisne Judges were of opinion that the Defendant was entitled to a verdict. The Chief Justice was of a contrary opinion.

The Chief Justice, in his charge, informed the jury, in substance, that the Judges were all clearly satisfied by the evidence, that the loan made by the Plaintiffs was so made in order to enable the Bank of Australia to meet liabilities previously incurred, and with the contracting of which it did not appear that the Plaintiffs had anything to do; that the entire amount had been advanced for such purposes, that no part of it had been applied in payment of engagements of Hughes and Hosking, or J. T. Hughes, with the Plaintiffs, except such as the Bank of Australia were previously liable for; that the assets of the Bank, at the time of the loan, were supposed on all hands to be ample, and that there was no ground for imputing to the Plaintiffs or their officers an attempt to take an undue advantage of the necessities of the Bank of Australia. The Jury were then informed that it was open to them either to find a general verdict for either party, or completely to separate the facts from the law by returning a special verdict. He proceeded to state that, assuming the facts to be all found in favour of the Plaintiffs the other Judges were of opinion, that they were not entitled to recover, by reason both that the Deed of Settlement conferred no authority, in their opinion, on the Directors to borrow money on behalf of the Company, even for the above purposes, in the manner in which the loan was effected in this case, and that, even if such authority existed, the conditions in the letter of the 27th February, 1843, so vitiated the contract, that the Plaintiffs could [166] not recover the money advanced under it: but that he was himself of a contrary opinion, both as to the existence of authority and the effect of the conditions. Upon the question of acquiescence by the proprietary, the learned Judge informed the jury that, in the opinion of the Court, the evidence to fix the proprietary with liability on the ground of having acquiesced in the loan was so loose, scanty, and uncertain, as to be almost intangible. The jury were then directed that the law of the case must be taken by them to be according to the opinion of the majority of the Judges, and they were accordingly advised to find for the Defendant, if they returned a general verdict.

At the close of his address, the Chief Justice told the jury that if they elected to return a special verdict, he would, with the assistance of the other Judges (and of the Counsel if they thought fit to assist), prepare the form and heads of such a verdict, and put such questions to the jury for them to find on the facts in dispute

as it would be necessary for them to notice in their verdict. The jury, after some time, intimated that they would comply with the suggestion of the Court, and find a special verdict, whereupon the Chief Justice prepared a sheet of paper with the formal commencement and conclusion of a special verdict, and with the body of it containing several blanks preceded by these words, "And we find that"—"And also that"—and he explained to the jury that the blank spaces were to be filled up with the leading facts of the case.

The jury retired, and shortly afterwards found the following verdict,—“ We find a special verdict for the Plaintiffs, on the seventh and eighth issues, for the Note £154,000, interest 8 per cent. £21,703 18s. 7d., [167] subject to the opinion of the Court on the points of law. And a verdict for the Defendant on all the other issues.”

Some discussion having taken place as to the effect of this verdict, in respect of the seventh and eighth issues, and it being admitted to be erroneous as to the ninth and tenth issues, it was then proposed by the Chief Justice, with a view of putting the whole case in train for an appeal to the Privy Council, that a form of verdict which would leave the questions at law directly open to the Court should be taken by consent, and that the Judgment of the Court should be given *instantly* and without argument; and his Honor proposed for adoption by the Counsel on both sides, the following form of consent, at the same time stating, in reference to the proposal for an immediate decision in the Colony without argument, that he thought few things more improbable than that any further discussion or consideration of the legal questions than had been already given to them, would alter the views taken either by his learned brethren or himself. The proposed consent was given on both sides. It was in these words,—“ The jury find for the Plaintiffs on the seventh and eighth issues with £175,703 18s. 7d. damages, subject to the opinion of the Court, whether upon the facts proved, the Plaintiffs be entitled to recover. If the Court be of a contrary opinion, the verdict to be entered for the Defendant. The jury find for the Plaintiffs, on the ninth and tenth issues, with one shilling damages, and for the Defendant, on all the first six issues. This is assented to by the Counsel on both sides. The Judgment of the Court to be delivered immediately. The whole to be without prejudice to either party's right of appeal.”

[168] The verdict of the jury was then returned accordingly, and a motion being made by the Defendants' Counsel for the entry of a verdict for them on the seventh and eighth issues, and opposed, *pro forma*, by the Counsel for the Plaintiffs, without argument on either side, the majority of the Court decided in favour of the motion, and a verdict was accordingly directed by the Court to be entered for the Defendant, on the seventh and eighth issues. On the 8th of September, 1845, final judgment was entered up by the Defendant on the several issues found for him, and for the Plaintiffs on the issues found for them, with one shilling damages.

The Plaintiffs, without applying to the Court below, presented a petition to Her Majesty in Council, praying for leave to appeal from the above-mentioned Judgment of the Supreme Court.

Sir T. Wilde, in support of the Petition.—This Court is the only jurisdiction which can entertain the present application. The Charter of Justice of New South Wales, of 1823, made in pursuance of the Act of Parliament, 4 Geo. IV., c. 96, gave a right of appeal to the King in Council, from the judgment or decree of the Court of Appeals in New South Wales. That Statute has expired, and the 9th of Geo. IV., c. 83, which was subsequently passed, contains no provisions for an appeal from the Supreme Court, to the Queen in Council. So that at present no right of appeal exists, *Flint v. Walker* (5 Moore's P.C. Cases, 179); and it can only be granted [169] by this Court under its general jurisdiction, or by the powers conferred by the Statute, 7th and 8th Vict., c. 69.—[Lord Brougham: The petitioners should have applied, in the first instance, to the Court below for leave to appeal, and if that was refused, to have applied here for indulgence.]—In *Flint v. Walker* [5 Moo. P.C. 179], application was made to the Supreme Court, but they held that they had no power to grant leave to appeal. It cannot be required to apply to the Court below *toties quoties*.

* Present: The Lord President (the Duke of Buccleuch), Lord Brougham, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

The Solicitor-General (Sir F. Kelly) opposed the Petition.

Lord Brougham:—We think the prayer of this Petition ought to be granted, and the appeal admitted upon giving the usual securities. The admission of the appeal will, of course, stay the proceedings in the Court below.

By an Order in Council, leave was given for the Corporation of the Bank of Australasia to enter and prosecute their appeal from the Judgment of the Supreme Court of New South Wales, and that the petitioners or their agents ought to be permitted to take from the proper officers of the Supreme Court, copies properly authenticated, of the records and proceedings which they may be advised are necessary to be laid before Her Majesty in Council, in support of the appeal, upon payment of the usual fees for the same.

In pursuance of this Order, documents were transmitted, comprising the record, the Chief Justice's notes of the evidence taken on the trial at bar, and the reasons of the Chief and Puisne Judges, in compliance with the general rule of the Judicial Committee of the Privy Council of the 12th of February, 1845 (see Rule, 4 Moore's P.C. Cases, App. p. xxv.).

[170] Upon these documents, the appeal now came on for hearing.

Mr. Bethell, Q.C., and Mr. Serj. Channell, (Mr. Serj. Gazelee, and Mr. H. Hill, with them,) for the Appellants.

The question lies in a very narrow compass: the sole inquiry is, had the Directors of the Bank of Australia power, under the provisions of the Deed of Settlement of 1st of May, 1833, to borrow, so as to bind the shareholders of the Company? The authority of the Directors is two-fold; first, under the Deed of Settlement; secondly, as incident, by law, to the nature of their partnership. The first question turns upon the true construction of the various clauses in the Deed of Settlement, which either limit or define their power, or from which their authority is to be inferred: these are principally the 38th, 48th, and 51st; by the latter clause, the Directors are to order, conduct, regulate, and manage the affairs of the Company "to the best of their discretion and judgment," restrained only by such provisions as are hereinafter contained. Then come the 53rd, 54th, and 55th; the 54th provides, that the Directors shall have the entire management and control of the lending of money on bills, notes, etc., while the 55th, after stating that the Directors are to settle and determine in whose name all securities required by the Company shall be taken and given, goes on, "and by whom and in what manner, and from and for what amount, the several cash notes of the said Company—shall be drawn, signed, given and issued." Surely, these provisions are amply sufficient to warrant the act in question. But let us look a little further into the matter. This is a Banking Company: the object is stated at the very outset of the Deed of Settlement; it recites that [171] it is deemed expedient for promoting the agriculture, trade and commerce of the colony of New South Wales, that a Bank should be established, as well for the purpose of discount and issuing of notes and bills, etc., as also for transacting and negotiating all such other matters and things, as are usually done and performed relating to, or connected with, the ordinary business of banking. By the 54th clause the powers belonging to the partners are vested in the Directors. Now, being a banking establishment, what are the duties of such a partnership, except they be, the borrowing and lending of money? That is the very object of the partnership, and, therefore, whether the Deed of Settlement conferred the power of borrowing and lending money specifically and in terms (as we have shown it does here), or not, yet we contend, that such power exists from the nature of the partnership, and is essential to it. *Kirk v. Blurton* (9 Mee. and Wels. 288). *Bramah v. Roberts* (3 Bing. N.C. 963). Then as to the circumstances of this transaction; that the money was borrowed by the Directors of the Bank of Australia is not disputed: the Respondent, who represents the proprietary, resists the claim, on the ground that the money was borrowed without the privity or authority of the shareholders. He relies upon the Deed of Settlement, which, we have already shown, conferred sufficient authority, even if such authority was not incident to the partnership as a banking concern. But he further rested his defence in the Court below, and he relies here, on the conditions contained in the letter of the 27th of February, 1843, which, he says, vitiated the contract in this instance, even if the Directors had power to enter into any [172] such: but the

proposals in that letter were not terms or conditions of the loan, nor did they form any part of the contract; they were independent of the contract altogether, and would not, even had they formed part of it, have vitiated it altogether. The Appellants' right to recover the money lent by them, would not be affected by the Directors having, in part, exceeded their authority, if they were entitled to raise funds in the way resorted to. *Glascott v. Lang* (2 Phil. 310). *Dobson v. Lyall* (2 Phil. 323, note). But the acting of the Directors and their Cashier, and the appointment of new Directors by the proprietary, are all confirmations by the proprietary of the acts of the Directors, and would, without other circumstances, we submit, amount to a recognition and adoption of their acts.

Sir F. Kelly, Q.C., and Mr. M. D. Hill, Q.C., (Sir John Bayley and Mr. Bovill with them,) for Respondent.

The real question has not been presented to your Lordships; it is simply this, whether each shareholder of the Bank of Australia is bound by the contract entered into by the Directors. The Respondent represents, and is, in fact, the whole body of shareholders: many of them reside in this country, and other places very distant from Australia: they neither knew, or could know, any of the transactions in question; having embarked their capital upon the faith of the Deed of Settlement. The Appellants had full notice of the nature of the Company, and the contents of the Deed of Settlement, at the time the transaction in question took place. The rights and liabilities of the shareholders [173] must, therefore, be governed by the terms of this Settlement. Now, the Court will not fix absent parties with a contract entered into by other persons on their behalf, unless it be satisfied that the parties entering into such contract had full legal authority to do so.—[Lord Brougham: The question is, not only whether they have conferred the authority, but whether the law does not necessarily confer or imply authority from the nature of the transaction.] It is a question of agency or authority. The powers conferred by the Deed of Settlement are to be exercised in strict conformity with the Deed. The Deed contains, in express terms, every power that is necessary to carry on the concern; and each of these powers are expressly declared to be subject to the provisions of the Deed. If money was required it should have been raised by calls. We submit, that neither under the express powers, or under any implied powers, had the Directors authority to bind the whole body of shareholders by such a contract as that in question, nor had they power to borrow money at all, except in the sense as provided for, namely, by receiving deposits or issuing notes. Bankers have no power to borrow, strictly speaking, for the purpose of increasing their capital, as distinguished from contracting debts. They cannot contract a loan under ordinary circumstances, even for the purpose of carrying on their business: but here the borrowing was, not for that purpose, but for the very reverse, namely, stopping the business. This was the first stipulation of the agreement.—[Lord Campbell: The nature of the business of Bankers is a part of the law merchant, and is to be judicially noticed by the Court. *Brandas v. Barnett* (12 Clk. and Fin. 787).]—It cannot be [174] contended that to borrow money for the purpose of stopping a Bank, is part of the business of a Bank. The next stipulation was, the taking the liabilities of Messrs. Hughes and Hosking. The Court below could not reject all these considerations, and treat the case as a simple borrowing.—[Lord Campbell: Suppose money, though borrowed for improper purposes, was applied with the consent of the lender to proper purposes, what would be the effect of that?—The application would not affect the original terms of the contract. *Gallway v. Mathew* (10 East. 263). Here the Appellants had notice of the Deed of Settlement. The question then will narrow itself to this, whether the shareholders have given an express or implied authority. The case of *Kirk v. Blurton* (9 Mee. and Wels. 288) expressly decides, that there is no implied authority in a partnership to borrow money, except in the name and on behalf of the firm, for the purpose of carrying on business. *Hawtayne v. Bourne* (7 Mee. and Wels. 595) shows that even where there is urgency, as a distress being levied against the partnership property, the Directors could not act beyond the authority conferred on them. In *Brown v. Byers* (16 Mee. and Wels. 252) it was held, that the Managing Director of a mining association had not authority to draw or accept bills of exchange, even for the necessary purpose of the mine, without the express authority of the Directors. It was incumbent upon the Appellants to prove that the Directors had power to bind

the shareholders: *Dickenson v. Valpy* (10 Bar. and C. 128), between whom and the Appellants there was no privity of contract express or implied. *Emily v. Lye* (15 East. 6). If this loan [175] was for the purpose of increasing the capital of the partnership, then the Directors had no implied authority to bind the shareholders. *Fisher v. Taylor* (2 Hare, 218). The purposes of the loan were expressed in the articles of agreement, and, among others, it was to meet the liabilities of Messrs. Hughes and Hoskings. Even if the banking business was to cease, the Directors had no authority to borrow for the purpose of paying debts; they had no powers except to wind up the concern, and this loan was not necessary for winding up the business. It is well settled, that where parties subscribe capital for one particular purpose, whatever the degree of responsibility that is marked out in the Deed may be, that liability cannot be carried out one bit further; you cannot bind a subscriber, except for the purposes of the joint undertaking. *Colman v. The Eastern Counties Railway Company* (16 Law Journ. N.S.C. 73; S.C. 10 Bea. 1). We admit, that, in a Court of Equity, in taking the accounts, the Directors would be given credit for part of the sums paid in satisfaction of Messrs. Hughes and Hoskings' liabilities, namely, those parts which have been guaranteed by the Company; but here we are on an action upon a promissory note, and the terms of the loan were, that some of Messrs. Hughes and Hoskings' liabilities, which the Company had not guaranteed, were to be paid thereout; it was not binding on the proprietary. The remaining stipulation in the agreement, that shareholders should not be at liberty to transfer their shares, was an evident interference with the rights of the shareholders. Suppose that before the agreement a shareholder contracted to sell his shares, it is clear, that in consequence of this stipula-[176]-tion, the Directors would have refused to allow the transfer; and if this action is maintainable, the Appellants may recover the whole demand against that individual shareholder, who, according to the Deed of Settlement, had a right to have his shares transferred to the purchaser. It is utterly impossible to say what portion of the loan of £150,000 was to be considered as the consideration for the Bank of Australia ceasing to act as a Bank of issue and deposit, and taking the business of a Loan Company. In *Palmer v. Gooch* (2 Stark. 428), it was held, that only for so much money as was proved to have been advanced to a captain of a ship for the purposes of the ship, would a bottomry-bond bind the ship. So here, though the Shareholders of the Company might be liable to their own Directors, as a matter of account for so much of the loan as they have applied to partnership purposes, they are not liable on this promissory note. *Thacker v. Moates* (1 Moo. and Rob. 79). It is immaterial whether the contract is a void contract or not; the question is, whether it is a contract between the Appellants and the Company. It may be a valid contract between the Appellants and the four Directors who authorised it, and such of the shareholders as may ratify it, and at the same time invalid as against the other shareholders: *Ex parte, Emily* (1 Rose, 61). In *Card v. Hope* (2 Bar. and C. 661), the Court held, that although one covenant in a Deed was lawful, yet as the entire Deed was formed on an illegal stipulation, the whole was illegal and void. To the same effect as to the indivisibility of contracts are the cases of *Symonds v. Carr* (1 Campb. 361), *Hol-[177]-land v. Hall* (1 Barn. and Ald. 53), and *Wilkinson v. Loudonsack* (3 Mau. and Sel. 117). If the application of the money was a necessary ingredient in the cause, that fact ought to have been submitted to the Jury. There is no satisfactory evidence as to that fact.

Mr. Bethell, in reply.—The grounds of the Respondents' arguments in support of the judgment of the Court below, are reduced to these several heads. First, they say that there was no power in the Directors, either express or implied, to contract this loan. As to the implied power, they attempt to negative it by reason, because the Deed of Partnership enumerates and confers upon the Directors various powers of an inferior order; therefore, the inference is, that this greater power would have been given expressly, if it had been the meaning of the Company that the Directors should have such a power; because the borrowing of the money was in effect an increase of the capital, and that that ought to have been done in the mode pointed out in the Deed; because the Directors were agents, and that it was well settled in law, that whatever might have been the powers of the principals, yet the

committal of their concerns to an agent did not confer on such agent the power of borrowing money; and because of its consequences, the character of the Deed being, that the Shareholders should only be liable to the amount of their shares. The second main head of their argument is, that admitting the Directors' authority to borrow, yet the conditions upon which the loan was granted, vitiated the contract. And thirdly, they say that no contract resulted [178] from the mere application of the money to the purposes of the Bank, and that there was no ratification, because no person was capable of binding the parties. To the first ground, then, I submit that there is express power given as an appendant power. It is given by the Deed. What construction can be put upon the word "securities," in the 55th clause? The only explanation of the word is, that it means securities for money borrowed by the Company. The very purposes of the Bank required that such a power should exist somewhere. If a party be invested in an office, he becomes clothed with the powers which belong to that office. Every power, therefore, that was conferred on the partnership, from their mutual relationship as partners, was vested in the Directors; they were, in effect, the sole partners of the concern. The very existence of the Company depended on the possession by the Directors of various implied powers, besides those expressly given. It was absolutely necessary that the Directors should have power to borrow money in a partnership of this description, particularly as the shareholders were scattered all over the world. It is admitted that the money was advanced, but the Respondent contends that the conditions on which it was advanced being illegal, the transaction is void. I submit, that if those conditions were *ultra vires*, they are innocuous. Secondly, if the Respondent could make out that any part of the loan was advanced for the purpose of paying off the debts of Messrs. Hughes and Co., to which the Company was in nowise liable, it would taint the contract to that extent, but not vitiate the entire contract. It has been held, that if part of a condition be illegal, the contract is so far bad *ab initio*, but the [179] other parts are good. Pigott's case (6 Co. Rep. 26). *Mosdel v. Middleton* (1 Ventr. 237), *Norton v. Simmes* (Hob. 12). Lastly, I submit that if a contract is made by one partner, and the terms on which it is made are contrary to his engagement with the other partner, yet if he adopt it he is bound by such contract. *Sandilands v. Marsh* (2 Barn. and Ald. 673).

The Right Hon. T. Pemberton Leigh (Feb. 15, 1848).—This case comes before us on appeal from a judgment of the Supreme Court of New South Wales, in an action brought by the Appellants against the Respondent. The Appellants are a corporation carrying on the business of bankers, at Sydney, under the title of "The Bank of Australasia." The Respondent is Chairman of a joint-stock company, carrying on the same business, at the same place, under the title of "The Bank of Australia."

The Company (a term which we use as designating the Respondent's Bank) was established, and the management of its concerns regulated by a Deed, which we shall have occasion particularly to examine. For the present, it is sufficient to state, that the general management was vested in a number of shareholders termed "Directors."

In the beginning of the year 1843, the Company was in great difficulties,—a large portion of its liabilities had arisen from transactions with the firm of Messrs. Hughes and Hosking. In February, 1843, the Directors thought it necessary to borrow a large sum of money, and they applied to the other Banks at Sydney, among the rest to the Appellants, for assistance. Upon this occasion, they prepared a statement of their [180] affairs, dated the 21st February, and submitted it to the Appellants. The effect of this statement is, that the Company would require, to meet their circulation and deposits, £113,648; for their acceptances on the account of Hughes and Hosking, and J. T. Hughes, £80,185; for Hughes and Hosking's own acceptances, for the due payment of a large portion of which the Company had granted letters of guarantee, viz., £72,387, making a total of £266,220. In reduction of this sum, it was estimated there would be recovered from bills in the Bank £75,000 in six months, and on Hughes and Hosking's estate £70,000 in twelve months—in all £145,000. Besides providing for these liabilities, the Directors were desirous of continuing to pay a dividend of £8 per cent. on their capital to the shareholders of

the Company. Upon this statement it appears to have been considered that an advance of £200,000 or £250,000 would be necessary, and as this was a larger sum than the Appellants were willing to supply, it was agreed that the superintendent of the Appellants' Bank should apply to the Union Bank to join them in the transaction.

With a view to this application, a memorandum of the terms on which the proposed loan was to be made was drawn out by the superintendent of the Appellants' Bank, and read over to the Directors of the Company. This memorandum is dated the 1st of March, and is in these terms:—“Memorandum. 1. Bank of Australia, to carry on their own concerns and those of Hughes and Hosking, J. T. Hughes and J. Hosking, which they will now incorporate with their own, will require assistance to the extent of, say £250,000, of which £120,000 will be called for immediately, and the remainder will be spread over the five or six ensuing [181] months. 2. These sums they propose to borrow on the security of their own acceptances, at the rate of £10 per cent. per annum, and consent to the following conditions:—1. To cease to be a Bank of issue, deposit, and discount, (except for the reduction of bills now held by themselves,) and their future payments to be made on cheques on, or the notes of, the Banks which may enter into the proposed arrangement with them. 2. To furnish a copy of their share list, and to permit no transfers without the consent of the said Banks. 3. Hughes and Hosking, and the individual partners, to execute a deed of trust to the Bank of Australia, assigning all their property, and restricting themselves from incurring further liabilities of any description. 4. Bank of Australia to incur no further liabilities without consent of said Banks, but to wind up and get in their capital as a loan company.” 3. The assets of the Bank of Australia consist of—coin, £4860; bills receivable, £346,082; and from these bills and the estate of Hughes and Hosking, they anticipate that they will recover before the end of the year £140,000. 4. All sums which may be recovered from these and other sources, the Bank of Australia engages to pay over to the Banks affording assistance, in reduction of their debt, less a sufficient amount to pay dividends not exceeding £8 per cent. per annum on their paid-up capital of £220,000, for which they will pass their cheques on the said Banks.” We take these facts from a letter of the Appellants, put in evidence by the Respondent, and to which they referred us as evidencing the real nature of the transaction.

Now, it was contended by the Appellants, that this memorandum could not be looked at, inasmuch as it was a mere treaty which resulted in a certain agreement. We quite agree it cannot be looked at for the [182] purpose of construing the agreement; but it may be looked at as part of the *res gesta*, for the purpose of judging the circumstances under which, and the objects for which, the loan was required, and of seeing whether there is any ground to believe that the real agreement of the parties was purposely concealed or misrepresented in the written contract. We feel bound, however, to say, that neither in the documents so referred to, nor in any other part of the evidence, do we discover any trace of misrepresentation or concealment of facts, or any ground for suspicion, that either the Appellants or the Directors of the Company acted otherwise than with perfect good faith towards the shareholders. The Directors may have exceeded their authority; they may have entered into stipulations contrary to the deed under which they acted, but we see no reason to doubt that they did what they considered best for the Company.

The agreement that was finally made between the Appellants and Respondent's Bank is contained in two letters, dated the 27th February, 1843, and the 2nd March, 1843. The first of these letters is addressed by Mr. McKenzie, the Cashier of the Bank of the Company, to Mr. Hart, the Superintendent of the Appellants' Bank, and is as follows:—“Sir, In reference to the communications which have taken place between the Directors and Cashier of this institution and the Bank of Australasia, relative to the intended alteration in the business of this Bank, and the assistance it will require for the purpose of meeting its immediate liabilities, I am directed by the Board to communicate to you their resolution of calling a meeting of the Proprietors for the 16th of March next, for the purpose of making the necessary arrangements for terminating the business of this Bank, and converting it into a loan company, [183] with a view to the security of its outstanding debts, and to enable the Bank in the meantime to liquidate its engagements without inconvenience to the public. I

am desired by the Directors to acknowledge and thank you for your tender of assistance, and to accept of the advance of the Bank of Australasia of a sum not exceeding £150,000, in such sums as may from time to time be required, on the security of the acceptances of this Bank, at three months' date, at an interest of £10 per cent. per annum, and subject to the following conditions:—First, that, on or before the 31st of March next, this Bank shall cease to be a Bank of issue, and, in winding up its affairs, all future payments shall be made through the Bank of Australasia. Secondly, that no bills shall be discounted by the Bank after that date, except such as may be required to renew bills now held by the Bank. Thirdly, that no transfer of shares or stock shall be made without the consent of the Bank of Australasia. Fourthly, that the liabilities incurred by this Bank for Messrs. Hughes and Hosking, and for Mr. J. T. Hughes, be covered by the execution by them of such trusts to the Bank of Australia as may be necessary to place the control of the affairs of the firm and of Mr. J. T. Hughes under this Bank to meet their existing obligations, and to prevent them from contracting new ones, without the consent of this Bank, and that the whole of their future business during the continuance of the trusts be transacted through the Bank of Australasia. Fifthly, that the Bank of Australia shall not incur new liabilities without the consent of the Bank of Australasia." Then there is the answer of the 2nd March, 1843, in these terms:—"Sir,—I beg to acknowledge the receipt this morning of your letter of the 27th ult., communicating the resolution of your Board to call a meeting of proprietors for the [184] 16th instant, for the purpose of making arrangements to terminate the transaction of business by your establishment as a Bank, and to convert it into a loan company, and intimating the intention of your Directors to avail themselves of the assistance of the Bank of Australasia, in liquidating their current engagements to an extent not exceeding £150,000, in such sums as may from time to time be required, on the security of the acceptances of the Bank of Australia, at three months' date, at an interest of £10 per cent. per annum, and subject to the conditions therein detailed; and in reply I beg to state, that this establishment is prepared to meet the requisitions of the Bank of Australia to the extent and on the conditions which you have specified." The effect of these letters we shall have presently to consider.

The £150,000 were advanced by the Appellants, on the footing of these letters; and according to the orders of the Directors of the Company, in the months of March and April, 1843, bills or notes, payable at three months, appear to have been given for the amount. The Appellants were dissatisfied with the mode in which the Company acted with respect to that part of the arrangement which related to the affairs of Hughes and Hosking, and some correspondence took place between the parties on the subject. Into the details of this correspondence it is unnecessary to enter, though some passages of the letters are material, and will be afterwards referred to. It may, however, be observed upon this correspondence, that while it contains suggestions on the part of the Company, that, by means of the arrangement, the Appellants had obtained a great advantage, by securing the payment of their debts from Hughes and Hosking, we find no suggestion of any unfairness or even harshness on the part of the [185] Appellants, or reference to the stoppage of the banking business of the Company. When the securities originally given for the advances made by the Appellants became due, they were renewed for another period of three months.

In October, 1843, a change having taken place in the direction of the Company, and a new Chairman (Mr. Norton) having been appointed, it was thought necessary to apply to the Banks which had rendered the required assistance, and amongst the rest to the Appellants, for the further advance of £10,000, and an additional indulgence of twelve months for the payment of the advances already made. On the 9th of October, 1843, the cashier of the Company addressed the following letter to Mr. Falconer, at that time the manager of the Appellants' Bank:—"Dear Sir,—Referring to my conversation with you this day, I am instructed to lay before you the following statement and proposition:—You are aware that the Board have, agreeably to the recommendation of a public meeting, adopted such arrangements as are most likely to lead to a satisfactory result in winding up the affairs of the Bank. The management have carefully gone over the assets and liabilities, and taken the general position of the Bank under review; and they are convinced that

it is a duty they owe to your institution as well as to their own Proprietors, to request from other institutions such temporary assistance as will enable them to devote the whole of their energies to the realisation of the varied and valuable assets under their management, and, at the same time, to accumulate an accession of capital by means of calls upon the Proprietors. The sum which they conceive will be necessary for this purpose they trust will be considerably less than, or at all events will not exceed, [186] £10,000, and for this amount they are desirous of opening credit with your institution and the Union Bank of Australia in equal portions. If this can be obtained, it is intended to obtain the consent of the other Banks to hold over the obligations in their hands for the period of one year, and the realisations in the interim will be applied, in the first instance, to the repayment of the sums to be drawn from the accounts now to be opened. I have most seriously to urge your favourable consideration of the proposition. That there are assets belonging to this institution of the most valuable description is indisputable, and if time is allowed for their realisation, the most favourable results may be anticipated; but if its affairs are to be thrown into that chaos which must result from inability to meet present pressure, the consequence will be, not only to this institution and its creditors, but to the colony, and more especially to the monied interests of the colony, fearful to contemplate."

After some negotiation, the Appellants consented to allow a further term of twelve months for the payment of their debt.

On the 30th of October, 1843, the existing securities held by the Appellants were cancelled, and in lieu of them a promissory note was given for £154,000, payable on demand, signed by Mr. Norton, the Chairman, on behalf of the Company.

It is upon this note that the action, in this case, is brought.

It appears that in the interval between the commencement of these transactions in February, 1843, and the month of October, 1844, the period at which the last-mentioned promissory note was to be paid, several meetings were held of the shareholders of the Company who thought fit to attend. We have no very distinct [187] evidence of what took place at some of these meetings, but in a letter from Mr. McArthur, the then Chairman of the Company, dated the 18th of May, 1843, which was written on the subject of the complaint against the Company, as to Hughes and Hosking's affairs, we find the following passage:—"Could these objects be effected, this Board does not apprehend that a further advance to an amount worthy of much consideration would be required; but, after the investigations which have taken place at two meetings of the Proprietors of this Bank, held in pursuance of the pledge contained in our letter to you, of the 27th of February last, and the resolutions of the Proprietors thereon, they feel they are too much fettered to undertake the execution of the trust. The interest of this Bank is, however, too deeply concerned in the stability of Messrs. Hughes and Hosking not to ensure their earnest co-operation in its management and execution." We think the necessary inference is, that at these meetings, the arrangements intended to be made with the Appellants were communicated to the shareholders, and no step to prevent their completion appears to have been taken either by any single shareholder, either by any legal proceeding, or by any notice or communication either to the Directors, or to the Appellants.

We have evidence of what passed at two subsequent meetings, one in the month of September, 1843, and the other in the month of January, 1844. In the accounts submitted to the shareholders at the first of these meetings, a full statement appears to have been made of the debts and assets of the Company, including among the debts, the acceptances on account of the Appellants' Bank for £153,357 16s. 6d. At the latter of these meetings, a statement was laid [188] before the parties present, of the arrangement with the Bank in the preceding October, and among the other liabilities of the Company the promissory note for £154,000 in favour of the Appellants is mentioned.

At each of those meetings the Directors proposed calls to meet the existing liabilities of the Company, which included the debt of the Appellants, and at both, the reports of the Directors were adopted.

A further meeting seems to have been held in June, 1844, though it does not appear what was the result. But on the 6th of August, 1844, a resolution was passed by the shareholders repudiating the debt. This resolution was communi-

cated to the Appellants, and was in these terms:—"That the loan negotiated between the Bank of Australasia, the former Directors of this Bank, and Messrs. Hughes and Hosking, is not binding on the proprietary of this Bank; and that the Board of Directors be hereby instructed to defend any action that the Bank of Australasia may bring for the recovery of the same."

Payment of the note was demanded in October, 1844, and was refused; and on the 26th of November, 1844, the present action was commenced. It came on for trial on the 27th of March, 1845; and the jury, being unable to agree, were discharged, according to the provisions of a Colonial Act. It was afterwards tried at bar, the trial beginning on the 23rd of June, and terminating on the 4th of August, when, after much discussion, the verdict was found for the Plaintiffs, subject to the opinion of the Court, whether upon the facts proved the Plaintiffs were entitled to recover, and the whole to be without prejudice to either party's right to appeal. Of the three Judges present, one, the Chief Justice, was of opinion in favour of the Plaintiffs; the two other [189] Judges were of a different opinion, and the verdict and judgment were accordingly entered for the Defendant (the Respondent) with costs of the action, which appear to have been recovered from the Appellants. From this judgment the present appeal is brought.

We intimated, during the argument of the appeal, a strong opinion that the effect of the arrangement made at the trial was to leave the whole matter to the consideration of the Judges, who were to draw what they considered the proper inference from the evidence, and apply the law to the facts so proved; that the whole matter was, in like manner, open to this Court, on the appeal, and that we had sufficient materials to enable us to deal with it. To that opinion we still adhere. The question, therefore, is, whether, applying the law to the evidence in the cause, the Court below has, or has not, come to a right conclusion.

The Appellants have a clear *prima facie* case: the note is signed on behalf of the Company, by an officer who had authority to sign bills and notes on their behalf, and the amount of the promissory note was advanced to persons professing to borrow and receive it for the benefit of the Company.

The defence is, that the persons borrowing had no authority to borrow money on behalf of the Company, under any circumstances, but, at all events, not under the circumstances, and for the purposes appearing in this case, and that the lenders had notice of such want of authority when they made their advances.

Much discussion took place at the bar, and many cases were cited with reference to the power of the Directors of Joint Stock Companies to bind the Com-[190]-pany, by borrowing money or other acts; and as to the distinction alleged to exist between the powers of such Directors and the authority of partners in ordinary trading partnerships.

It does not appear to us to be necessary, in this case, to enter into any consideration of the general doctrine, and we think it better to abstain from making any observations upon it. Here the shareholders of the Company had executed a Deed defining the purposes of the partnership, and the mode in which it was to be carried on. The corporation had notice of this Deed; and, indeed, had a copy of it in their possession at the time of the transaction in question; and we must, therefore, look to this Deed, in order to collect the extent of the authority intended to be conferred on the Directors, and we must construe it with reference to the nature of the business which was to be transacted, and the purposes which it contemplated, in order to judge what powers and authorities the law would imply from the nature of the office conferred on the Directors, and how far those powers and authorities are enlarged or restricted by any of the provisions of this instrument.

The Deed is dated the 1st of May, 1833. It recites a previous Deed dated in 1826, by which a Company had been established for a term of seven years, which it was now intended to continue, with increased capital, for a term of 100 years, "as well for the purpose of discount and issuing notes and bills, and lending monies on securities, and cash accounts, for the receiving monies on deposit accounts, for the safe custody of monies, and securities for monies, for the general public accommodation and benefit, as also for [191] transacting and negotiating all such other matters and things as are usually done and performed, relating to or connected with the ordinary business of banking."

It is impossible to use language more general than this; the new or continuing Company was to carry on the same business, and the Deed proceeds to declare the rules by which the Company is, in future, to be governed. The capital is to consist of 2000 shares, a number which seems to have been afterwards increased, of £100 each, and £20 are to be paid on each share at the time of signing the deed, and no further call is to be made unless the same should be deemed requisite by a majority of the members present at a general meeting of the Proprietors, to be convened for that purpose under the provisions hereinafter contained. Provisions are then made as to calls, which are not to exceed 5 per cent. at any one time upon each share, nor to be payable at less distant periods than one month, at the least, from the time at which every such call shall have been notified in one or more of the public newspapers. Power is given to the majority of the Proprietors to increase the capital either by the issue of new shares, or in such other manner as the Proprietors may deem most expedient; and no Proprietor is to hold above 100 shares, unless under certain particular circumstances.

The effect of these provisions is, that the paid-up capital at the commencement of the partnership, supposing all the shares were taken, and all the monies paid, would be £40,000; that no further sum could be called in, except by the consent of the majority of the members present at a general meeting, to be convened for the purpose: that several weeks must elapse before any money could be raised by any calls, [192] after a necessity for it should arise; that the shareholders must consist of a great number of persons who might be scattered over different parts of the world; that great difficulty, therefore, would probably exist in enforcing payment of calls, and that £10,000 would be the utmost sum that could be raised at one time by these means, supposing every shareholder to pay his *quota*.

Then follows the important clauses appointing and conferring powers on the Directors. The 38th clause is as follows: "That for the better management of the concerns of the said Company, under and in conformity to the provisions hereinbefore contained, or to be hereinafter provided for, and for securing the observance thereof, the same shall be confided to the care, superintendence, and management of eleven members, to be so qualified, elected, and appointed, and with such authority and powers as are hereinafter declared, which said members shall be and act as Directors of the concerns of the said Company." The 51st clause declares, "that such Board of Directors shall have, and they are hereby expressly invested with, full power and authority to superintend, order, conduct, regulate and manage all and singular the affairs and business of the said Company, to the best of their discretion and judgment, under and subject to the provisions hereinafter contained." The 53rd clause declares, "that such Board of Directors shall, or lawfully may, from time to time, devise and make such provisions, rules, orders, and regulations, touching the government, carrying on, and management of the affairs of the said Company, the same not being repugnant to the general rules and regulations herein contained, as they shall think expedient."

[193] It would be difficult to devise a form of words conveying more extensive powers of management, and a larger discretion in the Directors in the conduct of any business, than is found in these clauses; the only restriction is, they are to be subject to the provisions after contained. The effect, we think, is, to confer on these Directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the Deed restricting those powers.

First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary Banks? and, Secondly, if so, is there any restriction expressed, or to be inferred, from the Deed?

The general power of partners in ordinary trading partnerships, and the restrictions upon such powers, appear to us to be stated with great accuracy by Mr. Justice Story, in his Treatises on Partnership, and on Agency, and we willingly adopt his language. In the latter of these works, chap. vi. sections 124 and 125, the law is thus stated: S. 124. "Every partner is, in contemplation of law, the general and accredited agent of the partnership; or, as it is sometimes expressed, each partner is *praepositus negotiis societatis*; and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects

of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills [194] of exchange, checks, and other negotiable paper, in the name and on account of the partnership." S. 125. "The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm, bind it, when the other party to the transaction is cognizant of, or co-operates in such breach of duty."

That, in ordinary trading partnerships, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm, for money so borrowed, will bind the firm, is too clear to require any authority. It is treated as clear law from the case of *Lane v. Williams* (2 Vern. 277) to that of *Thicknesse v. Bromilow* (2 Crompt. and Jer. 425).

Then, is the nature of a Banker's business such as to exclude the power, from want of occasion for its exercise? Quite the contrary. The nature of a Banker's business, especially if the Bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own monies and those entrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which [195] may often be impracticable, or the concern must be ruined.

We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the Directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the Deed. Is there, then, anything in this Deed which excludes it? We find nothing having such a tendency, but much to a contrary effect. The Directors have the power of contracting debts and binding the Company to any amount, by issuing notes, receiving deposits, drawing, accepting, and endorsing bills; and they might, therefore, in these modes, subject the Company to liabilities to any extent.

On the other hand, if, according to the Respondents' argument, no monies could be borrowed to meet those liabilities, the money must be raised by calls; and yet if they are to be raised by calls, it is obvious, from the provisions before referred to, that the Company might be ruined long before sufficient funds could be raised, although it might have assets not immediately capable of being realised or converted, to a much larger amount than all its liabilities.

The 54th clause provides, "that such Board of Directors shall have, amongst other things, the entire management and control of the lending of monies on bills, notes, bonds, mortgages, and other securities." The 55th declares, "that such Board of Directors shall, from time to time, settle and determine, in whose name or names, all securities that shall be entered into, by or on behalf of the Company, or by or on behalf of any person or persons transacting or negotiating any matter or [196] business whatever therewith, shall be taken and given."

Now, this applies to transactions in which the Company either receive or give securities; the securities which they are to receive clearly extend to monies lent by them; and the securities which they are to give, may, we think, with equal reason, be held to extend to monies borrowed by them. Upon this part of the case, we can entertain no doubt. The real question is, whether there is anything in the circumstances under which the loan was made, which shows that it was not borrowed for partnership purposes, or was borrowed by the Directors in violation of their duty to the shareholders. It is contended by the Respondent, that this loan was made on the condition of the Bank terminating its business, and for the purpose of enabling the Directors to terminate and convert the Company into a partnership for a

different purpose: that the Directors had no authority to terminate the concern, or to form such Company; that the money was advanced to pay debts of Hughes and Hosking, to which the Company were not liable, and that there were conditions attached to the loan, to which the Directors had no authority to assent, viz., restraint of the transfer of shares contrary to the terms of the deed, and the assumption of the affairs of Hughes and Hosking. It is said that the Appellants imposed these conditions, and are affected with notice of these purposes, and are, therefore, not entitled (whatever may have been their rights against individuals) to recover from the Company the amount of the monies which they have advanced. It is perfectly true, that if a person lends money to a partner, for purposes for which he has no authority to borrow it on behalf of the partnership, [197] the lender having notice of that want of authority, cannot sue the firm; and this is, in truth, the whole effect of a decision, much relied upon at the bar, of *Fisher v. Taylor* (2 Hare, 218). On the other hand, if money be lent to a partner for purposes for which he has authority to borrow, it is a very different question, whether it is a bar to the recovery of the money which has been applied to the use of the partnership, that the borrower has entered into additional engagements on behalf of his partners, beyond his authority, and by which, therefore, they are not bound.

The question here, then, is, what is the real nature of the transaction which has taken place? It may be admitted that the Directors, without, or even with, the consent of the majority of the shareholders, had no authority to convert the Banking Company into a Company for totally different purposes, and that money borrowed for the purpose of such conversion, with notice on the part of the lender, would not form a debt of the Company. It may be further admitted, that no restraint on the transfer of shares in the Company could be lawfully imposed by the Directors without the assent of the majority of the shareholders. But it by no means follows, that the Directors had no authority at their discretion to discontinue the business of the Bank, or to restrict it to certain portions of the business originally contemplated, if they thought such conduct essential to the interests of the shareholders. Such a power seems necessarily implied in the exclusive power of management, in the power of determining what transactions should be entered into, what notes issued, what deposits received, what bills discounted, or loans made. A contrary construction would be attended with the most serious [198] consequences. It is said that the business could only be discontinued by the vote of the majority of the Proprietors under the 73rd clause; so that, unless a majority of the Proprietors could be brought together in person, or by their attorneys, the business was to continue for 100 years, and never could be concluded but by bankruptcy or insolvency. But even if the majority should be got together, it is only at intervals of ten years that the power of dissolution exists; so that, except at the decennial periods, the business could not be discontinued so long as one individual shareholder refused his assent, or was incapable of consenting, or could not be found. The business must go on till each individual shareholder might be ruined. For it is to be observed, that it by no means follows, that the creditors would have recourse to a Commission of Bankruptcy; they have a right to recover their debts from each individual shareholder.

We think, therefore, that the discontinuance of the business of the Bank, if the Directors thought it necessary or expedient, was within their authority; and that they had authority to borrow money for the purpose of discharging the existing engagements, and prolonging the business till the assets could be realized, and the concern wound up with the least injury to the Company.

If they had this authority, it is quite unnecessary to consider whether they exercised it discreetly or otherwise, whether the loan which they contracted was on hard terms or otherwise.

The Appellants had a right to annex such terms as they thought proper to their advance. If any of those terms were *ultra vires* of the Directors, they could not be enforced, and so far the lenders might lose the ad-[199]-vantage for which they had stipulated. The Corporation stood in no relation of trust or confidence to the shareholders of the Company. It had a right to make the best bargain which it could; and the only question is, was the purpose for which the money was lent, a legitimate purpose of the partnership? It appears to us, that the purposes for

which the money was borrowed, was not to increase the permanent capital of the Company, not to enable the Directors to engage it in new concerns beyond the provisions of the Deed, and contract new liabilities, but to enable it to discharge liabilities already contracted, and to afford it time for the realization of its assets.

In a letter of the Appellants, of the 15th of May, 1843, to the Respondents' Bank, put in evidence by the Defendant, the transaction is stated to have commenced in a representation by the Directors of the Company, "of the evils which would result to the community generally, and to an institution having so large a stake in its prosperity, as the Bank of Australasia in particular, from a suspension of the payment, either by the Bank of Australia," or by the firm of Hughes and Hosking. In the statement on the 21st of February, already referred to, the advance is stated as asked to the extent of £113,648, in order to meet the circulation and deposits of the Bank of Australia; for its acceptances on behalf of Messrs. Hughes and Hosking, £80,145; for acceptances of Hughes and Hosking, for a great part of which the Bank had given guarantee, £72,387,—in all £266,000. The letter of the 27th February, 1843, refers to the communications which had taken place between the Directors and Cashier of the institution and the Bank of Australasia, "relative to the intended alteration in the business of the Bank, and the assistance it will [200] require for the purpose of meeting its immediate liabilities." The answer of the 2nd of March, speaks of this letter as "intimating the intention of your Directors to avail themselves of the assistance of the Bank of Australasia in liquidating their current engagements to an extent not exceeding £150,000." These letters show, very distinctly, for what purpose this money was borrowed, and they are confirmed by all the other documents in the case.

It appears that this advance was not sufficient for the purpose, and it is stated in Mr. Macarthur's letter of the 18th of May, 1843, that a committee of the Directors waited on Mr. Falconer, and "explained to him the state of their affairs, and also the difficulty this Bank laboured under in obtaining sufficient funds to meet its deposits and notes in circulation, and requesting a further advance." This view of the case is strongly confirmed by the statement submitted to the shareholders in September, 1843, and January, 1844, and it is not opposed by any evidence whatever.

But then it is said, that if the money was advanced to discharge existing liabilities, a part of those liabilities consisted of obligations contracted for Hughes and Hosking, a part of which the Company was not liable to pay, and other part of which consisted of debts to the Appellants, who by means of this transaction obtained payment of demands which otherwise would have remained unsatisfied.

The Judges of the Court below appear to have been unanimous in the opinion, that there was nothing whatever in these objections; that there was no proof of any unfair dealing by the Appellants, or of improper advances being obtained by them in respect of the debts of Hughes and Hosking; and we are entirely of the same opinion. It is said, that a part of the debts of [201] Hughes and Hosking were guaranteed by the Directors on behalf of the Company, and that the Directors had no power to give such guarantees; whether they had or not, might depend on the circumstances under which they were given; but it would be extravagant to hold, that the Appellants, lending their money to enable the Company to meet its engagements, were bound by this circumstance to see to the nature of those engagements.

Then, if the money was borrowed *bona fide* by the Directors, for the purposes of the partnership and within the limits of their authority, and was advanced *bona fide* by the Appellants for those purposes, and applied to the legitimate purposes of the partnership, all of which facts, for the reasons already alleged, we consider as proved; can the liability to repay the money be discharged, because to the engagement to repay, are adjoined other engagements by the Directors, some of which we will assume to have been *ultra vires*? From Pigot's case (6 Coke's Rep. 26,) to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common-law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot. Here, in our opinion, the Directors had power to borrow the money for the Company, and of course power to bind the Company for the engagement. They did so bind them, and they engaged that the Company should do, in addition, certain

other acts, and which we assume that, without their consent, the Company could not be compelled to do. The engagements are entirely distinct. Can the shareholders say, because we cannot be compelled to [202] perform those engagements to which the Directors had no authority to bind us, therefore, we will not perform those engagements to which they had authority to bind us? The Company cannot have all the benefit for which they agreed to advance the £150,000, therefore they shall not even have their money? We think not: the only consequence would be, that those stipulations which are *ultra vires* of the Directors could not be enforced; and if the object of the present action were to enforce them, or to recover damages for a breach of them, it would be necessary to examine them more particularly than the view which we take of the case requires.

Upon the whole, therefore, we are of opinion, without reference to the questions of acquiescence by the Company, that the Plaintiffs in the action, the present Appellants, are entitled to recover, and that the verdict ought to be entered in their favour. If we had come to a different conclusion, on this part of the case, as did the majority of the Court below, we should have found it necessary to examine very closely the evidence in the cause with respect to communications made to the shareholders, both during the transaction and after its completion, and to consider very carefully what might be the effect of the conduct of the shareholders, of what they did and what they omitted to do, having regard to all the provisions of this Deed and the rules of law which may be applicable to Companies of this description. While we cannot express too strongly our sense of the care, industry, and the learning which the Judges of the Court below have applied to the case generally, we think it right to say, that they appear to have passed over this part of the case more lightly than its importance perhaps deserved.

[203] Our report to Her Majesty will be, that the verdict of the Court below ought to be reversed, and that the judgment ought to be entered in the Court below for the Plaintiffs. The Appellants will of course have the costs of the action below, and there will be no costs given of the appeal here.

The minute of the report of their Lordships having been drawn up, it was proposed to "reverse the Judgment of the Court below, and order that Judgment to be entered up, as of the date of the original Judgment, for the amount found due by the verdict and costs, and that the amount of subsequent interest, at the same rate at which it is calculated by the verdict, be paid by the Respondent to the Appellants." The Respondent objected to the proposed order, as to the allowance of interest, and their Lordships directed (13th April 1848*) the case to be argued upon that point, by one counsel on each side.

Mr. M. D. Hill, Q.C., for the Respondent.—There is no mention of subsequent interest being allowed, in the judgment of your Lordships. The proposed Order involves two grounds for consideration. First, I contend that this Court has no power to give interest, as proposed: and, Secondly, if it has a discretion to allow interest, according to the course and practice of the Court, it ought not to be exercised. In the first place, this Court, as a Court of appeal, has no greater original power than the Supreme Court at Sydney had, [204] and that Court could not order the Judgment to bear interest. By the 1st and 2nd Vict., c. 110, judgment-debts in England carry interest; but that Statute has not been extended to or adopted in New South Wales, and, therefore, cannot operate, as it forms no part of the law of the Colony. There are three Imperial Statutes, by which the power of making laws, in New South Wales, are regulated. First, by the 4th Geo. IV., c. 96, a Legislative Council is established, with power of making laws for the government of the Colony; secondly, by the Statute, 9 Geo. IV., c. 83, all the laws of England, which were then applicable, are imported into the Colony; and thirdly, the 5th and 6th Vict., c. 76, shows what subsequent Acts of the Imperial Parliament are to be adopted by the Legislature of New South Wales.—[Lord Campbell.—The proposed Order respecting interest is not founded upon the notion, that the 1st and 2nd Vict., c. 110, has been introduced into the Colony. Is it not founded upon that Statute at all? The question is, whether this Court, as a Court of appellate jurisdiction, has not power, under what may be called its common-law jurisdiction, to grant

* Present: Lord Brougham, Lord Campbell, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

interest in the form made by this Order.]—The submission upon which the appeal comes before the Privy Council does not extend to anything beyond an affirmative or reversal. If this Court was to give interest, it would not be sitting as a Court of appeal, but it would be exercising original jurisdiction.—[Mr. Pemberton Leigh.—We have had a note from Mr. Currey, the clerk of the House of Lords, and he gives us a statement of several precedents before the Statute, 1st and 2nd Vict., c. 110. The House of Lords used to get at justice by giving the interest, and adding it to the costs. These were upon Writs of Error.]—No case can be found in [205] which interest has been given by any Court in England, except under the peculiar powers conferred by Statutes. It will be found, from the Statute, 3 Hen. VII., c. 10, down to the 3 and 4 Will., c. 42, that interest is confined to cases in which the judgment is affirmed, and for the Plaintiff, and that is allowed for the delay which the Writ of Error interposes, by preventing the Plaintiff from obtaining the fruits of the Judgment. *Baring v. Christie* (5 East. 545). Lord Mansfield, in *Bodily v. Bellamy* (2 Burr. 1095), illustrates the practice of the various Courts, with allowance of costs.—[Mr. Pemberton Leigh.—Our decision will depend very much upon this, whether this case is to be considered in the strict sense of a Writ of Error, or whether it is not an Appeal. This Court, by the Charter of Justice, of the 13th of October, 1843, is to make such order which, at the time of the judgment, ought to have been pronounced.]—Strictly speaking, there are no Writs of Error in this Court, they are appeals.—[Lord Campbell.—Suppose a bill filed in the Court of Chancery against a trustee, to make him pay a sum of trust-money, and the Court dismiss the bill, and there is an appeal to the House of Lords, who reverse the judgment of the Lord Chancellor, and say that the money ought to be decreed to be paid, would not the House of Lords order interest to be paid, down to the time of the reversal?]—This is a common-law case, and the principles which regulate Courts of Equity do not apply. The present case is in the nature of a Writ of Error. Accordingly, if interest is a necessary incident, the parties ought to be left to proceed in the Court in the Colony, and [206] justice in the matter would be equally attainable by that course, and it is the regular one. This is the practice which has hitherto been acted upon. *Kirkman v. Moder Pestonjee Khoorsedjee* (3 Moore's Ind. Cases, 220).

Mr. Bethell, Q.C., for the Appellants, *contra*.

The Right Hon. T. Pemberton Leigh.—We do not think this case can be compared to a Writ of Error; we think it must be considered as an appeal, and that the power of giving interest is within the common-law jurisdiction of the Court, the Order, therefore, as to interest, must stand.

The report of their Lordships was, by an Order in Council, bearing date the 15th of April, 1848, confirmed. This Order was as follows:—

“Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the said Judgment of the said Supreme Court of Sydney be, and the same is, hereby reversed; and that the Judgment be entered up, as of the date of the original Judgment, for the amount found due by the verdict and costs; and that the amount of subsequent interest, at the same rate at which it is calculated by the verdict, be paid by the Respondent to the Appellants, together with the costs paid by the Appellants to the Respondent, in the Court below; and that this Order be duly obeyed, complied with, and carried into execution, by the Judges of the said Supreme Court of Sydney.”

[Mews' Dig. tit. BANKER, II. 2. DIRECTORS, a. *Powers*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, o. *Other matters*; tit. COMPANY, V. DEBENTURES AND MORTGAGES, 1. *Borrowing Powers of Company*, a. *Generally*; tit. CONTRACT, C. 5. ILLEGAL CONTRACTS, a. *General Rules*; tit. SPECIFIC PERFORMANCE, II. DEFENCES, B. 2. *Illegality*. S.C. *sub nom. Bank of Australasia v. Bank of Australia*, 12 Jur. 189. On point (i.) as to appeals (6 Moo. P.C. 169), see note to *Flint v. Walker*, 1845-47, 5 Moo. P.C. at p. 201: (ii.) as to implied power of borrowing (6 Moo. P.C. 195), see *MacLae v. Sutherland*, 1854, 3 E. and B. 1; *Galloway's Case*, 1854, 18 Jur. 885; *Royal British Bank v.*

Tarquand, 1855-56, 5 E. and B. 248; 6 *ib.* 327; *General Auction Estate and Monetary Co. v. Smith* (1891), 3 Ch. 132.]

[207]

IN RE CARD'S PATENT * [Feb. 9, 1848].

To entitle a Patentee to a confirmation of Letters Patent, under the Statute, 5 and 6 Will. IV., c. 83, s. 2, the Patentee must show, that he believed himself the first and original inventor.

Upon an application for a confirmation of Letters Patent, it was proved that the patent article was not publicly and generally known prior to the Letters Patent; but that some persons had systematically used an article, identical with the patent article, for several years prior to the grant of the Letters Patent, and that the subject of the patent was little more than an application of a well-known article in trade; in such circumstances, held by the Judicial Committee, that it was not a case in which the Statute was intended to apply, and their Lordships refused to recommend the confirmation of the Letters Patent.

This was a Petition, under the Statute, 5 and 6 Will. IV., c. 83, s. 2, presented by Nathaniel Card, for confirmation of Letters Patent granted to him on the 8th of September, 1841, for certain improvements in the manufacture of wicks for candles, lamps, and other similar purposes, and in the apparatus connected therewith.

The Petition stated, that at the time of the application for the Letters Patent and enrolment of the specification, the Petitioner believed himself to be the first and original inventor of the invention, and of [208] every part thereof, and that the same was a new invention within this realm. That he afterwards disclaimed in the title of the specification, the words "Lamps, and other similar purposes." That the invention of improvements in the manufacture of wicks for candles, and in the apparatus connected therewith, was an invention of great public utility, and comprised the use of threads doubled and twisted in a particular manner, instead of being twisted together as single threads in a mass; and of a certain apparatus for the manufacture of the improved wicks into suitable lengths. That the article used as candlewicks previous to the patent, was single threads of yarn. That the candlewicks manufactured according to the improvements described in the specification, possessed many advantages over those manufactured from single threads, which were particularly described; and that the improved candlewick was now generally employed by the trade. That since the granting of the Letters Patent, the Petitioner had discovered, that a certain description of yarn, known by the name of double hosiery yarn, had been used occasionally, and to a limited extent, before the date of his Letters Patent. That such double hosiery yarn had not been publicly and generally used for such purposes before the date of the Letters Patent; but on the contrary, that the use and advantage of the yarn double twisted, as described, were unknown to the manufacturers of candle and candlewicks. That such double hosiery yarn of the description and the manner in which the same was used before the date of the Letters Patent, resembled the use of yarn doubled and twisted, as described by the Petitioners, in no respect, except that the yarn was doubled, and the manufacturers who alleged such [209] prior use of the double hosiery yarn, as invalidating the Letters Patent of the Petitioner, did not then use double hosiery yarn of the description, and in the manner previously used, but had adopted the invention of the Petitioner, and refused nevertheless to pay the Petitioner any royalty, or patent right, in respect of their adoption of his invention. That the Petitioner had instituted proceedings at law, against Messrs. Waller, for an infringement of the Letters Patent, and that such proceedings were compromised by Messrs. Waller paying the Petitioner a sum of money and costs, and taking a

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

licence; and that they had notice of the Petitioner's intention to present this Petition. That the invention of the Petitioner was of great utility, and generally adopted by the trade. That the Petitioner was advised he could not with safety proceed in establishing his right at law unless the Letters Patent were confirmed, without which he would be wholly deprived of the benefit of the exclusive privileges granted to him by the Letters Patent.

Caveats were entered against the Petition, objecting, first, that the alleged invention had been publicly and generally known and used before the date of the patent; secondly, that the use of threads double and twisted, as in the specification mentioned, was not a new invention, nor was so at the date of the Letters Patent; nor were the threads, as described in the invention, doubled and twisted in the particular manner stated in the Petition, but in the same manner as in double hosiery yarn, which was an article which had been publicly and generally known and manufactured for many years prior to the date of the Letters Patent. The objections, however, not having been lodged in time, the parties entering the Caveats did not [210] appear by Counsel, and were not heard against the Petition.

The witnesses examined in support of the Petitioner's case consisted of several candle-makers in various parts of England, who stated that Card's patent wick was new, and was not publicly and generally known until the grant of the Letters Patent; that previous to it, the mode of manufacturing the candlewick was to place a number of single cotton threads side by side until of sufficient thickness, and then to slightly twist all together. That the patent wick had entirely superseded the old wick, and was a great saving in cotton. One of these witnesses, named Howe, a candle-maker, residing in Warwickshire, on cross-examination stated, that for many years back he had been in the habit of buying double hosiery yarn, and twisting the strands together for candlewicks; that he found it a great improvement over the common and ordinary mode of making wicks, both on account of the saving of cotton, and the candles being less subject to "wasters," and that he continued to use that cotton, and had recommended others to use it. Upon comparing the patent wick with the hosiery yarn, he stated that he could see scarcely any difference, except that the patent wick was more twisted.

Mr. M. D. Hill, Q.C., Mr. Gurney, Q.C., and Mr. Webster, for the Petition, cited Heurteloup's Patent (1 Webs. Pat. Cases, 553), Westrupp and Gibbins' Patent (1 Webs. Pat. Cases, 554), and offered to grant licenses to those who had used the hosiery yarn, upon such terms as the [211] Court might impose; they referred upon this point, to *Re Russell's Patent* (2 Moore's P.C. Cases, 496).

Mr. Waddington, on behalf of the Crown, opposed the Petition, contending, that the Petitioner had not satisfied the requisites of the Act of Parliament, as he was bound to show that his invention was new, and that the candlewick, for which he had obtained his Letters Patent, was not known prior to the patent; whereas the evidence of Howe showed that the supposed invention was, in effect, only the application of a well-known manufactured species of cotton, by the use of which the same effect was obtained, and that it was not the intention of the Legislature that the Court should have the power of confirming Letters Patent under such circumstances.

Lord Campbell.—Their Lordships are of opinion, that the prayer of this Petition ought not to be granted. The discretionary power that is entrusted by the Legislature to the Judicial Committee, which we are now asked to exercise, is a very extraordinary power, and ought to be very cautiously exercised. By the law, as it stood prior to the Statute, 5 and 6 Will. IV., c. 83, it was necessary, for the validity of a patent, that the invention should be new, as well as that it should be useful; and if it could be proved, that the invention had been practised publicly by any person before the Letters Patent were granted, the patent was invalid. That law led to hardship in many cases, because it often [212] happened that after experiments had been tried, and a certain progress made in the invention, and the experiments proving abortive, they were subsequently abandoned, some other ingenious man, *de novo*, took up the invention, and completed the process, by which a great benefit was conferred upon the community, whereupon he obtained a patent for his invention; but as soon as he began to reap the fruit of his invention, his patent was infringed, and when he brought an action for such infringement, the

former abortive experiments were brought up as proof that the invention was not new. Some doubt existed, in Westminster Hall, whether, if the experiment, although it had been, to a certain degree, successful, had been abandoned, it would vitiate the after acquired patent; but to remove all doubt upon the subject, this enactment was resorted to by the Legislature, that, although there may have been a general knowledge of the invention, if it was not actually carried out, and had been abandoned, that such knowledge should not vitiate the patent which perfected and rendered beneficial the original discovery.

The language used by the Legislature, in the 2nd section of the Statute, 5 and 6 Will. IV., c. 83, is this—that the Committee “upon examining the matter, and being satisfied that such Patentee believed himself to be the first and original inventor, and being satisfied that such invention, or part thereof, had not been publicly and generally used before the date of such first Letters Patent, may report to His Majesty their opinion that the prayer of such Petition ought to be complied with, whereupon His Majesty may, if he think fit, grant such prayer; and the said Letters Patent shall be available, in law and equity, to give to [213] such Petitioner the sole right of using, making, and vending such invention as against all persons whatsoever;” probably with the words intended to be understood, notwithstanding any prior use of the said invention.

Now, the Judicial Committee must first see, that the Petitioner believed himself to be the original inventor. Upon that part of the case, it seems to us, that the Petitioner has, in this case, not afforded sufficient evidence, from which we can reasonably infer that he was the first inventor. He has not shown any experiments which he made, and, probably, he may merely have bought a little double twisted hosiery cotton, and stumbled upon the improvement, as Mr. Howe said he did. But, however, supposing that he was really the first inventor, and believed himself to be so, it seems to their Lordships, that this is not a case in which it would be proper for the Letters Patent to be confirmed.

We have had it in evidence, that another manufacturer of the same article had adopted the same manner of making candlewicks before the patent was taken out; that he practised it in one part of Warwickshire, and his brother in another part of the county; that they considered it a great improvement both with regard to the economy of the cotton and the brightness of the flame, and that, instead of abandoning it as abortive, they continued to practise it, and to practise it with advantage: the deceased Mr. Howe, father of the witness Howe, used it till his death, and there is nothing to show, that since his death the trade has been carried on in any other manner; and Howe, who has been examined here as a witness, has continued to practise that mode of making candle-[214]-wicks down to the present day. He has mentioned it to others: he says that he believed another candlemaker has adopted it, and, for anything that we know, it may have been adopted by various others in the trade.

Under these circumstances what gross injustice would be done if the Letters Patent were confirmed. The trade of Mr. Howe must be immediately stopped, he would be liable to an action if he were to continue his trade in the manner in which he has carried it on for many years. It would be no defence for him, when that action came on to be tried, to prove that he had done no more since the confirmation of the Letters Patent than he had done before, that he was supporting himself and his family as he had done previously: the confirmation of the Letters Patent would be absolute and conclusive evidence that the invention was new: he would be liable to damages and all the costs of the action.

It has been said that this may be guarded against by the Petitioner undertaking to give Howe a License; but would it be fair to subject him to the risk that he would undergo by a License of this sort? But what is to become of the trade of the brother? It has been said, that a License might be granted to those who are carrying on that trade, for the benefit, as it appears, of creditors; but the probability is, that there are others who are carrying on the same trade, who might become subject, without any intention, to actions at law, which might bring ruin upon them.

Their Lordships are of opinion, therefore, that this is not a case which the Legislature had in contemplation when this enactment was passed; that it had in view the case where there had been an invention which [215] had actually been

practised, but which had not been continued to be practised: so that, under the circumstances, the patent should not be rendered invalid by the attempts to use it, in the first instance, having been abortive, and where the Letters Patent, under those circumstances are confirmed, no injury can be done to any one; the inventor who has obtained his Letters Patent, and made the invention public for the benefit of the community, has his fair reward for his ingenuity, and his industry, and the capital which he has employed, and no one suffers by justice being done to him. Therefore, in a case where it appears that an invention has been carried on to a certain degree, and abandoned, the Act of Parliament may, most beneficially, be acted upon. But their Lordships are of opinion, that a case of this sort, where the invention was used before the patent was considered beneficial by those who carried it out, and was proved to be beneficial by the persons so using it, never having been abandoned, but used by them down to the time at which this application is made, is a case to which the Act of Parliament never was intended to apply, and that, therefore, this application ought to be refused.

[Mews' Dig. tit. PATENT; F. CONFIRMATION, etc.; 1. *Confirmation*. S.C. 12 Jur. 507; 2 Web. P.C. 161. See *In re Honiball's Patent*, 1855, 2 Web. P.C. 201; 9 Moo. P.C. 378. *In re Lamenande's Patent*, 1850, *ib.* 164; *In re Jablochkoff's Patent* (1891), A.C. 293; and 5 and 6 Will. iv. c. 83, was repealed by the Patents Act, 1883, and confirmation can now take place only by special Act of Parliament, except (see *In re Brandon's Patent*, 1884, 9 A.C. 589) in the case of patents granted under the Act of 1852. See list of special Acts in Report of Select Committee of House of Lords on Potter's Patent Bill, 1887, p. 43.]

[216] ON APPEAL FROM AN AWARD OF THE COMMISSIONERS FOR LIQUIDATING THE CLAIMS OF BRITISH SUBJECTS ON FRANCE.

The Case of the REPRESENTATIVES of ANGELIQUE MICHAEL JOSEPH
WALL * [Feb. 14, 15, and 16, 1848].

A native-born Irishman, a British subject, married a French woman domiciled in France. They resided in France till the breaking out of the French Revolution, when they emigrated to Germany. The wife died in the lifetime of her husband, without having ever come within the territory of Great Britain. Held, in such circumstances, that she did not by her marriage become a British subject, for that, while she remained abroad, she was not within the allegiance of the Crown of England [6 Moo. P.C. 235].

An alien woman held real estates in Champagne in her own right, in fee simple, and these estates were expressly excluded by the marriage contract from the community of goods. By the custom of Paris, which governed this contract, this estate remained during the coverture the separate property of the wife, and she could, during her husband's lifetime, with his consent, have alienated them away, and have absolutely disposed of them at his death, so as to exclude her issue's right to *legitim*. The estates were confiscated by the French Revolutionary Government under the law of the French Convention against emigration, and she died in her husband's lifetime, leaving issue a son, a British subject. Held that the son had neither an indefeasible, or a contingent interest in such estates, and that he was not entitled to indemnity for their loss [6 Moo. P.C. 237, 238].

Held also, that the Statute, 7 and 8 Vict., c. 66, s. 16, by which an alien woman married to a natural-born subject is naturalized, is not a declaratory act [6 Moo. P.C. 236].

* Present: Lord Langdale, Lord Campbell, the Right Hon. S. Lushington, and the Right Hon. T. Pemberton Leigh.

By the Common Law of England, an alien woman married to an Englishman is not entitled to dower [6 Moo. P.C. 236].

The *Matrices de Roles*, or assessments to the land-tax of the year 1791, the primary evidence required by the Convention No. 7 for the purpose of ascertaining the value of the confiscated estates, not being forthcoming, it was held by the Judicial Committee, that the Commissioners for Liquidating the claims of British Subjects in France were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase-money, the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack rent; the rent, allowing a certain number of years' purchase, or the sum for which the property had been sold at the time of the confiscation [6 Moo. P.C. 233].

In the year 1761, Patrick Wall, an Irishman by birth, and a British subject, intermarried with Jeanne de Vauldery, a native of France, domiciled and resident in that country. At the time of the marriage, Patrick Wall was possessed of real estates in Burgundy, and Madle. de Vauldery was the owner of real estates in Champagne, and a settlement, or marriage contract, was executed, by which it was agreed, that the real estates of Madle. de Vauldery should be excluded from the community of goods, and remain during the coverture, her separate property.

At the breaking out of the French Revolution in [217] 1792, Patrick Wall and his wife emigrated to Germany, and in the year 1791, the Revolutionary Government, having first sequestered, confiscated and sold both the Burgundy and Champagne estates.

Jeanne Patrick Wall died in 1808, she never having resided within the British dominions, and Patrick, her husband, died soon after, leaving a son, Count Angelique Michael Joseph Wall surviving, who was the sole heir of Patrick Wall and Jeanne, his wife.

In 1821 a claim was presented, under the Convention commonly called No. 7, concluded between Great Britain and France on the 20th of November, 1815, by Angelique Michael Joseph Wall, for the value of the estates in Burgundy and Champagne.

The Commissioners having taken the claim into consideration, made their award, on the 12th of January, 1827, entirely rejecting the claim, on the ground, that the *status* of the Claimant and of the Claimant's father, Patrick Wall, was not such as to entitle them to be held such British subjects as were under the protection of the Treaty of Commerce of 1786, or contemplated by the Convention of [218] the 20th of November, 1815. This award was rescinded upon appeal (reported 2 Knapp, P.C. Cases, 13), by the Judicial Committee of the Privy Council, on the ground, that the *status* of the Claimant entitled him to claim compensation within the meaning of the Treaty of Paris and of the Convention, and the Judicial Committee reported to the Lords of the Treasury, that they were of opinion, that the amount of the loss sustained by the Claimant by the confiscation of the estates in Burgundy and Champagne, mentioned in the award, should be examined and ascertained. Accordingly the case of the Claimant was referred by the Lords of the Treasury, on the 31st of July, 1834, to the then Commissioners of French Claims, to examine, ascertain, and report to their Lordships, the amount of loss sustained by the Appellant from the confiscation of the estates in Champagne and Burgundy, mentioned in his claim.

On the 26th of June, 1835, the Commissioners made their report, in which, after stating the former decision and the reference made to them to re-open the awards of the former Commissioners, they proceeded to report as follows:—

“On examination we find that the estates in Champagne belonged to Madame de Wall, who was not a British subject, and who was married to Monsieur de Wall without community of goods, and was living, and in enjoyment of the estate up to the time of the confiscation, and consequently that this portion of the claim is not admissable. With respect to the estates of Monsieur P. de Wall, in Burgundy, as it appears, on inquiry, that the *Matrices de Roles* of 1791 is not in existence, we have adopted the valuation of the estate introduced into the contract of marriage between

[219] Monsieur and Madame de Wall in 1761, as more liberal and fair towards the Claimant than that of the proceeds in *assignats* of the sale by auction of the estate, after the confiscation had taken place; and according to this valuation, we find that Monsieur A. M. J. de Wall, is entitled to receive the sum of £15,486 8s. 4d. if no interest be allowed on his claim. But if the same rate of interest be allowed to A. M. J. de Wall as has been allowed to all those claims, which, like his, were preferred and admitted under the authority of the Treasury Minute of the 2nd of May, 1826, which granted 3 per cent. per annum from the date of the confiscation, to the 24th of June, 1826, then A. M. J. de Wall will be entitled to recover £30,121 1s. 8½d."

And they enclosed a statement of the valuation with and without the allowance of interest.

On the 3rd of October, 1835, the Claimant was paid the above sum of £30,121 1s. 8d. At the time of the payment he made a protest against that part of the Commissioners' report which decided that his claim in respect of the Champagne estates was altogether inadmissible. The ground of this protest was, and the Claimant insisted, that, by the terms of the reference, the Commissioners were precluded from entertaining at all the question as to the Claimant's right to any compensation; the only question submitted to them being, what amount of compensation was due.

A communication was afterwards made to the Judicial Committee upon this point, who reported to the Treasury, that the only question brought before them, on the appeal, was as to the *status* of the Claimant as a British subject, entitling him to compensation within the meaning of the Treaty of Paris and of the Convention [220]: that they decided that question in favour of the Claimant, and directed that the amount of the loss alleged to be sustained by the claimant by the confiscation of the estates in Burgundy and Champagne should be examined and ascertained, but that the extent of the right to compensation then established by the Claimant, and the nature and interest he might have in the estates in Burgundy or Champagne, entitling him to such compensation, were not brought under their consideration, but were left open for the decision of the Commissioners.

The Claimant further objected, that the Commissioners had omitted altogether a part of the Burgundy estates, and had estimated the value of the residue upon erroneous principles.

The case was again referred to the Commissioners upon these points, and on the 9th of January, 1837, the Commissioners made their report to the Lords of the Treasury, wherein, after stating that, in conformity with the instructions transmitted to them, directing that the principle on which their former report was founded should be communicated to Mr. Richardson on behalf of the Claimant, and that he should have an opportunity afforded him of being heard on any part of the claim, and that they had in consequence thereof given him frequent hearings, and further, that they were induced on the authority of precedents derived from the practice of the former Boards, to allow him to introduce other evidence than that which was before the Privy Council, for the purpose of proving the value of Count Patrick de Wall's estates at the period of their confiscation, they proceed as follows:—

"On examination of this evidence, we see no reason [221] to alter our report of the 26th of June, 1835, as to the 400,000 livres we awarded as indemnity to be paid for the estates of St. Sabine, Bouhey, and Crugy, bought of the creditors of Parisot.

"It appears, however, by the evidence introduced since the decision of the Privy Council, that Count Patrick de Wall, on the 17th day of May, 1778 (*i.e.*, subsequent to his marriage), purchased the estates of Froideville, Colombier, Chateauneuf, and Chaudenay, with certain feudal rights and tithes annexed to them, for 120,000 livres.

"And we further find that an estate consisting of 3½ journeaux of vineyard, situate near Dijon, and which seems not to have been a part of either of the before-mentioned estates, was confiscated and sold by the French Government in 1794, as property belonging to Count Patrick de Wall.

"In the absence of the *Matrices de Roles* (the primary evidence required by the Convention for the purpose of ascertaining the amount of the loss sustained by the confiscation), we required the leases of the several estates to be produced.

"Two only have been furnished—one for Froideville, bearing date the 11th day

of January, 1784, at 500 livres per annum; the other for Colombier, dated the 12th day of February, 1785, at 450 livres per annum.

"The leases at the annual rent of 950 livres, constituted, at 20 years' purchase, a capital of 19,000 livres, which is the total value of these estates.

"With respect to the estates of which there were neither *Matrices de Roles*, nor leases, viz., those of Chaudenay, Chateauneuf, and the vineyard near Dijon, we have *cy prés*, ascertained the value from the pro [222] ceeds of the sale made by the French Government of those several estates between *an* 2 and *an* 7, and we find them to amount to 22,309 livres 19 sous and 8 den.

"However inferior in point of value this calculation of the estates of Froideville, Colombier, Chateauneuf, and Chaudenay, may be to the original purchase-money (as appears from the contract for the purchase in 1778), still in the absence of all evidence as to these estates having been maintained up to their original extent till the period of the sequestration, and under the known fact of the abolition of seigniorial rights and tithes in France in the intermediate time, we have considered the produce of these sales to be the only evidence applicable to their value at the period of sequestration.

"The valuation in specie (*en numéraire*) of the last portion of the estates of Chaudenay, sold the 11th Frimaire, *an* 6, is calculated according to the information contained in our official communication of the 9th of this month, from the French Commissioners at Paris, in reply to a reference made to them by us in July last for instruction on this point.

"Finally, we award 3569 liv. 14s. for the value in specie (*en numéraire*) of the 3½ *journeaux* of vineyard near Dijon, sold on the 21st Ventose, *an* 2, for 6550 livres. This we have calculated according to the price of assignats at the time, according to the *Tableau de dépréciation du papier monnaie dans chaque département en exécution de la Loi du 5 Messidor, an* 5.

"These several sums, together with 400,000 livres allowed for St. Sabine, Bouhey and Crugey, are to bear interest at 3 per cent. from the 27th of January, [223] 1794, to the 24th of June, 1826. That interest amounts to 419,149 livres 15. 10.

"With respect to the estates in Champagne, we find no ground on which Angélique Michael Joseph de Wall can establish a claim to any interest in them. These estates, at the time of the marriage, were possessed by Madame de Wall, who was a Frenchwoman, and expressly excluded, by the marriage-contract, from community of goods with her husband.

"If we correctly apprehend the Letter of the Privy Council to the Treasury, dated 28th of June, 1834, under the authority of which we have re-opened the award of the late Commissioners, it does not establish that the said Angélique Michael Joseph de Wall had any right to claim a greater interest in the property than that to which his father, if living, would have been entitled: and our understanding as to this branch of the case is fortified by the printed report of the judgment of the Privy Council (3rd Knapp, p. 13).

"Accordingly, on this point, we adhere to our decision of the 26th of June, 1835, and reject the claim of Angélique Michael Joseph de Wall, for the value of his mother's estate."

To that report was annexed a schedule of the several calculations, which amounted, in the whole, to the sum of £33,238 9s. 4d., and awarded to the Claimant the sum of £3305 12s., as the balance due, after debiting him with the sum of £29,932 16s. 7d., already received in respect of the original award.

The Claimant protested against this second report, and stated various objections; upon which he was heard before the Commissioners, who adhered to their report; and, in accordance with which, the [224] Claimant was paid, under protest, the further sum of £3305 12s. 9d. so awarded to him as the balance due thereon.

A further question having arisen, which was referred to the Commissioners, upon the effect of the marriage contract of the parents of the Claimant, namely, whether it secured the property in the Champagne estates to the Claimant as son of the marriage, absolutely and indefeasibly, so that his right could not have been effected by any act of his parents, or either of them, the opinion of French Advocates was obtained, upon a case laid before them upon this point, and the

Commissioners reported, on the authority of those opinions, that the Claimant had not an absolute and indefeasible right in his mother's Champagne estates; but in respect of the interest which the father had, by surviving Madame de Wall for a period of nine months and sixteen days, they awarded the sum of £499 1s. 7d. This further sum was also paid to the Claimant. The Claimant still protesting against the decision of the Commissioners upon the same grounds as before, it was finally arranged, between the Claimant and the Lords of the Treasury, that the Claimant should be at liberty to appeal to the Judicial Committee of the Privy Council, against the reports of the Commissioners.

The Appellants, accordingly, submitted, that the award of the Commissioners was erroneous, and ought to be corrected, for the following reasons:—

As regards the Estates in Burgundy.—Because the Commissioners had improperly rejected the best evidence of value, and had proceeded on data and evidence unfair towards the Claimant, as well as contrary to the terms of the convention under which they [225] acted, and the practice of the former Commissioners: and because this portion of their award was inconsistent, and was supported by reasons wholly inconclusive and insufficient.

As regards the Estates in Champagne.—First, Because Count Angélique Michael Joseph de Wall was, under the above circumstances, entitled to compensation, in respect thereof, out of the Compensation Fund; and, secondly, because the right thereto was finally determined by the judgment of the Privy Council, on the 27th of June, 1834.

The Lords of the Treasury, on the other hand, contended that the reports were correct and proper, and ought to be supported, for the following reasons:—

1. Because, by the law of France, the Claimant took no absolute and indefeasible interest under the marriage contract of his father and mother in the Champagne estates, which were the property of his mother before marriage, and continued so up to the time of their confiscation, she being a French subject, and not within the meaning of the Convention or Treaty.

2. Because the Claimant never had any interest in the Champagne estates, either in possession or reversion—but the same might have been alienated and disposed of, without his consent, by his father and mother jointly, or by the survivor of them.

3 Because, in the absence of the *Matrices des Roles* of the year 1791 (the primary evidence required by the Convention, for the purpose of ascertaining the value of the confiscated estates), the means adopted by the Commissioners of estimating the property in Burgundy, as fully set forth and explained in the [226] reports, were the best that could have been procured under the circumstances.

4. Because, as far as it could be ascertained, with any certainty, from the evidence before them, the Commissioners included all parts of the Burgundy estates which appeared to belong to the Claimant.

Sir Fitzroy Kelly, Q.C., Mr. Bethell, Q.C., and Mr. Beavan, for the Appellants.—The objections to the award of the Commissioners may be divided into two heads. First, as to the mode in which the value of the Burgundy estates have been ascertained; and, Secondly, as to the Claimant's right to compensation for the confiscation of the Champagne estates.

I. The calculations made by the Commissioners, are based on erroneous principles. In the absence of the *Matrices des Roles*, the next best evidence of the value of the estates would be actual leases of portions of the property, and the testimony of living witnesses as to other portions ought to have been received, but the Commissioners rejected the *etat des ventes*, and the purchase-deeds, setting forth the price actually paid for the property, and adopted, as a criterion, the proceeds of the forced sale of the Revolutionary Government. The marriage settlement affords no criterion of the value of the three estates of Crugey, Bouhey, and St. Sabine; for the appraisement annexed, by way of schedule to the contract, was made, not for the purposes of sale or assessment, but merely to assign a nominal value for the purposes of the settlement. Even if the Commissioners were right in adopting such appraisement, still they erred in the application, [227] for they treat the valuation there given, as that of the three estates, whereas it was confined to the two first only. Such of the notarial leases as have been preserved, gave, on the basis of twenty years' value, a larger sum than the Commissioners have awarded.

As regards the tithes and seignorial rights, the abolition of which the Commissioners supposed diminished the value, it is clear that no deduction could reasonably be made on their account, because no money value was set upon these rights in the purchase-deed; moreover, as to part, at least, the proprietor was owner of the land, as well as of the title; and, therefore, gained on one hand what he lost on the other.

II. The question upon this branch of the case really turns upon the *status* of Madame de Wall, whether she, being a Frenchwoman, and entitled to real estates in France, having married a British-born subject, did not become, during her coverture, a British subject? It is a recognised principle that a wife, by her marriage, even before she leaves her residence, acquires the domicile of her husband; and no longer retains that of her origin (1 Burge's Comm. on Col. Laws, 56). If a single woman is in debt, and marries, she ceases to be liable for the debt, it becomes the debt of her husband. So, in cases of settlement under the Poor Law, the wife acquires the settlement of her husband; if she had a settlement, it is suspended during the coverture, and revives at the husband's death. *Shadwell v. St. John's, Wapping* (4 Chittys' Burn's Justice, Note to p. 313).—[Dr. Lushington: Suppose an Englishman marries a Frenchwoman, and then the husband dies without the wife ever having come to England, what is her *status* then?—Her alien *status* returns upon the death of her husband. Domicile is also the same; there cannot be [228] two domiciles at the same time, although there may be one domicile in the lifetime of her husband, and another at his death. Mr. Justice Story (Conf. of Laws, Chap. III., sec. 46) thus states the rule: "A married woman follows the domicile of her husband. This results from the general principle, that a person, who is under the power and authority of another, possesses no right to choose a domicile. *Mulierem, quamdiu nupta est, incolam ejusdem civitatis videri, cujus maritus ejus est*" (Dig., Lib. 50, tit. 1, l. 38. § 3. Id., Lib. 5, tit. 1, l. 65). In the case of *Warrender v. Warrender* (9 Bli. 89), the House of Lords held the same doctrine. It is laid down in Viner's Abr., tit. "Alien," (A. 2.) 6, that where "An Englishman passed the sea, and married a female alien, by this the *feme* is of the allegiance of the King, and her issue shall inherit." The decision of this Court, in the Countess of Conway's case (2 Knapp, P.C. Cases, 364), proceeded entirely upon the fact of the Countess being a widow, which is not the case in the present instance, and is no authority against us. In Andre's case (2 Knapp, P.C. Cases, 365), the Privy Council decided, that a Frenchwoman by her marriage to a British subject, became a British subject herself. So in the Marchioness of Wellesley's case (Cited, 2 Knapp, P.C. Cases, 366), compensation was given to her although she was an alien by birth; it was thought sufficient that she was a British subject, by marriage, at the time of the claim.—[Mr. Pemberton Leigh: The material question is, whether these Champagne estates are excepted out of the marriage settlement.]—The Commissioners seem to have drawn a distinction between the rights of an heir of a British subject, and those rights which he would [229] have brought forward in France, as a French heir; and because these estates would descend, not from a British subject, they hold that the Claimant is not entitled to compensation. We submit that, according to the Statute, 59 Geo. III., c. 31, it is sufficient if he shows that he is a British subject, and the heir of a British subject, and that he could then claim compensation in respect to any right which, by the law of France, he could establish in France. At all events, the Claimant was entitled to compensation; he claims through his mother. Now, it is enacted by the 16th section of the Statute, 7 and 8 Vict., c. 66, "That any woman married, or who shall be married, to a natural-born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." This is a declaratory Statute, and, therefore, the Claimant's mother, being at the time of the confiscation, a British subject, was entitled to compensation.

Mr. Waddington (on the part of the Attorney-General) for the Lords of the Treasury, in support of the award.

The *status* of Madame de Wall was French; she never was, as contended by the Appellants, an English subject within the meaning of the Treaty. Her marriage with Patrick Wall affected no change in her national character as a French subject,

and she and her estates were amenable to the laws of France; that being so, the Champagne estates were legally confiscated by the French Revolutionary Government, under the laws in force in France relating to emigration. The Baron de Bode's case (8 Q.B. Reps. 208). Assuming, however, that [230] these estates were illegally confiscated, still Madame de Wall having never been a British subject, could have no claim under the Treaty, for compensation; she owed no allegiance to the Crown of England, nor was she entitled to the protection of a British subject. Protection and allegiance are correlatives (1 Black. Com., p. 370). It is laid down by Blackstone (2 Black. Com., p. 131), as a clear doctrine, that an alien wife cannot be endowed of lands in England. The Statute, 7 and 8 Vict., c. 86, relied upon by the Appellants, does not apply. That Statute was not a declaratory, but an amending, Statute. The case of The Countess of Conway (2 Knapp P.C. Cases, 364) is however conclusive upon the point at issue. There it was held, that the wife of a British subject was not entitled to compensation under this very Treaty, unless she herself acquired a domicile in Great Britain at the time of her loss. It is quite clear that Madame de Wall had no English domicile, and, therefore, those claiming under her have no title to compensation. The opinions of the French *Avocats* taken in this case are clear that the claimant, had not, by the *Contume de Paris*, which was the adopted law of the Province where these estates are situated, either an indefeasible or a contingent interest in his mother's, Madame de Wall's Champagne estates. The Commissioners have adopted the best mode they could in the absence of the *Matrices des Roles*, in arriving at the true value of the Burgundy estates.

Sir Fitzroy Kelly, in reply:—First. The Commissioners have arrived at a wrong valuation of the Burgundy estates. They have adopted different modes, which are inconsistent and inconclu-[231]-sive, and the matter ought to be referred back to them. Secondly. I submit, that Madame de Wall was, during her coverture, a British subject.—[Lord Campbell: You must take all the circumstances together, namely, that she was never in this country, and had resided in France down to 1792, and her husband was domiciled in France.]—Domicile has nothing to do with the question.—[Lord Campbell: In the Countess of Conway's case [2 Knapp, 364], domicile was held to be the very thing to be considered].—At the time of the confiscation she and her husband had emigrated, war had broken out between France and England, and was she not then the wife of a British subject, and, as such, entitled to the protection of the English Crown? It is enough, that her husband was a British subject, and that this country was at war with France. The question of domicile in the Countess of Conway's case was forced upon the Committee; that lady, at the time she made her claim, was a widow, and had accordingly returned to her state as an alien.—[Lord Campbell: The question was, whether she had acquired a domicile at the time of her loss, and not at the time of the claim.]—The question is narrowed to this, Is the wife of a British subject an alien? She could have a settlement under the Poor Law; she cannot, it is true, by the Common Law, acquire dower, but that is a right which accrues upon the death of her husband. Try the question by the test applied by the other side, that allegiance and protection are correlative. Now suppose Madame de Wall had come to England with her husband, could the Crown, under the Alien Act, 33 Geo. III., c. 40, which was in force in 1794, have ordered her to leave the country, and separated her from her husband? I submit that the coverture suspended the alienship. It was contended that the separate estate of the wife was [232] duly confiscated and reliance for that position is placed upon the case of The Baron de Bode [8 Q.B. 208]. That case is distinguishable from the present. The ground of that decision was, that a French subject had emigrated, and that the Government of France could by law confiscate an emigrant's estate. The confiscation here was an invasion of the rights of a British subject. By the law of nations, the wife is the property of the husband, and bound to follow him. Was her emigrating with her husband such an act as could be punished by the law of any country? Suppose she had come to England, and had separated from her husband, and about to return to France, would her alienage, and the consequence of absenting herself from her country, be an answer to a suit for restitution of conjugal rights? Certainly not. The consequence, therefore, would be, that the laws of this country

would compel her to live with her husband, yet that they could not protect her property in France. Lastly, The Commissioners have misapprehended the effect of the marriage contract: the opinion of the eminent French lawyer, Dupin, was, that the estates which had been the Claimant's mother's, before her marriage, were, at the time of the confiscation, vested in possession in her husband, and in reversion in the Claimant, the only son of the marriage. I submit, that the Claimant was entitled to a fee simple of the Champagne estates, indefeasibly, on the death of his father and mother, or at least that he had a contingent interest in them, for which he was entitled to compensation, and that the award of the Commissioners ought, upon this ground, be reversed.

Lord Campbell (Feb. 21, 1848).—This was an appeal from an award of the Commis-[233]-sioners for claims on France, in a case in which Angélique Michael Joseph Wall, in his own right, and as representative of his father and his mother, claimed compensation under the Treaties on this subject with France, for the loss of certain estates in Burgundy, which had belonged to his father, and of certain estates in Champagne, which had belonged to his mother; all confiscated by the French Government, under the law against emigration.

With respect to the Burgundy estates, the Commissioners had professed to allow him the full value of the fee simple; and the complaint is, that, by mistake, they have not done so. Although reluctant to disturb the award of the Commissioners, on a mere question of value, we should feel ourselves obliged to do so, if we saw that they had proceeded on any erroneous principle, or that, in applying a right principle, they had fallen into a blunder of fact. But we are of opinion, that, in this valuation, there is no ground whatever for quarrelling with the result at which they have arrived.

The *Matrices des Roles*, or assessments to the land-tax of the year 1791, the primary evidence required by the convention, for the purpose of ascertaining the value of the confiscated estates, not being forthcoming, the Commissioners were at liberty to adopt any other evidence which might appear to them most satisfactory, with respect to each particular estate which was to be valued: such as the original purchase-money; the valuation of the parties themselves, in any subsequent transaction, where there was a lease at rack-rent; the rent, allowing a certain number of years purchase; or the sum for which the property had been sold, at the time of the confiscation. There were seven or [234] eight different estates belonging to the Claimant's father in Burgundy, to be valued, and with respect to these, as they were very differently circumstanced, the Commissioners have adopted sometimes one mode of getting at the just value, and sometimes another; but in following this course they were not guilty of any inconsistency, and we see no reason to think that they have done any injustice to the rights of the Claimant. It was strongly asserted at the opening of the appeal at the bar, that they had made a gross blunder in giving him no compensation whatever for the estate of St. Sabine, but it has been made quite clear to us, that the sum of 400,000 livres awarded to him, covers the value of St. Sabine, as well as of Crugey and of Bouhey; and that, in presenting this claim, he is merely seeking to take advantage of a clerical mistake, in the marriage settlement of his father and mother. The amount of compensation which he demands for these Burgundy estates appears to us quite extravagant, and we think that the Commissioners have done their duty, in cutting it down to its proper limits.

In support of the Champagne estates, he has been allowed only compensation for the interest which his father would have had in them by surviving his mother for a period of nine months and sixteen days, amounting to the sum of £499 1s. 7d., while he insists that he is entitled to the value of the fee simple of the whole.

This claim was first strenuously defended on the ground of *res judicata*, because when the case was formally before the Court, their Lordships ordered, "that the amount of the loss sustained by the Appellant by the confiscation of the estates in Burgundy and [235] Champagne, mentioned in the award, should be examined and ascertained." It would be most unfortunate if an order had been made to conclude the Court on questions which were never discussed before it, but we are all of opinion that this order, according to its just construction, merely established that the Appel-

lant was to be considered a British subject entitled to some compensation, leaving the amount and the interests to be compensated, for future inquiry.

Then the claim to the fee simple value of the Champagne estates is rested on the ground, that they belonged to his mother, who, in 1761, married his father, a native-born Irishman, domiciled in France, and in the military service of the French King, who continued to reside with her husband till the breaking out of the French Revolution; who then emigrated with him into Germany, and who died abroad in the year 1808, without ever having entered the territory of Great Britain. The contention here was, that, by her marriage to a British subject, she became a British subject, and, therefore, that she was entitled to indemnity as a British subject, for the loss of her estates in France, confiscated under the law of the French convention, against emigration. But this is expressly contrary to the decision of the Judicial Committee of the Privy Council, in the year 1834, in the Countess de Conway's case (2 Knapp, P.C. Cases, 364)—holding, that the foreign wife of a British subject is not entitled to compensation for the loss of her separate property under these conventions, unless she had herself acquired a domicile in Great Britain, at the time of the confiscation. This rule is quite consistent with Madame Andre's case (2 Knapp, P.C. Cases, 365), much relied upon; for there the Claimant, although a native-born [236] Frenchwoman, had resided and been domiciled in England many years before, and at the time of the confiscation, and so continued at the time of the claim; thus owing allegiance to, and entitled to the protection of, the English Crown. The Marchioness of Wellesley's case was likewise cited, in which it is supposed, that the Commissioners granted compensation to her, though she was an alien by birth, and did not come into this country till 1793, and did not marry the Marquis till 1794; they considering it enough that she was a British subject at the time of the claim. But that case, whatever the circumstances of it might be, was never brought by appeal before this Court: the only statement of it to be found, is in the argument of Counsel at the bar (2 Knapp, P.C. Cases, 366), and all authority must be taken from it by the subsequent decision of this Court in the case of the Countess de Conway.

Reliance has been placed on the recent Statute, 7 and 8 Vict., c. 66, s. 16, by which an alien woman married to a natural-born subject is naturalized; but this is not a declaratory Act, and we consider it to be quite clear that, at Common Law, not only was an alien woman, married to an Englishman, incapable of taking dower, but, while she remained abroad, she was not within the allegiance of the Crown of England.

Even if Madame de Wall were, in any sense, a British subject, it appears to us that her claim cannot be brought within any of the Treaties relied upon. Monsieur de Bergennes' Commercial Treaty of 1786, is clearly applicable to such a case. By Article 4 of the Treaty of 1814, British subjects are entitled to compensation for property "illegally confiscated (*induement confisque*) by the French authorities." This [237] confiscation must be contrary to the law of nations, or to some treaty with France; and of a wrong of which the English Government would have had a right to complain, if peace had existed between the two countries. But how could we have complained of this law against emigration as affecting Madame de Wall? She, at all events, continued a subject of France, and the supreme power in that country might enact a law, by which emigration from the territory of France by French subjects should be punished by confiscation of their property in France. Baron de Bode's case (8 Queen's Bench Reps. 279).

Lastly, it is contended, that, under the marriage contract between the Claimant's father and mother, and according to the law of France, he was entitled to the fee simple of the whole of these Champagne estates indefeasibly on the death of his father and mother, or that he had a contingent interest in them for which he has a right to compensation. We have read, very carefully, the contract in question, and the numerous opinions of the learned French Avocats who have been consulted upon it, and we have come to the conclusion that he had neither such indefeasible or contingent interest. It is quite clear, that he had no indefeasible interest, for even if, by the marriage settlement, the Champagne estates had entered into the community of goods, this would only have regulated the enjoyment of them during the coverture, without giving the issue of the marriage any vested interest in them. But they

remained the separate property of the wife; during the coverture she might, with the consent of her husband, have alienated the whole of them; and if she had survived her husband, she might, for valuable consideration, have alienated the whole [238] by her own sole act, spending the purchase-money, and leaving nothing from which *legitim* could be claimed. Much stress was laid upon the stipulation for *remploi*, or reinvestment, upon alienation during the coverture; but this seems to have been only for her protection; not with any view to the benefit of the issue of the marriage.

These considerations appear to us to show, equally, that the Claimant, at the time of the confiscation, had no contingent interest for which he has a right to compensation. The claim to *legitim*, if he had survived his mother, and she had not alienated the estates for valuable consideration, is the most tangible. But this arose entirely from the estates being the property of his mother, a French subject, who was deprived of them by the law of the country, of which she was subject, and the amount of it depended on so many contingencies, as really to make it impracticable. We cannot, here, be governed by the events which subsequently happened; for the mother might have survived both her husband and her son, and no right to *legitim* might ever have accrued. At any rate it was only an expectancy, a *spes successianis*, which, however probable, could give no right to compensation under these conventions. Upon the whole, we shall communicate to the Lords of the Treasury that, in our opinion, the award of the Commissioners ought to be affirmed.

[Mews' Dig. tit. EVIDENCE, III. DOCUMENTARY EVIDENCE, c. 5 *Original not capable of production*; tit. HUSBAND AND WIFE, VII. DOWER AND FREEBENCH, 1. *Of what lands*; tit. INTERNATIONAL LAW, IV. PERSONS, a. *Alienage*, 1. *General Principles*, S.C. 12 Jur. 145; see note to *Conway's (Countess De) case*, 1834, 2 Knapp, 364; and cf. *Reg. v. Manning*, 1849, 1 Den. C.C. 467.]

[239] ON APPEAL FROM THE SUPREME COURT IN JAMAICA.

The Hon. DOWELL O'REILLY, Attorney-General for the Island of Jamaica,—*Appellant*; JOHN MANDERSON, Esq.,—*Respondent* * [Feb. 18, 1848].

M. was surety in a bond given by G., the Collector of taxes in Jamaica, for payment of the collection for the year 1842. G., at the date of the bond, was in arrear for taxes collected by him in 1841. G. appointed one S. his deputy, to collect the taxes for the year 1842, which he partly did, and G. collected the remainder. Shortly after the collection of the taxes, the Receiver-General pressed G. for the payment of the arrears of 1841. G. went to S. and obtained from him £3000, to remit to the Receiver-General, S. taking that amount out of a chest, in which were placed the monies collected for 1842. G. converted that sum, and also £2000 which he had collected for taxes in 1842, into paper money, and transmitted £5000 to the Receiver-General, who appropriated the whole amount in liquidation of the arrears for 1841. In an action brought by the Crown against M. upon the bond, the Judge charged the jury, that if they were satisfied that the sum of £5000 had been remitted out of the taxes of 1842, and that G. had not expressly assented to the appropriation of that amount towards payment of the arrears of 1841, they ought to find for the Defendant. Held, by the Judicial Committee, sustaining a bill of exceptions to the Judge's charge, and awarding a *venire de novo*, that the Receiver-General had a right to appropriate the remittance by G. to the liquidation of the arrears of 1841, and that it was not necessary that G. should assent to that appropriation, and that M. was bound by the appro-

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

priation, and liable on the bond for the deficiency of the taxes for the year 1842.

Appeal allowed, under the Statute, 7 and 8 Viet., c. 69, direct to Her Majesty in Council, upon a bill of exceptions, to prevent the delay and expense of bringing a writ of error returnable before the Governor and Council of the Island of Jamaica [6 Moo. P.C. 250].

This appeal arose out of an action of debt, brought by the Appellant, on behalf of the Crown, against the Respondent, as one of the sureties of William Stanford Grignon, on a bond given by him upon his appointment, in the year 1842, to be the collecting constable and collector of rum duties for the parish of St. James, in Jamaica. The penalty of the bond in question, (which was joint and several,) was for £6000, the con-[240]dition being as follows:—"That if any copy or roll of any assessment or assessments of any public taxes payable by any person or persons should be made out and delivered as by law required to him, the said William Stanford Grignon, to enable him, the said W. S. Grignon, to collect and gather in the several sums of money assessed therein; and if the said W. S. Grignon did and should well and truly, according to the best of his skill and ability, collect and gather in from every person or persons who should be named in such copy or roll, all such sum and sums of money as every such person or persons respectively should stand charged with in such copy or roll, and pay the same into the hands of John Edwards, Esquire, Receiver-General in and for the Island, or the Receiver-General for the time being, within the time allowed by law for such purpose, retaining to himself such monies as by law he is authorised to retain thereout during the time aforesaid; and also did and should well and truly pay over to J. Edwards, Her Majesty's Receiver-General (or to Her Majesty's Receiver-General for the time being), whenever thereunto required, all such sum and sums of money as should from time to time and at any time during his, the said W. S. Grignon's, being collecting constable as aforesaid, and until he should be lawfully discharged from his said office or appointment as [241] aforesaid, be collected or received by, or come into the hands of, him, the said W. S. Grignon, by virtue of his said office or appointment as aforesaid, on account of any public or parliamentary taxes whatsoever, ordinary or extraordinary, and also did and should justly in all things, well and faithfully demean himself in the said office of collecting constable (and also that if any copy or roll of any assessment or assessments of any public taxes, or duties payable by any person or persons, under or by virtue of the above last-mentioned law, should be made out and delivered to the said W. S. Grignon, to enable him to collect and gather in the several sums of money assessed therein; and if the said W. S. Grignon did and should well and truly, according to the best of his skill and ability, collect and gather in from every person and persons who should be named in such copy or roll, all such sum and sums of money as every such person and persons respectively should stand charged with in such copy or roll, and pay the same into the hands of the Receiver-General aforesaid, or of the Receiver-General for the time being, within sixty days after such roll should have been so delivered to him, retaining to himself such monies only as by law he was authorised to retain thereout, during the time aforesaid; and also did and should well and truly pay over to the said Receiver-General, as aforesaid, or to the Receiver-General for the time being, whenever thereunto required, all such sum and sums of money as should, from time to time, and at any time during his said inspectorship and collectorship, and until he should be lawfully discharged from his said office or appointment as aforesaid, be collected or received by, or come into the hands of, him, the said W. S. Grignon, by virtue of [242] his said office or appointment, as aforesaid; and also did and should justly in all things, well and faithfully demean himself in the said office of inspector and collector; Then the foregoing obligation to be void, otherwise to be and remain in full force and virtue."

The collecting constables are appointed, one for each parish, to collect the public and parochial taxes of the parish or district. They are annually appointed for the ensuing year during the session of the Jamaica Legislature in November or December, by the members of the House of Assembly acting in that behalf, in their capacity of Commissioners of public accounts.

The collecting constables, by virtue of their office, are also the collectors of rum duties or monies to be levied and collected, for the use of the public of Jamaica, under an act of the Jamaica Legislature, entitled, "An Act for laying a duty on all wines, and on brandy, gin, rum, and other distilled spirits retailed or consumed within the Island, and on teas imported into the same, and for laying a further tax on licences to be granted for the retailing of brandy, gin, rum, and other distilled spirits, and on the public offices, and for applying the same to several uses." It was the duty of the collecting constable, to pay over the public taxes and duties to the Receiver-General of the Island, at the treasury in Kingston.

The collection of the public taxes is regulated and enforced by a Legislative Act of the Island, 3 Vict., c. 16, which recites, "that it is necessary that the several public taxes for supplying the exigencies of the government should be speedily and effectually raised and collected, and the arrears of all such taxes as shall at any time remain outstanding and uncollected be levied and gathered in." By section 8 of this Act, the collecting [243] constable is required, upon his being appointed, to enter into security to Her Majesty, with two sufficient sureties, for the public taxes and rum duties to be collected by him for the year for which he has been appointed.

Grignon died in 1843; he had been collecting constable, and collector of rum duties for the parish of St. James, from the year 1838, and the question which arose in this case, was, whether certain sums of money, remitted by Grignon on, or shortly after, the 23rd of August, 1842, on account of public taxes and duties, ought to have been appropriated to pay the taxes of the current year 1842, or to the liquidation of previous arrears, then due from Grignon.

In October, 1843, the Appellant brought his action of debt in the Supreme Court of Judicature in the Island, against the Respondent, upon the above Bond. The declaration stated, that the Respondent thereby acknowledged himself to be held and firmly bound to Her Majesty in the sum of £6000 of lawful money of Jamaica, to be paid to Her Majesty, and which the Respondent had not rendered to Her Majesty, although frequently thereunto required. To the damage of Her Majesty of £200.

The Respondent pleaded to the action, the general issue, and *non est factum*, and thereupon issue was joined.

The cause was tried by a jury at a Court of Assize, before the Honorable Justice McDougall. At the trial, it appeared from the evidence of a clerk from the office of the Receiver-General, that the taxes for the parish of St. James, for the year 1842, amounted in the aggregate to the sum of [244] £8865 2s. 4d. It was also proved that the rolls for the assessments to that amount were delivered to Grignon.

The Plaintiff then gave in evidence the following letters:—a letter from John Edwards, Esq., the Receiver-General, to Grignon, dated, "Treasury, Kingston, 9th July, 1842.—Sir, I have to call your attention to the state of your account as collecting constable of St. James." Also a letter from the Receiver-General, to Grignon, as follows: "Treasury, Kingston, 19th August, 1842.—Sir, I wrote you some time since requesting a settlement of your account. You have not as yet attended to it. May I request you will see the necessity of complying with my request previous to the 2nd of September, on which day I am directed to lay before the Commissioners of Accounts a statement of all balances due by the collecting constables."

Also the following letter from Grignon to the Receiver-General: "Montego Bay, August 23rd, 1842.—Sir, I am in receipt of your letter of the 19th ultimo. I now send you £5000 as at foot, and I shall feel obliged by your acknowledging receipt thereof. I am respectfully, Sir, your most obedient servant, W. S. Grignon. To John Edwards, Esq., Receiver-General, Kingston. Order of James Duff, on the Colonial Bank, dated 8th August, 1842, in favour of John Jump, Esq., £500: ditto of Hislop, Lawson and Manderson, for grant of the House of Assembly for Bridge at Montego Bay, £300. The Bank of Jamaica will pay £4200—£5000."

And in reply to this letter, the Appellant further produced, and gave in evidence on the part of the Crown, a letter from John Edwards to Grignon, and the en-[245]-closure therein contained respectively in the words and figures following, (that is to say): "Kingston, 27th August, 1842.—Sir, Enclosed is a statement of your account for 1838, 1840, and 1841, showing a balance still to pay, after applying your remittances (amounting to £5089 3s. 5d.), of £322 5s. 11d., which I would

recommend you settling as early as possible. Please to forward the receipt for £89 3s. 5d." Enclosed in this letter was an account for the arrears for the years 1838, 1840, and 1841, and the rum duties up to March, 1842.

And in acknowledgment of the last-mentioned letter and appropriation, the Plaintiff produced in evidence, a letter from Grignon to the Receiver-General, as follows: "Montego Bay, 30th August, 1842.—Sir, Your letter of the 27th instant, covering account with the Receiver-General's Office, I received, and have requested the Jamaica Bank to pay you £150 more. I have not had time to go over your account, nor to make a counter-statement to go by post, but which I shall do by the next post. It appears, however, that you only give credit for 12s. reliefs, whereas the relief granted by the vestry amounts to nearly £100. Of the last rum roll I have not yet received more than one-third. I enclose the receipt for £89 3s. 5d."

The following letters were also produced and given in evidence by the Appellant on behalf of the Crown:—"To W. S. Grignon, Esq., C. C., St. James. Treasury, Kingston, 30th September, 1842.—Sir, I have to call your attention to a balance against you of £172 5s. 11d., to close the 1841 taxes and duties, and the March 1842 rum duties. Under the supposition that you would have remitted the balance at your debit on the receipt of the statement, or immediately [246] after, I returned you in the list of collecting constables as *nil*. The statement forwarded you showed £322 5s. 11d., of which I received £150 a few days ago. Be so good as to forward me the balance as early as possible. I am, Sir, your obedient servant, John Edwards, R. G." And in reply thereto the following letter: "Montego Bay, 18th October, 1842.—Sir, I am in receipt of your favour by post. I have not been very well for some time past, which prevented my writing you fully. I now enclose three orders, viz., S. Levison on Rec.-Gen. p. £30; Parish of St. James for road grant £50; E. Jordon on R. S. Lambert, £14 11s. 8d.—£94 11s. 8d. Also reliefs for £72 14s. 2½d., which I thought Mr. Mouchett had previously remitted to you. I shall by the next or following post, remit you a very considerable sum, together with my statement of account, which in some respects differs from yours. The stamps are ready to be shipped. I am, Sir, your very obedient servant, W. S. Grignon."

A witness, named Solomon, deposed, that he was Grignon's deputy for the year 1842, and had been thirty years in the employment of the Defendant. That the amount of arrears made up to October, 1842, was £2848 14s. 8d. That he continued to act under Grignon, as deputy-collecting constable, till his death: he collected subsequently to the 31st of October, 1842. That the original rolls were £8878. That arrearage after his death, at 27th of February, 1843, was £2532 1s. 10½d., leaving £6333 0s. 5½d. collected. The difference between the £2848 14s. 8d., and £2532 1s. 10½d., was collected after the 31st of October, 1842. On his cross-examination, he said:—"Grignon asked me for a sum of money, to remit to the [247] Receiver-General £3000 on the 23rd of August: he asked me as deputy-collecting constable for 1842. Had taxes for 1842, to meet his demand. I received considerably more than £3000 as deputy-collecting constable. The Defendant sent me to be deputy-collecting constable. The Defendant was interested as being surety for Grignon. I went there for his (the Defendant's) interest. Grignon never paid me. I never asked him or looked to him. Witness had all the monies in the Defendant's chest. Grignon had a chest in the collecting constable's office. The day for discount to individual tax-payers, was the 10th day of August. I was successful in realizing taxes before the day of discount. I allowed discount as to this £3000. I paid this sum to Ruddock, (Grignon's private clerk at that time,) as part of 1842 taxes. I do not know what was done with this money. I gave Ruddock £2500 in checks, and a bank order for £500. Mr. Jump gave me the order. I would not have paid Grignon if I had known it was to be applied for another purpose, without consulting Mr. Manderston. If the £3000 had not been applied in payment of those taxes to the Receiver-General, the result would be, that the discount allowed to tax-payers would be thrown away." On his re-examination, he said, "he knew nothing of its appropriation."

The case for the Crown having closed, the Defendant called Ruddock, who deposed that he was clerk to Grignon, in 1842, in the collecting constable's office. There was a chest there: Grignon deposited money there in his, witness's, presence: he got that money from taxes collected in 1842. He, witness, received money (£3000) from

Solomon on the 23rd day of August, 1842, to remit it to the Receiver-Ge-[248]neral. Grignon put £2000 to that; he got it from the collections of that year; Grignon allowed discount on £2000. Witness calculated the discount on the several accounts, and it was allowed on almost all of them. Grignon had an arrearage roll for collection at that time. The identical sums of £3000 and £2000 were sent up to save discount. Money was collected on arrearage roll in 1842, and was put into the chest. He saw the £2000 taken out of the chest and counted by Grignon; none of the £2000 was sent up in cash. Grignon went out with the cash taken out of the chest, and brought back papers which amounted to £5000. Solomon had orders from Grignon not to collect arrears.

The evidence being closed, the Appellant, as Attorney-General, insisted, on behalf of Her Majesty, that the several matters so produced, and given in evidence on the part of the Crown, were sufficient, and ought to be admitted and allowed, as decisive evidence to entitle the Appellant to a verdict against the Defendant, and the Appellant prayed the judge to direct the jury, that if they found that Grignon gave no directions to the Receiver-General, as to the mode in which the sum of £5000, remitted in August, should be appropriated, that Grignon was bound by the appropriation made by the Receiver-General, and that it was not necessary that there should be an express assent by Grignon, to the appropriation so made by the Receiver-General, and communicated to Grignon, by the letter of the 27th of August, 1842, and the Appellant called upon the Judge to charge and direct the jury, that in reference to the liability of the Defendant, it made no difference whether the sum of £5000 remitted in August, 1842, consisted of the col-[249]lections of that year, or of any previous year, for the taxes of which Grignon was in arrear, and that, at all events, the Appellant was entitled, on behalf of the Crown, to a verdict for the difference between the sum of £6333 0s. 5½d. shown to have been collected, and the sum of £5000 alleged to have been paid.

To this the Counsel for the Defendant objected, and insisted that the several matters so produced and given in evidence, on behalf of the Crown, were not sufficient, nor ought to be admitted, or allowed to entitle the Appellant, on behalf of Her Majesty, to a verdict, and the Counsel for the Defendant then and there insisted that the several matters so produced and given in evidence, on the part of Defendant, were sufficient, and ought to be admitted and allowed as decisive evidence to entitle the Defendant to a verdict, and bar the Appellant of his action, and prayed the Judge to direct the jury accordingly.

The Judge declared his opinion to the jury as follows. That if they were satisfied that the sum of £5000 had been remitted out of the taxes for 1842, and that Grignon had not expressly assented to the appropriation of that amount by the Receiver-General towards payment of the arrears of 1841, they ought to find for the Defendant. And that the several matters so produced, and given in evidence on the part of the Defendant, were sufficient to bar the Appellant, as Attorney-General of Her Majesty, of his action aforesaid; and with that direction left the same to the jury. The jury, thereupon, gave their verdict for the Defendant.

The Counsel for the Plaintiff thereupon excepted to the above opinion of the Judge, and insisted on the several matters as sufficient to entitle the [250] Plaintiff for Her Majesty, to a verdict against the Defendant; and tendered a bill of exceptions to the charge of the Judge. Judgment was entered up in the Supreme Court of Jamaica for the Defendant.

The Appellant, in order to avoid the expense and delay of a Writ of Error to the Governor and Council of Jamaica, applied, by petition, to Her Majesty in Council, for liberty to appeal under the Statute, 7 and 8 Vict., c. 69, direct to Her Majesty in Council, from the judgment of the Supreme Court of Jamaica.

Mr. Rennalls in support of the motion.

Their Lordships granted leave (April 4, 1846 *), and by an Order in Council, dated the 6th of April, 1846, leave was given to the Appellant to enter and prosecute his appeal, or bill of exceptions to the charge and direction of the Judge of the Supreme

* Present: The Lord President (the Duke of Buccleuch), the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Court of Jamaica, without any intermediate appeal to the Court of Appeal in Jamaica.

The bill of exceptions having been signed and sealed by the Judge who tried the cause, the Appellant prayed, that the judgment of the Supreme Court of Jamaica might be reversed, for the following reasons:

First, Because the exceptions made to the Judge's charge to the jury, were valid and well grounded exceptions, and the Judge ought to have charged and directed the jury to find a verdict and assess damages for the Crown.

Secondly, Because it appeared, from the evidence before the Court and jury, that Grignon had received, on account of taxes for the current year, 1842, the [251] sum of £6333 0s. 5½d., and that he made no payment to the Receiver-General, on account of the taxes of 1842, except the sum of £800, remitted in his letter of 1st November, 1842.

Thirdly, Because before the taxes of the year 1842 were due, Grignon was required by the Receiver-General's letter of the 9th of July, 1842, (and afterwards urged by the letter of the 19th of August,) to settle the tax account then long due by him as collecting constable. And the sum of £5000 was remitted to the Receiver-General on the 23rd of August, 1842, expressly with reference to the previous demand of a settlement of the old account, in respect of which Grignon was a defaulter under sections 33 and 34 of the Collecting Constables' Act. Because, moreover, it would have been contrary to that Act of the Jamaica Legislature, to have applied to the account of taxes of the current year, monies paid in by the collecting constable when that officer was, at the very time, largely in arrear for the taxes and duties of previous years.

Lastly, Because the charge delivered by the Judge to the jury was erroneous and against law, and a misdirection. And, in consequence thereof, the Appellant had been prevented from obtaining a verdict for damages and judgment to which he was entitled on behalf of Her Majesty on the bond executed by the Respondent.

The Respondent, on the other hand, submitted that the appeal ought to be dismissed, for the following reason:—

Because the £5000 remitted on the 23rd of August, 1842, having been money actually collected for the taxes of that year, and having been remitted to the [252] Receiver-General, without any direction or express assent on the part of Grignon, that the same should be appropriated by the Receiver-General towards payment of the arrears of taxes for 1841, or of any previous years, all which was a question of fact for the consideration of the jury, the receipt of that sum by the Receiver-General under all the circumstances, was, to that extent, a satisfaction and discharge of the liability of the surety; and any subsequent arrangement between the Receiver-General and Grignon, to which the surety was no party, that any portion thereof should be appropriated towards satisfaction of the arrears of any year prior to 1842, was not such an assent on the part of Grignon, as could affect the position of the surety, and, therefore, the direction of the learned Judge was correct in point of law.

Sir F. Theſiger, Q.C., and Mr. Rennalls, for the Appellant.—The point raised by this appeal, is a simple question of appropriation. The question being, whether the money paid in the year 1842 is to be applied in liquidation of the arrears of taxes for previous years, and whether the surety has a right to insist, that the money received on account of the taxes for the year for which he was surety should be applied exclusively of the taxes due in that year. The law upon this subject is clear and indisputable. If a party be indebted to another, in two or more accounts, he is entitled to appropriate any payment he may make to whichever account he pleases. If, however, he does not make any appropriation of the payment, then the creditor may appropriate it as he pleases. Here the Respondent, as surety, has no right [253] to have the payment appropriated in satisfaction of his liability, as the circumstance of a surety being interested, makes no difference in law. *Kirkby v. The Duke of Marlborough* (2 Mau. and Sel. 18). *Simson v. Ingham* (2 Bar. and Cr. 65). If assent by Grignon was necessary, his letters to the Receiver-General amount to a sufficient assent to the appropriation of the collections of 1842, to the arrears of 1841.

Mr. Kindersley, Q.C., and Mr. Greenwood, for the Respondent. There can be no dispute that the law, as to appropriation, is correctly stated by the Appellant, and, if the question was now being argued between Grignon and the Crown, the doctrine of appropriation contended for by the Appellant must prevail. It does not, however, apply here; for the case is different; it is between the Crown and the surety; and the Crown seeks to make the surety liable, not only for taxes for the year 1842, but for arrears of taxes of previous years. The question is, how far the surety is affected by the appropriation between the Receiver-General and the Collector? It is in evidence, that he procured an agent of his own to collect the taxes, and put them in a chest, and we have it, in evidence, that these very taxes were paid to the Receiver-General, who, when he received them, should have inquired from what year's collection the money came.—[Lord Campbell. Had the Receiver-General any discretion in the appropriation of the payments?]—We submit, that the money remitted to the Receiver-General, being the money collected for the taxes of 1842, the [254] conditions of the bond were fully complied with. *Pearsall v. Summersett* (4 Taunt. 593). *Glyn v. Hertel* (8 Taunt. 208). *The Wardens of St. Saviour's v. Bostock* (2 Bos. and Pul. N.R. 175). *Nicholson v. Paget* (1 C. and M. 48; 3 Tyr. 164). There is a technical objection to this appeal. It appears from the bill of exceptions, that the exceptions were not tendered till after the verdict: such a course is never permitted. *Culley v. Doe dem. Tayler-son* (11 Adol. and Ell. 1013). *Money v. Leach* (3 Burr. 1742). Indeed, this appeal ought never to have been allowed. The Attorney-General ought not to have gone to the expense of appealing here: he should have moved in the Court below for a new trial, on the ground of the Judge misdirecting the jury.

Lord Campbell.—This appears to be a case of very great hardship upon the Respondent, but we must take care that hard cases do not make bad law. It appears to us that, in this case, the direction on the part of the Judge of the Court below was bad, and there must be a *venire de novo*. The Counsel for the Respondent resorted to every point which they thought it would likely to be of any avail. They have not even omitted to object to the manner in which the bill of exceptions was made; they say, and that is so, that a bill of exceptions should have been tendered before the verdict. To ascertain this we must look to the whole of the record, and, having done so, it appears to us, that there is no reasonable doubt but that, in this case, the bill of exceptions was tendered during the direc-[255]-tion of the Chief Justice, and we are the more fortified in that conclusion from the circumstance that, in the reasons to the case of the Respondent, no objection whatever is taken of the manner in which the bill of exceptions was tendered.

When we come to consider the case upon the merits, the question does not really admit of any reasonable doubt. There must be a breach of the bond alleged and proved. The breach here is alleged in the words of the condition, and we think it is sufficiently proved. Upon the facts, as they appear, it cannot be said that these payments by Grignon were made in respect of the taxes of 1842; it is clear that there has not been such an appropriation either in law or in fact. It is not necessary to refer to the rule of law, that where there is general payment, without any appropriation of it by the debtor, the party receiving it may appropriate such payment to either of two debts; for is there not here, in substance, an appropriation by Grignon himself? There is a demand made upon him by the Receiver-General for the arrears of taxes due in the year 1841. He did not answer that letter; then the Receiver-General wrote a second letter, demanding payment of the arrears of the year 1841. To this letter Grignon answered as follows:—"I am in the receipt of your letter of the 19th ultimo. I now send you £5000, as at foot." Is not this payment of the money demanded? The money that was demanded was for the arrears of the year 1841, and this payment was in satisfaction of that demand. But supposing this is not to be looked at as the payment of a particular demand, it is perfectly clear that there was no appropriation of this sum by Grignon to the arrears of the year 1842; and then the general rule must take [256] effect, which gives the right of appropriation to the Receiver-General; and immediately an answer was sent by him, by which the money was appropriated to the arrears of the year 1841. Was it necessary, then, that there should have been any subsequent

assent to this appropriation by Grignon? Clearly not. There was an absolute right of appropriation in the Receiver-General. If, therefore, this was appropriated to the arrears of the year 1841, there now are arrears for the year 1842, and for those arrears the surety is liable. This is the case as it appears upon the merits. Let us now look whether the law was properly expounded to the jury by the Judge of the Court below; for unless the Judge miscarried in this respect, the appeal cannot be maintained upon a bill of exceptions. Now it appears that the Judge told the jury that the evidence given was a complete answer to the action; that the Attorney-General was barred; and he told them that, if they were satisfied that the sum of £5000 had been remitted out of the taxes for the year 1842, and that Grignon had not expressly assented to the appropriation of that amount, towards payment of the arrears of 1841, that ought to be considered as a discharge of the arrears of 1842, and they ought to find for the Defendant. Now this was clearly a mistake of the Judge, there being the general right of appropriation in the Receiver-General, without any subsequent assent by Grignon. It is an extremely hard case for Mr. Manderson, and we certainly do very much commiserate his position. Had he carried the box with the identical pieces of money which were received for the year 1842, the case might have been different, but we do not express any opinion upon that. The bill of exceptions must, therefore, be sustained, and there must be a *venire de novo*.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to appeal*. On point as to surety's liability, cf. *London, Brighton, and South Coast Ry. Co. v. Goodwin*, 1849, 3 Exch. 736. For similar cases of direct appeal, see *In re Barnett*, 1844, 4 Moo. P.C. 453; *Harrison v. Scott*, 1846, 5 Moo. P.C. 357. As to appeals from Jamaica, see O. in C. of 14th April, 1851 (Stat. R. and O. Rev. iv. 334].

[257] ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

RICHARD SPOONER and BOMANJEE NOWROJEE.—*Appellants*: JUDDOW (Widow),—*Respondent** [Feb. 19, 1848, and Feb. 14, 1850].

By the Charter of Justice of the 23rd of December, 1823, establishing the Supreme Court at Bombay, that Court was prohibited (in like manner as the Supreme Court at Calcutta, under the 21st Geo. III., c. 70, s. 8), from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof.

In an action of trespass brought against the Collector of revenue at Bombay, for distraining for arrears of Government "quit-rent," the Defendant pleaded "Not guilty" only. The Supreme Court at Bombay held, that the "quit-rent" was not "revenue" within the meaning of the Charter, and that the act complained of, was not warranted by the usage of the country and the Company's Regulations, and that the Court had jurisdiction to entertain the action, and found for the Plaintiffs.

Held, reversing such finding and judgment,—

First, that the "quit-rent" was part of the revenue of the East India Company at Bombay [6 Moo. P.C. 282]; and

Secondly, that it being a matter concerning the revenue, and the collection thereof, the Supreme Court had no jurisdiction, and that the Court being excluded by the Charter from any matter concerning the revenue, the plea of "Not guilty" was sufficient, and that the Judge ought at the trial to have directed a non-suit, or a verdict to be entered for the Defendant [6 Moo. P.C. 275, 282].

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Assessor.—Sir E. Ryan.

A plea in abatement to the jurisdiction of the Court must point out another Court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the Court in which the suit ought to have been brought [6 Moo. P.C. 279].

If a party *bona fide*, and not absurdly, believes that he is acting in pursuance of a Statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act [6 Moo. P.C. 283].

The Supreme Court in overruling the objections to the jurisdiction of the Court refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon Petition, the Judicial Committee granted leave to appeal, but upon terms, of the East India Company paying the Respondent's costs of the appeal, to enable him to appear to prevent the question being argued *ex parte* [6 Moo. P.C. 264-5].

This was an action of trespass brought in the Supreme Court at Bombay, in which Hurkissondass Hurgovundass, since deceased, and now represented by his widow, Juddow, the Respondent, was Plaintiff, and the Appellants were Defendants.

[258] The action was brought under the following circumstances:—In the month of November, 1846, Hurkissondass Hurgovundass, was the owner and occupier of a house and piece of ground, situated in Bazar Gate-Street, within the town of Bombay, which were liable to the payment of an annual quit-rent called pension, which forms part of the land revenue of the East India Company; and there was then due to the Collector the sum of Rs. 8. 3a. 8p., on account of arrears of such pension, which had not been collected from the above-mentioned premises since the year 1827. At that period Narrondass Tookaydass was the owner and occupier of the premises, and his name was registered as such in the books of the collectorate; subsequently, in the year 1836, this property was sold to Hurkissondass Hurgovundass, who continued in possession of it up to the date of the proceedings which gave rise to the present appeal. No change, however, of name was made in the books of the collectorate, and throughout this period, Narrondass Tookaydass appeared in those books, as the registered proprietor of the property.

The Appellant, Spooner, was the Collector of revenue at Bombay, and the other Appellant, Bomanjee Nowrojee, was one of his assistants. On the 11th of October, [259] 1846, Spooner sent a *purvoo*, or officer belonging to the Collectorate establishment, to the house of Hurkissondass Hurgovundass, in order to demand the payment of the arrears of pension which were due from him as occupant of the above premises. Hurgovundass refused to pay the arrears, and in consequence of this refusal, Spooner, on the 6th of November, 1846, placed a warrant, signed by him, in the hands of Bajeeba Jugunnathjee, one of the receivers in the office of the Collector, in order that it might be executed. The warrant was in the following form:—"To Babajee Jugunnathjee.—Whereas Narrondass Tookaydass has failed, after due notice, to discharge the revenue due by him to the Honourable Company, amounting to eight rupees, three annas, and eight pice (8. 3. 8.), you are hereby authorized, by virtue of the powers given to me under the 4th Sec., Cl. First, of Reg. XIX., A.D. 1827, to enter into and take possession of the house and property of the said Narrondass Tookaydass, situated at Bazar Gate-Street, within the fort, and to continue in such possession thereof, until the said sum of Rs. 8. 3a. 8p. shall be duly paid, or until the said house and property shall have been sold, in liquidation of the amount so due, pursuant to the said Regulation."

Babajee Jugunnathjee, on the 24th of November, in the same year, went, accompanied by the Appellant, Bomanjee Nowrojee, and some sepoys, to the house of Hurkissondass Hurgovundass. They were, however, not allowed to enter, and on a demand of payment being made, Cowasjee Hormasjee, his agent, said that he would not pay the amount, nor allow them to take anything away with them. He then became very violent, and ordered some of his attendants to expel [260] the officers of the collector; a scuffle ensued, in the course of which one of the sepoys took down a globe lamp, and the Appellant, Bomanjee Nowrojee, ordered him to carry it away. This was done, and the police having come up, Cowasjee Hormasjee was given into custody, on the charge of assaulting the Collector's servants in exe-

cuting the warrant of distress. On the 27th of November, the case was brought on before Mr. Larken, one of the magistrates of Bombay, who decided that the warrant was illegal, and dismissed the case.

On the 13th of January, 1847, the Respondent brought an action of trespass in the Supreme Court of Bombay, against the Appellants, and in his declaration stated, that they, on the 24th of November, 1846, with force and arms, broke and entered his dwelling-house, and made a great noise and disturbance therein, and forced and broke open, broke to pieces and damaged, a door of the Respondent, belonging to the said dwelling-house, and seized and took away a door and a globe lamp of the Respondent, then being in the said dwelling-house, "of great value, to wit, of the value of Co.'s Rs. 50," and forcibly carried off the same, and converted and disposed thereof to their own use, to the damage of the Respondent of 10,000 rupees. To this the Appellants pleaded "Not guilty," and thereupon issue was joined.

On the 9th of June, 1847, the cause came on for trial before Sir Thomas Erskine Perry, acting as Chief Justice; and the Counsel for the Appellants objected, that the Court had no jurisdiction to try the case, on the ground, that it was a matter concerning the revenue, and expressly excepted out of the jurisdiction of the Supreme Court, by the Statutes of the 37th Geo. III., [261] c. 142, and the 21st Geo. III., c. 70, sec. 8, and the 4th Geo. IV., c. 71; and by the Letters Patent which established the Court. To prove the nature of the claim, Mr. Hutchinson, an assistant Collector of land revenue, was called, who stated that arrears of revenue called pension, amounting to between 8 and 9 rupees, were due from the property in question, and that it was the practice to issue the warrant in the names of the parties, whose names were entered in the books of the collectorate. He also stated, that the name of Hurkissondass Hurgovundass had not been entered in those books in place of the name of Narrondass Tookaydass, and that the distress warrant was for the pension, due from the land in the occupation of Hurkissondass Hurgovundass. The learned Judge reserved the point, and gave interlocutory judgment in the nature of a verdict for the Plaintiff, assessing the damages at 250 rupees.

On the 12th of June, 1847, the Counsel for the Appellants moved on the leave reserved, and obtained a rule *nisi*, to show cause, why a verdict should not be entered for the Defendants, on the ground that the Supreme Court had no jurisdiction to entertain the action; and cause having been shown against this rule, Sir T. E. Perry, on the 22nd day of June, 1847, discharged it with costs. In delivering judgment, the learned Judge said that, at the trial of the cause, he thought the question to be left to the jury was, "whether the irregularity which had been confessedly committed by the Defendants in the execution of the warrant, was a mere slip, such as might happen to the most careful revenue officer in the exercise of his duties, or whether it was a substantial breach of the law, which entitled the Plaintiff to due compensation." [262] The learned Judge then proceeded thus:—"I have not the least doubt that the Legislature never intended to give the Company's servants in India, a total immunity from action in the Supreme Court for wrongs committed in the collection of the revenue, any more than the 21st Geo. III. [c. 70, s. 24] intended to give them an immunity for wrongs committed as magistrates. On perusing the whole of these Statutes, it appears to me clear, that the intention of the Legislature was, to erect a separate Court for the decision of the revenue claims, and to allow the Company's officers to collect the revenue, either in the mode in which they had been accustomed to do so heretofore, or according to the regulations to be laid down, from time to time, by the local Government.

"Ample powers are thus given for all governmental purposes, but it is so contrary to the spirit of British Legislation to suppose that unlimited or irresponsible powers were intended, as to make me require express words to show that such was the intention.

"It was said, however, that the subject would not be without remedy in any case of wrong, as the Regulation of 1827 establishes the Court of a Revenue Judge for the Island of Bombay, to which a complaint like the present might be made. But that Regulation did not receive legislative force till the year 1834, when it was confirmed by the Supreme Government; and even if it were in force from its commencement, still from 1797 till 1827, there was no tribunal, except the Supreme Court, open for the redress of such a grievance; and so, at the present moment, where is

a party in the Mofussil to sue for any illegal act committed in the collection of the revenue? All cases in this Presidency are, I believe, tried, in the first instance, [263] before a native Judge, but the idea of a Collector being tried before a Sudder Amin, for trespass, presents such a ludicrous aspect, that it never could be seriously entertained by any one acquainted with India.

"For all these reasons, I think that the jurisdiction of this Court has not been taken away, when the act complained of is not warranted by the usage of the country, or by the Company's Regulations; and as I do not see the slightest trace for any authority to demand the arrears of twenty years, or of two hundred years, as claimed by the Collector, of any person found in occupation of the land, I think the act in question was not authorized by usage and practice; neither does the Regulation of 1827 furnish any authority for the act. It was argued, for the Plaintiff, that the mode there pointed out for executing a distress had not been followed: but this is a mistake; the warrant there spoken of does not refer to a distress for land revenue, but to other matters comprised in a different chapter."

On the 27th of August, 1847, final judgment was signed in the cause; and, on the same day, the Appellants presented a petition to the Court, praying that they might have leave to appeal to Her Majesty in Council, against the judgment. On the 30th of that month, Counsel for the Appellants were heard in support of the petition; and, on the same day, Sir T. E. Perry made an order, that the motion should be refused, on the ground that the value of the matter in dispute was under the sum of 10,000 rupees,—“being the amount provided by the rules of the Privy Council.” The Appellants, thereupon, pre [264]-sented a petition to Her Majesty in Council, for leave to appeal from the judgment and order.

Mr. Wigram, Q.C., in support of the petition.

(Feb. 19, 1848 *) The present application is for leave to appeal. The sum involved is trivial, and greatly under the sum required by the Charter of Justice of Bombay, and the rules of the Privy Council; but the question of jurisdiction of the Supreme Court, in matters relating to the revenue, is one of very great importance, as affecting the revenue authorities in India.

Lord Langdale.—The question appears to be of very considerable importance; but you observe that the amount at issue is only a sum of 250 rupees, and for the purpose of deciding that, you put the Respondents to the expense of this appeal. The question is, whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of the whole country, the whole expense of this appeal should not be borne by them. However important it may be to establish the law, upon a question of this kind, it would be very wrong to put the party to so great expense in a case where so small amount is at issue. Even if the right of appeal were granted, you might be defeated in this way; the Respondent may say, that it would be much better to pay his 250 rupees, than to come here, and pay the expense of this prosecution.

By an Order in Council, bearing date the 2nd of [265] March, 1848, it was ordered by Her Majesty in Council, that the Appellants should have leave to appeal from the judgment and order, the East India Company undertaking to bring the appeal to a hearing before the Judicial Committee of the Privy Council, and to pay all costs, charges, and expenses, which might be incurred on behalf of the Respondent, as well as on behalf of the Appellants.

Hurkissondass Hurgovundass died shortly afterwards, without issue, but leaving a widow, named Juddow, who, by an order of the Supreme Court of Bombay, dated the 15th of January, 1849, was admitted to be the Respondent to this appeal.

The appeal now came on for hearing.

Mr. Wigram, Q.C., Mr. Lloyd, Q.C., and Mr. Forsyth, for the Appellants.—Two questions arise. First, whether the Supreme Court at Bombay is not precluded from entertaining and adjudicating upon such a case as this, which relates to the revenue of the Bombay Government; and, Secondly, whether the objection to the

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

jurisdiction of the Supreme Court is properly raised under the plea of "Not guilty."

I. The Supreme Court has no jurisdiction to try the case. It relates to a matter concerning the revenue of India, and is exempt from the jurisdiction of that Court. The Court of Judicature at Bombay was first created by the Statute, 37 Geo. III., c. 142, s. 9, which section empowered the Crown, by Charter or Letters Patent, under the Great Seal, to erect and establish a Court of Judicature at Bombay, and appoint a Recorder thereof; and the 11th section expressly provided, that such Court, so to be erected, should not "have or exercise any jurisdiction in any [266] matter concerning the revenue under the management of the Governor and Council respectively, either within or beyond the limits of the town, fort, or factory, or concerning any act done according to the usage and practice of the country, and the Regulations of the Governor and Council." In conformity with the provisions of this Act, the Court of the Recorder of Bombay was established by Letters Patent, which, in the words of the Statute, was expressly excluded from exercising any jurisdiction in any matter concerning the revenue.

In the year 1823, an Act of Parliament was passed, the 4th Geo. IV., c. 71, the seventh section of which provided that it should be lawful for His Majesty, George the Fourth, by Charter or Letters Patent, to establish a Supreme Court of Judicature at Bombay, which Court was to have the same Civil, Criminal, and Admiralty and Ecclesiastical Jurisdiction, and to be subject to the same limitations, restrictions, and control, as the Supreme Court of Judicature at Fort William in Bengal consisted of, or was invested with. By the ninth section, so much of the Charter and the Statute, 37 Geo. III., c. 142, as related to the Court of the Recorder of Bombay, was repealed. Now the Supreme Court of Judicature at Fort William, to which reference is made in this Statute, was established by Letters Patent of the 26th of March, 1774, under the Statute, 21 Geo. III., c. 70. By section 8 of that Statute, it was enacted, "that the said Supreme Court should not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the regulations of the Governor-General and Council." The Supreme Court at Bombay was established by [267] Letters Patent of the 8th of December, 1823, which contained this clause, "Nor shall the said Court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council of Bombay respectively, either within or beyond the limits of the said town, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the regulations of the Governor and Council of Bombay aforesaid." We submit, therefore, that it is conclusive, from the provisions of these Acts of Parliament and Letters Patent, establishing the Supreme Court at Bombay, that that Court has no jurisdiction whatever, in any manner connected with the collection of the revenue, of which the quit-rent, or pension, in question forms part; and this construction can work no injustice; for, if parties feel themselves aggrieved by any act done by, or under the authority of the Collector, they are not without a remedy; for by Regulation XIX. of 1827 it is provided, that the senior Magistrate of Police in the Island of Bombay shall be Revenue Judge at that Presidency, and the Collector and his assistants and native officers shall, in respect of acts done by them in their official capacities, be amenable by civil prosecution to the jurisdiction of the Revenue Judge, in whom alone is vested the jurisdiction to decide all suits on account of the land revenue. If, therefore, the Charter was silent on the subject, this Regulation, which has the force of law, would clearly exclude the jurisdiction of the Supreme Court.

Now it cannot be doubted but that this pension, or quit-rent, is to be considered as part of the general revenue of the State of India, and within the exception [268] pointed out by the Statute. The Court below has erred in treating it as distinct from land revenue. The Statute, 21 Geo. III., c. 70, s. 8, uses the term "revenue," and not "land revenue."

It is, however, said that there were irregularities committed by the officers, and that the warrant was objectionable. But if an act is done *bona fide*, even though there be an excess of jurisdiction in the Magistrate, or, as it is alleged in this case, an irregularity on the part of the officer collecting the revenue, both the magistrate

and officer are protected by Acts of Parliament. *Prestidge v. Woodman* (1 Bar. and Cr. 12), *Weller v. Toke* (9 East, 361), *Daniel v. Wilson* (5 Term. Rep. 1), *Hughes v. Buckland* (15 Mee. and Wels. 346), *Huggins v. Waydey* (15 Mee. and Wels. 357), *Parton v. Williams* (3 Barn. and Ald. 330), *Smith v. Wiltshire* (2 Brod. and Bing. 619).—[Dr. Lushington: Suppose a man was killed by the revenue officers, who would try the case? It is a different thing to protect an officer who might justify having committed such an act.] The Bombay Regulation III. of 1799 gives redress for all complaints against revenue officers, and the Regulation IV. of 1815, s. 5, makes further provisions to the same effect. In case of murder, the Supreme Court would have jurisdiction to try the case.—[Lord Campbell: Would the Revenue Judge have power to award damages for trespass?—Yes. Regulation XIX. of 1827 enacts that the Collector, for the purpose of collecting the land revenue, and his assistants, and native officers, shall, with respect to acts done by them in their official capacities, be amenable by civil prosecution to the jurisdiction of the Revenue Judge. The [269] same distinction exists in this country. An action of trespass against a revenue officer for his conduct in the execution of his office would be removed from the Common Pleas, or Queen's Bench, to the Court of Exchequer. *Anon* (1 Anst. 205), *Carthorne v. Campbell* (note, 1 Anst. 205), *Attorney-General v. Hallett* (15 Mee. and Wels. 97), *Siddon v. East* (1 Cr. and Jer. 12), *Attorney-General v. Kingston* (8 Mee. and Wels. 163). The Indian authorities are to the same effect; thus in *Woodupnarain Bhooyeah v. Harvey* (1 Bignell's Calcutta Reps. 77), the Supreme Court at Calcutta held that a bill of discovery in aid of proceedings in a Mofussil Court would not lie against a Collector of revenue, regarding a claim made by him in the execution of his office. It is true Sir E. H. East, in the case, *Budden Soorye v. D'Oyley* (East's Notes of Cases, 2 Morley's Digest, 172), sustained an action of trover against a Collector of revenue, but the report of the case is doubtful.

II. The next point really is only a question of pleading, purely of a technical character; it is whether it was open to us at the trial to take the objection to the jurisdiction of the Court under the plea of "Not guilty?" The Court had no jurisdiction to try the case, and as soon as it had judicial notice of that fact, as by the Advocate-General objecting at the trial that the cause of action was *ultra vires*, it was the duty of the Judge to have stayed the proceedings. The Court could either have discharged the jury or have refused to enter up judgment upon the verdict. In *Egerton v. Furseman* (1 Car. and Pay. 613), the action was brought against a stakeholder, on a dog fight, to try which dog had won the battle. The action was brought before Chief Justice Abbott, [270] with perfectly regular pleas, both parties being anxious to have the case tried by a jury; but he said, "I certainly shall not try the case," and refused to hear it, as the time of the Court would be wasted in trying such a case; and there are cases in which Judges in a similar way have refused to let such frivolous cases go to a jury. If the matter was out of the jurisdiction of the Court, the judgment is void, being *coram non judice*. But the plea of "Not guilty" was sufficient, for as soon as it appeared that the Court had no jurisdiction, it was *coram non judice*. *Hilliard v. Webster* (6 Man. and Gr. 983), *Tinnswood v. Pattison* (3 Com. Ben. 243), *Parker v. Elding* (1 East, 352), *The King v. Johnson* (6 East, 583), *Capes v. Jones* (2 Com. Ben. 911), Comyn's Dig., Tit. "Courts," (P) 15. Comyn's Dig., Tit. "Prerogative," (D) 28. Tidd's Practice, p. 960, shows the manner in which you can take advantage at the trial, of a Statute excluding a Court from entertaining an action, and that in this mode of raising the objection to the jurisdiction of the Court, we were perfectly regular.

Mr. Turner, Q.C., Mr. Leith, and Sir J. Bailey, for the Respondent.—I. The first thing to be considered is the jurisdiction of the Supreme Court at Bombay, to entertain this action: we admit the Appellant's argument, that the Court at Bombay is to be assimilated in all respects to the Supreme Court at Calcutta; for whatever powers or immunities were vested in the Calcutta Court, are conferred upon the Supreme Court at Bombay, by the Statute 4 Geo. IV., c. 71. It will be necessary then to see what has been excepted out of [271] the jurisdiction of the Supreme Court at Calcutta. The Calcutta Court was established by the Statute, 13 Geo. III., c. 63, and was a Court of general jurisdiction. The Court exercised jurisdiction over all persons, natives or others, within the local limits of the Mahratta ditch. It was doubtful whether, under this Statute, the Supreme Court had jurisdiction in revenue

cases, and to settle this doubt, the Statute, 21 Geo. III., c. 70, was passed: and by the 8th section of that Statute, cases of "revenue" are expressly excepted out of the jurisdiction of the Supreme Court. It is necessary, to arrive at the proper meaning of the word "revenue," used in this Statute, to trace the origin of this tax. The East India Company's rights at the time of the passing of this Act of Parliament, were dependent upon two distinct titles: the one was by purchase of lands in Calcutta: quit-rents payable to the Company *qua* landlords, and *qua* the Government, the other the revenue title, which is quite distinct. That, in the first instance, proceeded in Bengal, under the grant of the Dewanny, first from the Nawab, and confirmed by Shah Allah, in the year 1756; that is the "revenue" which is spoken of in this Statute, the "revenue" of the Provinces of Bengal, Bahar, and Orissa. It has been called "revenue" or impost, in contradistinction to taxes, and is founded upon the right of the Mahomedan Government, as conquerors, and was adopted by the East India Company when they came in under the grant of the Dewanny. The question then is narrowed to this; is the term "revenue" used in this Act of Parliament to be construed as extending to all the revenue of the State, or only to that particular portion, namely, "land revenue." At Calcutta, the Legislature had no power [272] within its limits to raise any taxes, and a Special Act of Parliament was passed to enable them to do so. We submit that the term "revenue" used in the Statute, 21 Geo. III., c. 70, sec. 8, does not include "quit-rent" or ground-rents in the Island of Bombay, and that the Statute only applies to Bengal, Bahar, and Orissa. The "quit-rent," called a pension, in respect of which the trespasses complained of were committed, is not a "revenue" within the meaning of the 21 Geo. III., c. 70, sec. 8. The argument of the Appellants in treating this as "revenue" is not correct. The nature of this "quit-rent" is described in an agreement entered into between the Portuguese inhabitants of the Island of Bombay and the East India Company: it was to be paid in lieu of lands which were, in the first instance, taken possession of by the East India Company, on coming into possession of the Island under the Charter of Charles the Second. It is clear, therefore, that this rent comes within the category of rent payable by a tenant to his landlord, a perpetual ground-rent incapable of being raised; and not of land "revenue." The Regulation XIX. of 1827, so much relied upon by the Appellants, as excluding the Supreme Court's jurisdiction, does not apply to this "quit-rent," it relates only to "land revenue." The seventh section of that Regulation, clearly establishes this position: it enacts "that the Revenue Judge shall decide all suits brought by him by contributors to the land revenue at the Presidency against the Collector, or any person of his establishment, on account of land revenue." It is clear from this, that the Revenue Judge had no jurisdiction over other suits. The construction put by the Court below upon the Statute, 21 Geo. III., c. 70, and the Regulation XIX. of 1827, [273] was, that even if they applied so as to take away the jurisdiction of the Supreme Court, still, that an action would lie in the Supreme Court against any one who was liable to its jurisdiction generally, for any outrage committed in the collection of the revenue; and this opinion of the Court is in conformity with the case of *Doe dem. Pearcemony Dossee v. Bissonauth Bonnerjee* (1 Bignell's Calcutta Reps. 1), where it was held that the Supreme Court of Calcutta was not precluded by the Statute, 21 Geo. III., c. 70, from exercising jurisdiction in a revenue case; and also by Sir E. H. East, in the case of *Budden Soorye v. O'Donley* (East's Notes of Cases, 2 Morley's Digest, 172), and by this Court, in *Calder v. Halket* (3 Moore's P.C. Cases, 28).

II. The defence to the want of jurisdiction of the Supreme Court, could not be put in issue under the plea of "Not guilty." The Defendants ought to have pleaded the want of jurisdiction specially. The Supreme Court at Bombay, being the Court of highest jurisdiction, and having a general jurisdiction within the town of Bombay, could not be ousted of that jurisdiction, over any matter of complaint instituted therein, except by a plea to the jurisdiction, showing positively and affirmatively, what Court, other than the Supreme Court, had jurisdiction over such matter of complaint. How was the Court to arrive at the fact, that the question at issue was a matter of revenue, unless it was specially pleaded? The practice of the Indian Courts has been to plead, specially, in cases similar to this. 2 Smout's Rules and Orders of the Supreme Court at Calcutta, p. 65. Under the New Rules of the Court at Bombay, in an action of trespass, no defence, which confesses and

avoids, can be given in evidence, [274] under the plea of "Not guilty." All matters of confession and avoidance may be pleaded specially. That was the course pursued in *Calder v. Halket* (3 Moore's P.C. Cases, 28), which was an action of trespass against a Judge of the Foujdarry Court in the Mofussil: the Defendant justified himself under this very Act, the 21st Geo. III., c. 70, s. 24, but this Court held, that he was not justified by it. So in *Taafe v. Lord Downes* (note, 3 Moore's P.C. Cases, 36), an action was brought for trespass and false imprisonment, against the Chief Justice; and, although the Defendant had protection, by law, being a judicial officer, he pleaded specially, first, the general issue; secondly, not guilty, as to part; and as to the residue, justification, that the acts done by him, were done in the exercise of his judicial functions. Again, in *Mostyn v. Fabrigas* (1 Cowp. 172), Lord Mansfield said, that "nothing was more clear, than that if the Court has not a general jurisdiction of the subject-matter, the Defendant must plead to it." The cases cited by the Appellants, of its being patent upon the face of the proceedings, that the Court had no jurisdiction, do not apply. How is the Court to ascertain whether it is a class of cases which is within the general jurisdiction of the Court, or within the particular exception to that jurisdiction, until the Court tries the question? But the Defendants, by pleading "Not guilty," admitted the jurisdiction of the Supreme Court, and waived all objection thereto, and it was not competent to take the objection at the trial.

Lord Campbell (Feb. 22, 1850), after stating the facts of the case, proceeded as follows:—Two questions arise: First, whether the objection [275] to the jurisdiction of the Court could be taken, under the plea of "Not guilty;" and, Secondly, whether the objection be well founded.

On the first question, we have had some difficulty, and my own opinion has varied during the argument. It appears from the Books of Practice cited, that it has been usual to plead such a defence in the Indian Courts, and, certainly, the convenient course would be to put it upon the record. The issue joined, seems simply to be, whether the alleged trespasses were committed by the Defendants, and it is urged, that the necessity for a special plea is rendered more urgent by the "New Rules" introduced at Bombay, which provide, that in actions of trespass, under the plea of "Not guilty," no defence shall be given in evidence which confesses and avoids.

However, looking at the Statutes and Charters under which this Court is constituted, and to the cases in point, which have been decided in Westminster Hall, we have come to the conclusion, that the Court, under the plea of "Not guilty," was bound to admit the objection.

By an Act of Parliament, the 37th Geo. III., c. 142, s. 9, His Majesty was empowered, by Charter, or Letters Patent, under the Great Seal, to erect and establish a Court of Judicature at Bombay; but the 11th section of that Act expressly decided that such Court, so to be erected, "should not have or exercise any jurisdiction in any matter concerning the revenue under the management of the Governor and Council respectively, either within or beyond the limits of the town, fort, or factory of Bombay, or concerning any act done according to the usage and practice of the country, and the Regulations of the Governor and Council."

[276] In conformity with the provisions of this Act, a Court of Judicature, styled, "The Court of the Recorder of Bombay," was established by Letters Patent under the Great Seal of Great Britain, bearing date the 20th day of February, 1798. These Letters Patent contained a clause, providing that "the said Court should not have, or exercise, any jurisdiction, in any matter concerning the revenue, under the management of the said Governor and Council respectively, either within or beyond the limits of the said town and Island of Bombay, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the Regulations of the Governor and Council."

Subsequently, in the year 1823, an Act of Parliament was passed, the 4th Geo. IV., c. 71, the 7th section of which provided, "that it should be lawful for His late Majesty, King George the Fourth, by Charter, or Letters Patent, under the Great Seal of Great Britain, to erect and establish a Supreme Court of Judicature at Bombay, aforesaid, to consist of such and the like number of persons, to be named, from time to time, by His Majesty, his heirs, and successors, with full power to

exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and control, within the said town and Island of Bombay, and the limits thereof, and the territories subordinate thereto, and within the territories which now are, or hereafter may be, subject to, or dependent upon, the said government of Bombay, as the said Supreme [277] Court of Judicature in Bengal, by virtue of any law now in force and unrepealed, doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to, or dependent on, the Government thereof."

And by the 9th section of the same Act, it was provided, "That so much of the said Charter, granted by His said late Majesty, King George the Third, for erecting the Court of the Recorder of Bombay, as relates to the appointment of such Recorder, and the erecting of such Courts of Judicature at Bombay, in case a new Charter shall be granted by His Majesty, his heirs, or successors, and shall be openly published at Bombay, from and immediately after such publication shall cease and determine, and be absolutely void, to all intents and purposes whatsoever, and all powers and authorities granted by the said Act of the 37th year of His said late Majesty, King George the Third, to the said Court of the Recorder at Bombay, shall cease and determine, and be no longer exercised by the Supreme Court of Judicature to be erected in virtue of this Act, in the manner and to the extent hereinbefore directed."

The Supreme Court of Judicature at Fort William, in Bengal, to which reference is made in the 7th section of the last-recited Act, was established by Letters Patent, under the Great Seal of Great Britain, bearing date the 26th day of March, 1774; and by an Act of Parliament passed in the year 1791, the 31st Geo. III., c. 70, s. 8, it was enacted, "That the said Supreme Court shall not have, or exercise, any jurisdiction, in any manner concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the Regulations of the Governor-General and Coun-[278]-cil." Therefore, that clearly now regulates the existing Court of Bombay.

The Supreme Court of Judicature at Bombay was established by Letters Patent, under the Great Seal of Great Britain, bearing date the 8th day of December, 1823; and the Letters Patent contain the following clause, "Nor shall the said Court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council of Bombay respectively, either within or beyond the limits of the said town, or the forts and factories subordinate thereto, or concerning any act done, according to the usage of the country, or the Regulations of the Governor and Council of Bombay aforesaid."

Therefore, by Statutes and Charters, of which the Judges of the Supreme Court of Bombay are bound to take judicial notice, they are forbidden to exercise any jurisdiction in any matters concerning the revenue under the management of the Governor and Council, or any act done according to the Regulations of the Governor and Council respecting the collection of the revenue: any such matter arising before them was declared to be *coram non judice*.

We are not prepared to say, how it might have been if, when the Plaintiff's case was closed, nothing more had appeared, than that the Defendants entered his house at Bombay, and carried away his lamp.

Possibly, under the plea of "Not guilty," the Defendants might not have been at liberty to adduce evidence which went in confession and avoidance, and the facts ousting the Court of its jurisdiction might never have been judicially before the Judge. But the Plaintiff, himself, proved the controversy respecting his liability for the arrears of the quit-rent, the demand made upon him for the arrears, and the warrant [279] to levy them by distress: therefore, supposing, upon these facts, the Court had no jurisdiction to try the cause, was the Court to try it, and give judgment for the Plaintiff, because the Defendants had omitted to plead specially?

This bears no resemblance to the cases where there is a plea in abatement to the jurisdiction of the Court, which must point out another Court before which the matter is cognizable. If the defence has been put upon the record, it would have

been in the form of a plea in bar; and if well founded, it would have been sufficient, without pointing out any other Court in which the suit might be instituted.

If the Court is forbidden, by law, to try this cause, neither the "New Rules," nor any omission of the Defendants, would give the Court jurisdiction over it. The facts ousting the jurisdiction having been brought judicially to the notice of the Judge, and with perfect regularity, he usurps a jurisdiction which does not belong to him, if he proceeds and gives judgment for the Plaintiff. Therefore, these facts coming out, for the first time, on the trial of an issue, although they may seem irrelevant to that issue, he must have power, by directing a nonsuit, or by some other means, to stop the trial; and, accordingly, in some Statutes, which take away the jurisdiction of Courts in particular cases, there is a power expressly given to nonsuit, and if the jurisdiction is clearly taken away by the facts proved, a similar power may be here implied.

The cases cited to us, of Judges refusing to proceed in the trial of ludicrous wagers, do not appear to be in point, for they are not founded on any rule of law, but upon discretion, which has been differently exercised by different Judges.

However, the case of *Parker v. Elding* (1 East. 352) [280] appears to us a strong authority in favour of the Defendants. That was an action of assumpsit for work and labour, with a plea of non-assumpsit only. The Plaintiff proved the existence of his demand, to the amount of £1 18s., and no more. The debt arose in the Isle of Ely, for which, by a public Act of Parliament, a Court of Requests was established, with a clause, "that no action for any debt, not amounting to 40s., and recoverable by that Act, in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any of the King's Courts, at Westminster." The Defendant resided in the Isle of Ely, where the debt was contracted. The objection of want of jurisdiction being made by the Defendant, the Plaintiff answered that it could not be taken under the plea of non-assumpsit, and that upon the issue joined, he was clearly entitled to a verdict. But Grose, Justice, who tried the cause, directed a verdict to be entered for the Defendant, giving leave to the Plaintiff to move to enter a verdict for the £1 18s. Such a motion being made, Lord Kenyon said, "here is a general law, of which we are bound to take notice, which says, that no action shall be brought against any person residing within the jurisdiction, for any debt not amounting to 40s., and recoverable by virtue of that Act. The demand, in question, is of that sort. How then can we say, that the Plaintiff shall recover it against the positive direction of the Act? This being directed to be taken as a general Act, is part of the general Law of the land." The other Judges concurred, and a rule to show cause was refused.

In another case, of *Taylor v. Blair* (3 Term Rep. 452), where, by a similar Court of Requests' Act, a power was expressly given, on an action being brought [281] in the Superior Courts, "to plead the Act in bar," and there having, under the plea of non-assumpsit, been a verdict for less than 40s., Lord Kenyon, in refusing leave, after verdict, to enter a suggestion, observed, "the Defendant might have pleaded the Statute, or, perhaps, if the objection had been made at the trial, the Plaintiff would have been nonsuited."

Less reliance is to be placed upon the case of *Hilliard v. Webster* (6 Man. and Gr. 983), as there, the Statute specifically pointed out the duty of the Judge on the want of jurisdiction appearing before him. An Act for regulating the proceedings of a local Court, enacted, "that in case any personal action, for the recovery of any debt, shall be commenced out of the jurisdiction, and it shall appear to the Judge of the Court where such action shall be tried, that the debt to be recovered in such action does not amount to 40s., and the Defendant shall prove that, at the time of commencing such action, he was resident within the jurisdiction, then, unless the Judge shall certify that there was reasonable ground for bringing the action for more than 40s., such Plaintiff shall not recover, but be non-suited in such action." Assumpsit being brought in a superior Court, and non-assumpsit only pleaded, it appearing that the debt to be recovered was under 40s., and that the Defendant was resident within the jurisdiction of the local Court, a non-suit was entered, which the Court of Common Pleas refused to disturb. The Plaintiff's Counsel then strenuously contended that, under the "New Rules," a special plea was necessary, to let in the defence; but Maule, Justice, said, that upon such a matter the new rules made no difference.

[282] We are, therefore, of opinion, that if the Supreme Court of Bombay had not jurisdiction over this cause of action, the Judge ought either to have directed a nonsuit, or a verdict to be entered for the Defendants.

Upon the second question we have not been able to entertain any doubt. Whether the Plaintiff might have redress before any other tribunal, can only be material in a doubtful construction of the Statutes and Charters establishing the Court in which the action was brought. If, by these Statutes and Charters, its jurisdiction in this action is clearly taken away, our decision could not be influenced by the consideration, that the Plaintiff is left without remedy.

We are of opinion, that the "quit-rent" being part of the revenue of the East India Company, the cause of action is a matter concerning the revenue under the management of the Governor and Council of Bombay, and concerning an act done according to the Regulations of the Governor and Council of Bombay. The "quit-rent" goes into the treasury of the East India Company, and the Defendants *bona fide* professed to act under Regulation XIX. of the Regulations made by the Governor and Council of Bombay, giving power to the Collector to distrain for all arrears of rent due to the Company. For this purpose no distinction can be taken between this "quit-rent" and the rent due from the Rajah or Zemindar, in respect of the land which they occupy and cultivate.

The point, therefore, is, whether the exception of jurisdiction only arises where the Defendants have acted strictly according to the usage and practice of the country, and the Regulations of the Governor and Council. But upon this supposition the proviso is [283] wholly nugatory; for if the Supreme Court is to inquire whether the Defendants in this matter concerning the public revenue were right in the demand made, and to decide in their favour only if they acted in entire conformity to the Regulations of the Governor and Council of Bombay, they would equally be entitled to succeed, if the Statutes and the Charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act. In this case it may well be that the warrant against the goods of Tookaydass did not authorize the taking the goods of Hurgovundass, or even that Hurgovundass might not be liable for the arrears of "quit-rent" which accrued before he became owner of the house. Still the Collector was evidently of opinion, that a distress might be made for the whole of the arrears due, and that it was sufficient to introduce into the warrant the name of Tookaydass, in whose name the house continued to be registered. The other Defendant never could have doubted the sufficiency of the warrant. If Indian revenue-officers have fallen into a mistake, or without bad faith have been guilty of an excess in executing the duties of their office, the object of the Legislature has been, that they should not be liable to be sued in a civil action before the Supreme Courts. Liability to be prosecuted criminally, stands upon a totally different foundation.

[284] We must view the question of the jurisdiction of the Supreme Courts of India in cases of revenue, upon the supposition that there are peculiar Courts in which these questions are to be discussed and decided. In England, if such an action were brought in any other Court than the Court of Exchequer, it would be a mere matter of course to remove it into that Court, and to prevent any other Court taking cognizance of it. Thus in the 7th year of James the First, process issued out of the Exchequer to levy an amercement of £10; the bailiff levied the amercement. J. S., the person on whom it was levied, brought trespass, and it was said by the Barons, and ordered, that if J. S. will bring an action for distraining of this amercement, be it lawfully imposed or not, yet J. S. shall be restrained to sue in any other Court but in this, and here he shall sue in the office of Pleas, for the bailiff levied it as an officer of this Court. Lane's Exchequer Reps. 55. The same doctrine is to be found in *Cawthorne v. Campbell* (1 Anst. 205), and I can testify, that I myself, while I had the honour of being Attorney-General to the Crown, in several instances stopped actions commenced in the Courts of King's Bench and Common Pleas by an application to the Court of Exchequer, upon an

allegation, that the King's revenue came in question in the subject to be discussed; without attempting to show that the parties impleaded had acted lawful, and had a good defence.

We are, therefore, bound to differ from the Judge below, who says, "that the jurisdiction of his Court has not been taken away, when the act complained of is not warranted by the country, or by the Company's Regulations." If it concerned the revenue, or was a matter concerning an act *bona fide* believed to be [285] done according to the Regulations of the Governor and Council of Bombay, his jurisdiction was gone, although *prima facie* it appeared to be a trespass over which his jurisdiction might be properly exercised.

We hope that if the Plaintiff was injured, he might have had redress by a different proceeding; but at any rate, we are of opinion, that he was not entitled to redress by suing in the Supreme Court at Bombay, and we shall humbly advise Her Majesty that the judgment appealed against should be reversed.

The effect of their Lordships' decision will be, to make the rule *nisi*, of the 14th of June, 1847, absolute.

[Mews' Dig. tit. COURT, D. INFERIOR COURTS, 1. *General Principle*; tit. PRACTICE, A., I. NOTICE OF ACTION, b. *To whom given*, 2. *Acts done in pursuance of Statute XXV.*, Pleading, c. *Defence*. S.C. 4 Moo. Ind. App. 353. On point (i.) as to acting in pursuance of statute (6 Moo. P.C. 283), distinguished in *Sinclair v. Broughton*, 1882, L.R. 9 Ind. App. at p. 172; and see *Calder v. Halket*, 1839-40, 3 Moo. P.C. 28; 2 Moo. Ind. App. 293; (ii.) as to special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125; and cf. *Castrique v. Buttigieg*, 1853-55, 10 Moo. P.C. 94; *In re Sibnarain Ghose*, 1853, 8 Moo. P.C. 276; *Sibnarain Ghose v. Hullothar Doss*, 1854, 9 Moo. P.C. 354; *Kerakoose v. Brooks*, 1860, 14 Moo. P.C. 452; *Brown v. MacLaughlan*, 1870, 7 Moo. P.C. (N.S.) 306; *Bahoo Lekraj Roy v. Kanhya Singh*, 1874, L.R. 1 Ind. App. 317; *Banarsi Parshad v. Kashi Krishna Narain* (1900), L.R. 28 Ind. App. 11; (iii.) as to exclusion of revenue cases from original jurisdiction of Indian High Courts, see Ilbert, *Government of India*, pp. 243, 249. The High Court of Bombay is now constituted by letters patent of Dec. 28, 1865 (Stat. R. and O. Rev. iv., p. 108), made under the Indian High Courts Act, 1861 (24 and 25 Vict. c. 104.)]

[286] ON APPEAL FROM THE SUPREME COURT OF CEYLON.

PHILIP ANSTRUTHER, PHILIP WATSON BRAYBROOKE, SAMUEL BRAYBROOKE, and THOMAS LILLIE,—*Appellants*; SEPTIMUS ARABIN,—*Respondent* * [Feb. 19 and 21, 1848].

The Appellants brought an action of ejectment in the island of Ceylon, for lands then in the possession of the Respondent, and for mesne profits. The Respondent had filed a Bill in the Court of Chancery, in England, to establish a contract of sale of the same lands. From the insufficiency of the pleadings in the action, at Ceylon, the real question between the parties, namely, whether an absolute contract had been executed according to the law of Ceylon, was not put in issue, or brought before that Court. This omission arose principally, if not entirely, from the conduct of the Respondent. A decree was made by the District Court of Kandy in favour of the Appellants; but upon an application to the Supreme Court, by the Respondent, stating the omission of the facts necessary to enable the Court to have decided the question at issue, and for leave to amend the pleadings, the Court set aside the Decree of the District Court, granted a new trial, with

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

leave to amend the pleadings, and to enter into further evidence. Upon appeal from this order, the Judicial Committee considered that the conduct of the Respondent had been such, that a new trial ought not to have been granted, and that the same point ought not to be litigated in England and Ceylon; and considering also the difficulty of the parties obtaining effectual relief in England, put the Respondent upon terms of consenting to the dismissal of his Bill in England, with costs, and to pay the costs incurred in the Court below, when they would sustain the order appealed from; or, in the alternative, that their Lordships would reverse the Order, granting the new trial, and put the Appellants in possession of the lands, leaving the Supreme Court in Ceylon, to ascertain the amount of the mesne profits.

This was an appeal, brought by special leave, from an order of the Supreme Court of the Island of Ceylon, [287] bearing date the 8th of October, 1846, in an action of ejectment brought by the Appellants, as the administrators of the estate of the late Right Honorable James Alexander Stewart Mackenzie, against the Respondent, to recover several tracts of land in the Island of Ceylon, called the "Horogalle estate," of which the Respondent had been let into possession by the Honorable James Alexander Stewart Mackenzie; together with damages, in the nature of mesne profits. By this Order, a final judgment, given in favour of the Appellants, by the district Court of Kandy, was set aside, and the cause remanded to the District Court for a further hearing, upon further evidence on both sides, with liberty to each party to amend their pleadings.

The facts and circumstances of the case, and the nature of the proceedings, are fully set forth in the Judgment.

The appeal was argued by Mr. M. D. Hill, Q.C., Mr. Bethell, Q.C., and Mr. McChristie, for the Appellants; and Sir F. Thesiger, Q.C., Sir Fitzroy Kelly, Q.C., Mr. E. J. Lloyd, and Mr. Wilde, for the Respondent.

In the course of the argument, the following authorities were referred to: *Frontin v. Small* (2 Lord Ray. 1418), *Combe's case* (5 Co. Rep. 75).

[288] Lord Langdale (Feb. 29, 1849).—The Appellants, who were Plaintiffs in the action (in which the Judgment, now appealed from, was given), state themselves to be administrators of the estate of the late Mr. James Alexander Stewart Mackenzie; and their libel, which was filed on the 15th of April, 1846, alleged that Her Majesty had granted certain tracts of land in Ceylon to Mr. Mackenzie, being grants by the Crown, of the land in question, who entered into possession thereof; and that he being so possessed thereof, Frederick Loch, acting as the agent of the Defendant, Mr. Arabin, on the 3rd day of April, 1843, forcibly entered into possession of the premises, ejected Arabin therefrom, and refused to deliver them back, to the damage of the Plaintiff, of £10,000. Whereupon the suit was brought, and the Plaintiffs prayed a declaration, that the lands belonged to the estate of Mr. Mackenzie; that the Defendant might be ejected therefrom; that the Plaintiffs might be put in possession thereof; and that the Defendant might be adjudged to pay the Plaintiff the sum of £10,000, and the costs of suit.

To this libel the Defendant put in an answer, and thereby, after denying the title of the Plaintiffs, and of Mr. Mackenzie, and also that Loch had ejected Mrs. Mackenzie, alleged that Loch had purchased the premises from one James Steuart, who was in possession thereof, for £8000, of which the sum of £2000 was to be deposited in the Bank of Ceylon, in the joint names of James Steuart, and two of the Plaintiffs, and the residue of the £8000 was to be paid on a good title being shown, and a proper conveyance being made. The answer further states, that the £2000 was deposited as agreed upon, and that James Steuart, in part performance of the agreement, delivered pos[289]-session of the premises to Loch, as agent of the Defendant, who had ever since continued in the possession and occupation thereof, and expended money on the faith of the agreement.

Replication to the answer was filed on the 7th of May, and issue was joined on the 14th.

On the 18th of May, the Defendant, by his agent, Mr. Loch, and on his affidavit, that Mrs. Mackenzie (residing in England), Mr. James Steuart (on his

voyage to England), and James Elphinstone Dalrymple (residing in Scotland), were material and necessary witnesses for the Defendant; and that the Plaintiff, Philip Anstruther, was, as Mr. Loch believed, acquainted with facts respecting which Mr. Loch believed it would be for the interest of the Defendant, and conducive to the interest of justice, that he should be examined; the Defendant obtained a rule for the Plaintiffs to show cause why a Commission, on the part of the Defendant, should not issue for the examination of witnesses in England and Scotland, and for the examination of the Plaintiff, Mr. Anstruther. And that the trial of the cause might be stayed, until the return of the Commission.

In another affidavit made by Mr. Loch, in support of the rule for a Commission, he distinctly stated, that the application was not made for the purpose of delay.

On the 26th of May, an affidavit, in opposition to the rule, was made by Mr. M'Christie, and, thereby, the nature of the contest between the parties, which did not appear in the pleadings, was shown: it was stated that James Steuart, was one of the agents of Mr. Mackenzie in Ceylon, and that, on the 3rd of April, 1843, he contracted with Mr. Loch, as the agent of Arabin, that the estates in question should be sold to [290] Arabin, if Mr. Mackenzie, upon being informed of the terms of the proposed sale, should agree thereto, and transmit to Steuart a power of attorney, authorizing him to sell and convey the property to Arabin; that, in the interim, Loch was to be let into possession, but his continuing in possession was to depend on the approval or disapproval of the proposed sale by Mr. Mackenzie. That Mr. Mackenzie, on being informed of the proposed sale, disapproved thereof, and, by James Steuart, his agent, required Loch to deliver back the possession, which he refused to do, and Arabin caused a Bill to be filed in the Court of Chancery, in England, against Mrs. Mackenzie, widow of Mr. Mackenzie, who was then dead, stating, that in March, 1843, Mr. Mackenzie claimed to be entitled to the estate, as absolute owner thereof, and, by his agents, cultivated the same, and gave to James Steuart full power to sell the same. That Loch, as agent of the Respondent, agreed with James Steuart, as agent of Mr. Mackenzie, to purchase the same for £8000, which Mrs. Mackenzie, since his death, had become entitled to receive, but that she refused to perform the agreement, required the Respondent to give up possession, and, on his refusing to do so, threatened to compel him, by legal proceedings in the Island of Ceylon, and praying for a specific performance of the agreement, and for an injunction to restrain all proceedings in the Island, to recover possession of the estate, or for recovering mesne profits.

Mr. Mackenzie answered the Bill. No injunction was ever obtained, and, in May, 1845, the Appellants brought their action in the District Court of Kandy, against Loch and Browning, who were in possession as agents of the Respondent, to turn them out of pos-[291]-session, and they, by their answer, stated, that James Steuart, as the agent of the Plaintiffs, i.e. of the representatives of Mr. Mackenzie, had delivered the possession to Loch, as the agent of Arabin, who claimed to be the owner by virtue of an alleged sale thereof to his agent Loch, and Browning and Loch objected to the prosecution of the suit against them as agents.

The Plaintiffs then expressed their willingness to allow Arabin to come in and join in the defence, and after some discussion, and a proposal to bring a fresh action against Arabin, the Chief Justice declared, that unless Loch would satisfy the Court that he had power to appear and defend the action for Arabin, and would undertake to appear and put in an answer in eight days, the proceedings in the action against Loch and Browning must go on; and thereupon, on the 7th of April, 1846, by consent of both parties, it was adjudged that the suit should lie in abeyance, until the Plaintiffs should have commenced, prosecuted, and brought to a determination, an action against Arabin, for the subject-matter of the present suit. And upon the determination of the new suit, the Plaintiffs should be at liberty to proceed or not as they might be advised with the then present suit; Loch undertaking, by himself and his counsel, to appear and answer in the new suit for Arabin, and, as his agent, with power to defend the same. The Defendant, in the new suit, to answer in eight days (unless further time were obtained upon cause shown) after service of the summons upon Loch.

On the 9th of April, only two days after the date of this Order, the Plaintiffs' Proctor informed Loch that James Steuart was, on the 15th, about to [292] quit

Colombo for England, and stating that if Loch desired to examine him touching the matters in question, the Plaintiffs would not object to his examination *de bene esse*, but that, if the Defendant desired to examine him after he left the Island, the Plaintiffs would absolutely object to any delay on the ground of his absence. This offer was not accepted: it was stated that the next three days were public holidays; and that, as the order given to Arabin, eight days, to file his answer after service on Loch of the libel in the new suit, and as the defence (if any) which Loch might be advised to offer, had not been definitively determined on, it was not thought advisable to examine Steuart till after issue joined, even if there were time for so doing before the 15th. Mr. McChristie then set forth an affidavit made by James Steuart before his departure from Colombo for England, in which it was stated, that the contract entered into by Steuart with Loch was purely conditional; and that the completion thereof was to depend on Mr. Mackenzie sending to Steuart the requisite power to make a transfer of the land, and that if he refused to send such power, the arrangement between Steuart and Loch should be void. That the conditional agreement was never confirmed, and that Steuart informed Loch of the refusals made by Mr. Mackenzie, and, after his death, by Mrs. Mackenzie, to confirm the same. These matters were set forth in great detail and with letters, which, if true (which we see no reason to doubt), show a manifest intention on the part of the Defendant to struggle for delay.

It was upon these affidavits of Mr. Loch and Mr. McChristie, that the acting district Judge of Kandy ordered that the Defendant's motion for a Commission to [293] examine witnesses in England should be refused, and made another order on the motion of the Plaintiffs, that the trial of the cause should be fixed for Monday, the 22nd of June.

The Defendants appealed from these Orders to the Supreme Court of the Island of Ceylon.

On the hearing of the appeal, it was plain, and so observed by the Court, that the pleadings did not sufficiently disclose the facts of the case; both sides appeared to have endeavoured to state as little as they possibly could of the real facts, whilst the Court was even left to be informed by the affidavit of Mr. McChristie, and the statements at the bar, that the Defendant was let into possession pending a negociation for purchase from Mr. Mackenzie. The affidavits of Mr. Loch were considered to be insufficient, and, on the 13th of June, 1846, it was ordered, that the order of the district Court of Kandy of the 26th of May, rejecting the Defendant's application for a Commission to examine witnesses, should be affirmed, except as to costs; but the pleadings were remanded back to the District Court with liberty to the parties to amend their pleadings, within such time, and on such terms, as the District Court might, on motion, appoint, and to examine witnesses in the Island; and the Defendant might renew his motion, or make such further application for a Commission as he might thereon be advised to be necessary for his defence, and he might be entitled to, on further affidavits, stating, generally, the points to which the witnesses were to testify, or the first Plaintiff was to be examined, so that the Court might be enabled to judge from the pleadings and such affidavits whether the witnesses were, or were not, material, and whether the examination of the first Plaintiff would conduce to the purposes of justice. The order fixing the trial for [294] the 22nd instant was set aside, and both parties were adjudged to pay their own costs.

Both parties were now informed of the opinion of the Supreme Court, that the pleadings did not sufficiently disclose the facts of the case, and that the pleadings and affidavits did not enable the Court to judge whether the witnesses which the Defendant proposed to examine, were, or were not, material; and the opportunity to amend, and also to apply for time, was given.

If the Plaintiffs had thought proper to amend, they might, perhaps, have saved themselves some time and trouble, but they were under no obligation to do so, and, with a view to urge the Defendant forward, they set down the cause again for hearing, and, on the 6th of July, obtained a rule *nisi* for fixing the hearing (which in the ordinary course would have stood for the 4th of November) for the 31st of July. The rule was argued on the 10th of July. It was alleged on the part of the Defendant, who, however, filed no affidavit on the occasion, that there would

not be sufficient time for the parties to amend their pleading, if so disposed, or for the Defendant to repeat his motion for a Commission to examine witnesses in England. The Court considered that there had been ample time to amend the pleadings, if the Defendant considered it necessary, and had ample time to do so before the 31st; and, also, that the Defendant had sufficient time to repeat his motion for a Commission, and if that should be granted the case would necessarily be postponed. The rule was made absolute.

The Defendant appealed, and, before the appeal was heard, an affidavit was filed by the Defendants' Proctor in the District Court, stating some additional reasons for examining James Stuart and Mr. Mackenzie. The appeal was called on to be heard in the [295] Supreme Court on the 25th of July last, but, at the instance of the Defendant, was postponed till the 28th, when it was dismissed. This attempt to prevent the trial being fixed for the 31st of July, was made at a time when no application had been made to amend the pleadings.

The Defendant made no direct application for time for the allowance of which he seems to have had some reasons, if he had thought fit to state them; but he endeavoured to obtain time by means of a Commission to examine witnesses, the execution of which would require time and make it necessary to postpone. Time, though Loch seems to have wanted it, with a view to obtain instructions from Arabin, or the means of amendment, was not asked for on that ground; but Arabin's agent continued, in the unaltered state of the pleading, to require the examination of witnesses, and on the 27th of July, as it seems, upon the application of Mr. Smith, the Proctor, another application for a Commission to examine witnesses in England was made; a rule *nisi* returnable on the 31st (the day appointed for trial) was granted, but on argument was discharged. The Defendant at once declared his intention to appeal, and endeavoured to postpone the trial on that ground; but failing in that endeavour, his Counsel refused to take any part in the trial, in consequence of which the cause was heard as an undefended cause, and witnesses being examined for the Plaintiffs, it was thereupon considered and adjudged that the Plaintiffs, as administrators of Mr. Mackenzie, were entitled to, and should be put in possession of, the estate, and that the Defendant should be ejected therefrom; and, further, that the Defendant should pay the Plaintiff £6000, as and for mesne profits, and costs.

[296] From this judgment, the Defendant presented his Petition of appeal to the Supreme Court: the Petition alleged and complained of several errors in the proceeding and on the trial, and is also to be considered as an application to the discretion of the Court for a new trial.

The two appeals, one from the Order discharging the Defendant's rule for a Commission to examine witnesses, and the other from the final judgment, and also a motion to set aside the judgment, were all of them pending at the same time.

The appeal against the Order discharging the rule for the Commission to examine witnesses was dismissed, and the collective Court, in refusing it, stated their opinion, that from the facts made known to them, it could be of no real service to the Defendant upon the present state of the pleadings.

Affidavits were filed by Mr. M'Christie, on the 25th of August, and by Mr. Loch, on the 8th of September, 1846: Loch stating that he was fully acquainted with all the circumstances connected with the Defendant's possession of the premises, and that a copy of Mrs. Mackenzie's answer to the Bill filed against her by the Defendant in England, had been transmitted to him.

The motion to set aside the judgment was refused, with costs, by the collective Court.

The appeal came on to be heard on the 30th of September, before a single Judge of the Supreme Court; and on the 8th of October, judgment was pronounced. It was considered, and adjudged, that the decree of the District Court of Kandy, of the 31st of July, 1846, should be set aside, and that the case should be remanded back to the District Court for a [297] further hearing, and further evidence on both sides, the parties being at liberty to amend their pleadings, on such terms, and within such times, as the District Court may appoint, the costs to stand over.

From this judgment the Plaintiffs have presented the present appeal, by special leave, without first obtaining the judgment of the collective Court of Ceylon.

From the information conveyed to us by the affidavits which it has been our duty to consider, it appears, that the principal question between the parties, from the commencement of the case, was, whether a valid contract was entered into by James Steuart, as the agent of Mr. Mackenzie, for the sale of the lands in question, to Loch, as the agent of the Respondent.

And it is perfectly clear, that though the principal question between the parties has not only not been tried, but has not even been raised on the pleadings, although both sides well knew, from the declaration of opinion by the Supreme Court, that the facts of the case were not sufficiently disclosed on the pleadings, and leave was given to both parties to amend.

The Defendant, by not amending, and by neglecting to state the facts which were within the knowledge of his agent, kept back the circumstances under which he took possession, and availing himself of the absence of those allegations and proofs by which his only title, namely, his title under the contract, was to be shown, claimed a right to question the title of Mr. Mackenzie, in a manner to which the real state of the case did not entitle him. He had received possession from Mr. Mackenzie's agent, in part performance of the agreement; and although he might have required a good [298] title to be shown in Mackenzie before he paid the residue of his purchase-money and accepted a conveyance, he was not justified in setting up a pretended title in James Steuart, otherwise than as Mackenzie's agent, for the purpose of requiring Mackenzie to prove his title in that state of the proceedings.

The question, whether the contract was absolute or conditional, has not been tried; the result of the trial is altogether unsatisfactory. And it is impossible to feel satisfied that justice has been done. If the Defendant had stated the contract according to his own understanding of it, admitted his possession under it, and claimed to have a good title shown, his case would have been very different, and we must consider that the unsatisfactory result of the proceedings has arisen principally, if not entirely, from the omissions of the Defendant's agents to state the true facts of the case. We cannot doubt that, if the Defendant had, by his agents, fairly stated the facts, and the reasons which might have been properly advanced, for the allowance of the necessary time to communicate with the Defendant personally, the time would have been granted to him. He did not do so; and if he has failed to receive justice (which we must consider to be doubtful, because there has been no effective trial), it has happened through the fault of his own agent.

If there were any other means by which the merits of the case could be satisfactorily tried, the conduct of the Defendant has been such, that, in our opinion, a new trial, in this cause, ought not to be granted to him.

But, considering that the lands, the subject of the contract, are situate in the Island of Ceylon, where the Roman-Dutch Law prevails, and that it might be at [299]-tended with very great difficulty and expense, to ascertain by evidence, that law, and its application to the case for the purpose of adjudicating upon it, in the Court of Chancery, in England: considering, further, that the Roman-Dutch Law does not recognize the distinction between legal and equitable estates, and, consequently, that a judgment in force in the Island of Ceylon might form an insuperable bar to obtaining effectual relief here; and not being aware of any other means by which the case can be satisfactorily tried,—we have considered upon what, if any, terms, a new trial might justly be granted; and we think it should be refused, unless the Defendant will consent to pay the costs of the trial of the 31st of July, 1846, and to give security for the payment of such, if any, damages as the Plaintiff may recover, upon the new trial. Moreover, as the same point ought not to be raised and litigated in two Courts, in different countries, at the same time, we further think, that a new trial in Ceylon ought to be refused, unless the Defendant will further consent to dismiss his Bill in Chancery against Mrs. Mackenzie, with costs.

If the Defendant will consent to these terms, namely, to dismiss his Bill in Chancery against Mrs. Mackenzie, with costs, to pay the costs of the trial of the 31st of July, 1846, and to give security for the amount of £6000, for the payment of such damages and costs, if any, as the Plaintiffs may recover upon the new trial, we shall think it right, and shall so report to Her Majesty, that the Order appealed from should be affirmed.

But, if the Defendant declines to consent to these terms, we shall think it right, and so report to Her Majesty, that the Order appealed from should be re-[300]-versed, and the judgment of the 31st of July, 1846, affirmed, except as to mesne profits and costs, order the Defendant to deliver up to the Plaintiffs immediate possession of the land, and direct the Court in the Island to ascertain the amount of what may be justly payable to the Plaintiffs, for mesne profits and costs, at the time when they recover possession under the judgment.

The appeal was subsequently compromised by the parties, and an order of dismissal, without costs, taken by consent.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principle on which Privy Council acts*, S.C. 12 Jur. 883.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

RAMLOLL THACKOORSEYDASS, and Others,—*Appellants*: SOOJUMNULL DHONDMULL and MOOLTAN CHUND CUPPOORCHUND. —*Respondents**
[Feb. 22, 1848].

By the common law of England, in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid; if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy [6 Moo. P.C. 310].

The mere circumstance that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal [6 Moo. P.C. 310, 311].

A wager upon the average price which opium should fetch at the next Government sale at Calcutta, the Plaintiffs having to pay the Defendants the difference between such price and a sum named, per chest, and the Defendants having to pay the difference between such price and the sum so named, if the price should be above that sum; is not an illegal wager, or contrary to public policy, though the proceeds of the opium sold at Calcutta formed part of the Government revenue. The judgment of the Court below, holding such wager illegal, reversed.

The Statute, 8 and 9 Vict., c. 109, amending the law relating to games and wagers, does not extend to India [6 Moo. P.C. 310].

This was an action on promises, brought by the Appellants in the Supreme Court of Judicature at [301] Bombay, against the Respondents. The declaration contained seven counts. The first count was for breach by the Defendants, of a promise made on the 24th of October, 1846, whereby, in consideration that the Plaintiffs, at the request of the Defendants, then promised the Defendants to pay the Defendants within a reasonable time after notice of the first public Government sale of opium, to take place at Calcutta, next after the making of the said promise, such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of Patna opium, of the opium to be sold at such first public Government sale, (to be calculated according to the actual price which the whole amount of Patna opium, which should be sold at such first public Government sale, should be sold for and realise,) and the sum of Rs. 1395, if such average should be less than the sum of Rs. 1395 per chest, the Defendants promised the Plaintiffs to pay the Plaintiffs, within a reasonable time after notice of such first public Government sale of opium at Calcutta, such sum as should be equal to five times the amount of the difference between the sum of Rs. 1395, and

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Assessors.—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

the average price of one chest of Patna opium, of the opium to be sold at such first public Government sale, to be calcu-[302]-lated as aforesaid, if such average should exceed the sum of Rs. 1395 per chest.

The remaining six counts were for breaches by the Defendants, to the same effect, upon similar promises, made on other dates.

To each of these counts, the Defendants filed a demurrer for the following causes.

"That the plaint is not sufficient in law, and the Defendants, according to the form of the Statute in such case made and provided, state and show to the Court here, the following causes of demurrer to each and every of the several counts of the said plaint, that is to say, that it does not appear in the several counts, by whom the opium in the several promises in the Plaint mentioned, was to be sold, or to whom the said opium belonged, or what certain quantity of opium was to be sold at the several sales, in the promises in the Plaint respectively mentioned, or within what certain period or time the said several sales were to take place, or what was the particular character or nature of the said several sales, and that it is not, in the several counts in the Plaint, stated with sufficient certainty, and does not appear therein how, or in what manner, or on the price of what certain opium, the averages in the promises in the Plaint respectively mentioned, were to be calculated. The Defendants intend to argue, that the wagers declared on are illegal and void, because they have a tendency to interfere with a public sale, in which neither the Plaintiffs nor Defendants had any interest: because the wagers have a tendency to diminish the public revenue, by creating an interest in the Defendants, to exert themselves in reducing the price of opium, at the sales, in the Plaint [303] mentioned: because the wagers bring into discussion the public revenue of India, at the instance of parties who are not shown to have any interest in the subject of the wagers, or any right to bring the revenue into discussion: because the wagers have a tendency to affect unduly public markets and prices; and because the wagers are against public policy: also that the promises in the Plaint mentioned, were void by reason of the infancy of one of the Plaintiffs, and that the Supreme Court is precluded from entertaining questions of revenue."

The Plaintiffs having joined in demurrer, the same was argued on the 22nd, 23rd and 24th of February, 1847, before Sir D. Pollock, Chief Justice, and Sir E. Perry, Puisne Judge.

The learned Judges differed in opinion; Sir E. Perry being of opinion, that the Appellants were entitled to recover; the wager declared upon being legal. Sir D. Pollock was of a contrary opinion, as such contract tended to interfere with the price of opium in the market, and was, therefore, contrary to public policy, and he gave judgment for the Defendants, on the demurrer, ordering each party to pay their own costs.

From this decision, the Plaintiffs in the Court below appealed to Her Majesty in Council. The appeal now came on for hearing.

Sir Fitzroy Kelly, Q.C., and Mr. Peacock, for the Appellants.—The simple point in this case is, whether according to the principles of the common law of England, prevailing and in force in India, the contract made between the parties is a legal and binding contract.—[Lord Campbell.—Is not this, in form and substance, a wager [304] on the price of opium? It cannot be said to be a mercantile transaction.]—We admit that, upon the record, it must be taken as a wager contract: and the question then is, whether, as a wager, it is a good contract in law. It is admitted that the late Gambling Act, 8 and 9 Vict., c. 109, does not extend to India. A wager is not, *per se*, illegal, at common law, and it lies on the Defendants, who resist its enforcement, to show that this is not good. The exceptions are, where the wager is prohibited by Act of Parliament, or has a tendency to injure the feelings of private individuals, not parties to the contract; or if the contract be against morality, decency, or tending to a breach of the peace. *Jones v. Randall* (Cowp. 37). *Da Costa v. Jones* (Cowp. 729). *Good v. Elliott* (3 Term. Rep. 693). *Allen v. Hearn* (1 Term. Rep. 56). Unless, therefore, the wager in this case falls within one or other of these objections, it is valid. It can only be argued against this wager, that it holds out a temptation to the parties interested, to commit a fraud, in depreciating or enhancing the prices of opium in the market. [Lord Campbell.—We are

not to presume that a fraud will be perpetrated; it is not necessarily for the legality of a wager, that there should be no temptation to commit a wrong.] In *The Earl of March v. Pigot* (5 Burr. 2803), it was held, that the circumstance of there being an inducement to kill, or shorten a life, would not make the wager bad. So again, in *Gilbert v. Sykes* (16 East. 150), the wager, on the life of Napoleon Bonaparte, was held bad, not on the ground that it was an inducement to procure the assassination of the Emperor, but that it was against public policy, that foreign Sovereigns should be able to complain, that [305] a subject of this country had laid a wager favouring their assassination. It is well settled that time-bargains in the English funds were good, by the common law, prior to the Statute, 7 Geo. II., c. 8; that being so, why should not this wager, which is a time-bargain, be good? It may have been, at one time, a question whether that Statute extended to foreign funds. In *Morgan v. Pebrer* (4 Scott. 230), it was held, that a wager on the price of foreign funds was legal. That case is in accordance with *Wells v. Porter* (2 Bing. N.C. 722), and *Oakley v. Rugby* (2 Bing. N.C. 732); the law is, therefore, settled that wagers, as to the price of foreign funds, are legal. In *Evans v. Jones* (5 Mee. and Wels. 77), a wager, as to the acquittal or discharge of a prisoner on trial on a criminal charge, was declared illegal, on the ground that, according to the ordinary course of things, the wager gave an interest to one of the parties, to do what would be against his duty. The principle laid down in that case was this, that a man should not be allowed by a wager to acquire an interest in doing what was contrary to his evident duty. *Atherfold v. Beard* (2 Term. Rep. 610), which was a wager respecting the amount of hop duties to be collected, was decided on the ground that individuals having nothing to do with the affairs of Government, as the collection of the revenue, should not make wagers upon the amount of revenue in a particular department, because it would lead to an improper discussion, and was contrary to sound policy. It is no objection to a wager that it may have some connection with the revenue. It is only bad where the wager cannot be determined without doing that which is against public policy. This was expressly decided, by Lord [306] Ellenborough, in *Mortimer v. Salkeld* (4 Camp. 42). It was urged by the Defendants below that the wager in this case was illegal, because the parties to the wager had no interest in the subject-matter of the wager. This position is distinctly displaced by the decisions (see Cases collected, Marshall on Insurance, vol. i. p. 119) prior to the Statute, 19 Geo. II., c. 37, which decided that a party might insure a ship in which he had no interest. *Crauford v. Hunter* (8 Term. Rep. 23). *Goss v. Withers* (2 Burr. 683). A contract for sale is not bad, merely because the party who is to deliver the goods at a future day is not possessed of the goods, and has no reasonable expectation of being possessed by the day named. *Hibblewhite v. M'Morine* (5 Mee. and Wels. 462). From these cases, the following conclusions are to be drawn: That a wager is only bad at common law where, by the terms of the wager, the object is illegal or immoral, or where it can only be determined upon the result of inquiries which it is against public policy to allow, or where the wager itself places the parties in a position where their interests are immediately in opposition to their duties. In the present case, there was no natural tendency arising from the wager, either to raise or depress the prices of the Government sales of opium, and it can only be argued as to its invalidity, by reason of there being a natural tendency one way or the other. We submit, therefore, first, that the several promises declared on are legal, and do not interfere with or influence public sales, or prejudicially affect the public revenue of India: secondly, that the promises declared on are in no respect [307] contrary to public policy, or have a tendency for either party to violate public morality.—[Lord Campbell.—Both the parties to the record are Hindoos, and, as such, under the Charter of Justice, the contract may be governed by the Hindoo law; do you raise any question on that point?—None. The contract has been treated in the Court in India, as one of English law.

Mr. Serjeant Channell, and Mr. Smirke, for the Respondents.—The cause of action is founded on a mere wager, and not upon any *bona fide* contract for the sale of opium, the parties to the wager having no interest in the subject-matter of the wager. The event of the wager was subject to be determined or influenced by the acts of the Plaintiffs—viz., by bidding an excessive price at the opium sales. We admit that the Statute, 8 and 9 Vict., c. 109, does not apply to India, neither do we

deny that a wager may be good by the common law, but the *onus* is not thrown upon us to bring this wager within any particular class. It is enough for us to show that this wager has a tendency to work injuriously to individuals, and that it is not necessary to assume that the party will so act as to cause a wrong. This wager clearly affected, or had a tendency to affect, the sale of a Government commodity: it concerned a branch of the public revenue of the East India Company (Bengal Reg. XIII. of 1816), received and applied by the Company in trust for the Crown, for the Government of India. It was admitted in the argument below, on both sides, that the Court was bound to take notice that the wager concerned the public revenue. Such a wager is, therefore, illegal and void, on the ground of public policy, and especially on the [308] ground that it gives one of the parties to it an immediate interest in diminishing the revenue arising from Government opium sales. The Government must be desirous that every sale should be conducted so as to be fair to the public, fair to the trade, and fair to itself. The case of *Bryan v. Lewis* (Ryan and Moody, 386), shows that to make time-bargains invalid, it was not necessary that the articles bought and sold should in any way belong to the Government.—[Lord Campbell.—Where there is a contract for goods to be delivered on a given day, at a given price, that is not what is properly called a time-bargain. What is generally understood as such, is where there is a fictitious sale of goods, at a particular price, and an agreement to pay or receive the difference between that price, and the price at which the goods shall be, on a particular day.]—It was the evident interest of one of the parties to this contract to depress, and of the other to raise, the price of opium; we submit that it is against public policy that public auctions should be tampered with. The case of *Mortimer v. Salkeld* [4 Camp. 42], relied on by the other side, has no bearing on the present question: it merely decided that dealings in lottery produces were not within the Stock-jobbing Acts. Neither is the case of *The Earl of March v. Pigot* [5 Burr. 2803], considered as an authority. *Eltham v. Kingsman* (1 B. and Ald. 683). *The King v. De Berenger* (3 Mau. and Sel. 67). Upon the whole, we submit that no wager relating to a subject-matter of State is legal. Neither is a wager, with respect to the subject-matter of which the parties have no interest, and that no action can be maintained on such wager. *Murrey v. Kelly* (cited Selwyn, N.P. p. 1411 (11 Edit.)). *Thornton v. Thack-*[309]*-ray* (2 Y. and J. 156). *Hartley v. Rice* (10 East. 22). *Squires v. Whisken* (3 Camp. 140). *Shirley v. Sankey* (2 Bos. and Pul. 130). *Evans v. Jones* (5 Mee. and Wels. 77). *Brown v. Lisson* (2 H. Bla. 43). *Henkin v. Guerres* (12 East. 247). *Fisher v. Waltham* (4 Q.B. Rep. 889). *Pope v. St. Leger* (Lutwyche, 484). *Levi v. Levi* (6 Car. and Pay. 239).

Mr. Peacock, in reply.—It cannot be maintained that the mere circumstance of a wager having a tendency to make a party act immorally, will vitiate the wager: if it were so, prior to the Statute 19 Geo. II., c. 37, all policies on ships, in which the insured has not an interest, would have been bad, as tending to procure the loss of the ship. So in the case of horse-racing, the legality or illegality of the wager depends, not on whether the tendency was an injurious one, but only on the circumstance whether the wager be for a sum of money less than ten pounds.

Lord Campbell (28th Feb. 1848).—This was an appeal from a judgment of the Supreme Court of Judicature at Bombay, holding, on a demurrer to a declaration that the contract therein set out was illegal, and could not be enforced in a Court of justice. The contract amounts to a wager upon the average price which opium should fetch at the next Government sale at Calcutta, the Plaintiffs having to pay the Defendants the difference between this price, and a sum named, per chest, if this price should be below that sum; and the Defendants having to pay the [310] Plaintiffs the difference between this price and that sum, if this price should be above the sum.

We are of opinion that we must take judicial notice, that the opium to be sold was the property of the Government of India, and that the produce was to form part of the public revenue.

I regret to say that we are bound to consider the common law of England to be, that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feel-

ings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame, on the subterfuges and contrivances and evasions to which Judges in England long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the Legislature, an event which probably would have happened much sooner without the abortive attempts to accomplish the object by judicial decision.

The Statute, 8 and 9 Vict., c. 109, does not extend to India, and although both parties on the record are Hindoos, no peculiar Hindoo law is alleged to exist upon the subject; therefore this case must be decided by the common law of England.

On the part of the Defendants, the general rule, as I have stated it, is admitted; but they contend that this wager is illegal, on the ground of public policy as it concerns the public revenue, and it gives the Defendants an interest unduly to lower the price, whereby individuals dealing in opium, and the East India Company, may be injured.

We are of opinion that the mere circumstance that this wager refers to the public revenue does not [311] establish its illegality. The cases about the hop duties, *Atherfold v. Beard* (2 Term. Rep. 610), and *Shirley v. Sankay* (2 Bos. and Pul. 130), proceed on the ground, that the wagers could not be determined without calling, as witnesses, officers of the Government, and making them disclose what had been the amount of a tax within a particular district. A wager on the amount received for a tax, as it shall appear, in a return published by the authority of the House of Commons, I think would have been free from legal objection.

But the great question here is, whether the wager gave either party an interest, which is to be considered injurious to individuals or to the Government. We are of opinion, that, although, to a certain degree, it might create a temptation to do what was wrong, we are not to presume that the parties would commit a crime; and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it, we cannot say that it is contrary to public policy.

Suppose the wager had been laid in England within a month before the sale was to take place at Calcutta, I see no valid objection to its legality; for it could not by possibility have affected the result of the sale; and I can see no difference, in point of law, from the fact that they were residing at Calcutta, where the wager was laid, and the sale took place.

The Defendants' Counsel mainly relied upon the case of *Evans v. Jones* (5 Mee. and Wels. 77), in which it was held that a wager upon the result of a criminal trial was illegal; but this proceeded upon the ground, that it gave the parties an interest, at variance with [312] duties they might have to perform as witnesses, or prejudice in the same manner as a wager, upon the event of a lawsuit, would be illegal with the Judge who had to decide it, or a wager on the result of a parliamentary election with one of the electors.

Had the case of *Gilbert v. Sykes* (16 East. 150), respecting the life of Napoleon, been decided on demurrer, or in arrest of judgment, it would have been an authority of great weight in support of the doctrine, that a wager that has any tendency to tempt a man to offend against the law is illegal. But we must recollect that it was discussed on a motion for a new trial, after a verdict for the Defendant against evidence, and that the Court was mainly influenced in refusing a new trial, by the consideration, that, according to the evidence, the wager arose out of a conversation respecting the probability of Napoleon being assassinated, so that it was considered tantamount to a wager, that he would be assassinated within one hundred days. It is likewise remarkable, that Mr. Justice Grose, who, when he differed with the rest of the Court, was generally thought by the profession to be right, was of opinion that this wager, under all the circumstances, was lawful, although he concurred in refusing the new trial.

The doctrine contended for, is disproved by the consideration that time-bargains in English funds were not unlawful till the Stock-jobbing Acts, although such bargains gave an interest to raise or to depress the funds, injuriously to individuals and to the State: by the consideration that before the 19th Geo. II. [c. 37], an insurance on a British ship was lawful, although the party assured had no interest

in the ship, and had a temptation to contrive her destruction before she reached her destination; and by the consideration, [313] that before the Statute, 14 Geo. III. [c. 48], insurances on lives were lawful, without any interest in the life insured, although as soon as the policy was executed, the party who had paid the premium had a temptation to commit murder.

The danger of such speculations is illustrated by Lord Tenterden's ruling, that a contract for the sale of goods, the seller not having any such goods at the time of sale, was void; whereas it must now be considered as settled, that not only such a mercantile contract is valid, but that there was no illegality at common law in a time-bargain for goods at home, any more than in a time-bargain for foreign securities. *Hibblewhite v. M'Morine* (5 Mee. and Wels. 462).

We were referred to the case of *The King v. De Beverger* (3 Mau. and Sel. 67) to show the frauds which may be attempted from the desire of gain in such speculations; but the Defendant's Counsel might as well cite the murders supposed to have been committed a few years ago, which have been made the subject of a popular novel, to show that insurance on lives ought to be entirely prohibited. If the doctrine contended for were established, it ought to be followed up with an enactment, that the life of the Queen (whom God long preserve) should never be introduced into a lease, because by its introduction Her sacred person is endangered. But the law believes that the awful penalties which it provides, to enforce the dictates of conscience and religion, will outweigh the temptation to commit spontaneous crimes, for the sake of gain, where no conflict is introduced with a positive duty.

It is for the Legislative Council at Calcutta to consider how far it may be conducive to the benefit of our [314] Indian Empire, to introduce into it the provisions of the Statute, 8 and 9 Vict., c. 109.*

We think that, by the common law of England, the wager in question is not illegal, and may be enforced in a court of justice; and agreeing with Mr. Justice Perry, we shall report to Her Majesty that, in our opinion, the judgment appealed against, ought to be reversed.

[S.C. Moo. Ind. App. 339. [Act No. XXI. of 1848 was repealed by the Indian Contract Act (No. IX. of 1872); and see s. 30 of that Act and *Kong Yee Lone and Co. v. Lowjee Nanjee*, 1901, 17 T.L.R. 585.]

ON APPEAL FROM THE SUPREME COURT AT BRITISH GUIANA.

ROBERT ALLEN and EDWARD CARBERRY,—*Appellants*; EDWARD BEDWELL KEMBLE and Others,—*Respondents* † [Feb. 25, April 10 and 13, 1848].

If a Bill of Exchange is drawn in one country and payable in another, and the Bill is dishonoured, the drawer is liable, according to the *lex loci contractus*, and not the law of the country where the Bill was made payable [6 Moo. P.C. 321, 322].

But where a Bill is drawn generally, the liabilities of the drawer, acceptor, and indorsers, are governed by the laws of the Countries in which the drawing, acceptance, and indorsement respectively takes place.

The principle of compensation in the civil law, adopted by the Dutch-Roman Law, applies to Bills of Exchange, and a debt due by a [debtor] to [a creditor] is extinguished by a liquid debt of the same amount due from the creditor to the debtor.

A., resident in Demerara, drew a Bill of Exchange in favour of B., also resident

* These wagers are now declared invalid by the Act of the Governor in Council of the 10th of October, 1848 [Act No. XXI. of 1848].

† Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

in Demerara, payable in London, upon C., resident in Scotland, and C. accepted the same, making it payable in London. B. endorsed the Bill to D., who shortly afterwards became bankrupt. When C.'s acceptance became due, he held two Bills of Exchange accepted by D., which were dishonoured and protested for non-payment. D.'s assignees did not proceed against C., but brought an action in Demerara against A. and B., the drawer and indorser, who pleaded a right of set-off to the extent of the two bills accepted by D., which the Supreme Court disallowed, and found for the Plaintiffs: Held by the Judicial Committee reversing such sentence [6 Moo. P.C. 320, 321],—

First, that the Bill having been drawn in Demerara, the Dutch-Roman Law, in force in that colony, must govern the case, and that, by that law, the Bill accepted by C. was compensated or extinguished, *pro tanto*, by the Bills accepted by D.;

Secondly, that a surety was entitled to avail himself of this rule of law, 'in respect of a debt due to the principal debtor; and,

Thirdly, that the drawer and indorser were to be deemed sureties for the acceptor, and entitled to plead this right of set-off.

The facts of this case, together with the principal arguments raised upon the appeal, are fully stated in the judgment of their Lordships.

[315] The case was argued by Mr. Fitzherbert for the Appellants; and Mr. Bethell, Q.C., and Mr. Follett, for the Respondents.

The following authorities were cited and referred to in the course of the argument, *Alsager v. Currie* (12 Mee. and Wels. 751). *Chapman v. The British Guiana Bank* (6 Moore's P.C. Cases, 23). *Trimhey v. Vignier* (1 Bing. N.C. 151). *Potter v. Brown* (5 East. 124). Vander Linden, pp. 695, 679 (Edit. 1828, by Henry). Heineccius, 6 Hoofdd. s. 27, n. 39, et s. 30, n. 44 (Edit. 1709). Vander Keessel ad Grotii, lib. III., part XIII., s. 6, pl. 623. 3 Pothier, part. 1, c. II., ss. 22, 23; and part 1, c. 6, "*De la compensation*."

The appeal was afterwards directed, by their Lordships, to be re-argued by one Counsel on each side, [316] upon the following points: First, by what law the rights of the parties were to be governed: and, Secondly, what their rights would be, supposing the Dutch-Roman Law not to be found applicable to the case.

The Appeal was accordingly re-argued.

Mr. Fitzherbert, for the Appellants, upon the first point, contended, that as the Bill was made in British Guiana, the place of the domicile of both parties, it was to be regulated by the Dutch-Roman Law, in force in that country: he cited *Snaith v. Mingay* (1 Mau. and Sel. 87). *Potter v. Brown* (5 East. 123). 3 Kent's Comms., Lec. 4, on Com. and Mar. Law. *Rothschild v. Currie* (1 Q.B. Rep. 43). Story on "Bills of Exchange," sec. 153, p. 195, note p. 196. Secondly; that, by the English Statute of bankruptcy, 6 Geo. IV., c. 16, s. 50, the Appellants were entitled to set-off the Bills, *pro tanto*. *Hankey v. Smith* (3 Term. Rep. 507).

Mr. Follett for the Respondents.—First, the English law is the rule to govern this contract, as the note to be paid in this country; the place of the payment made in the Bill, being the place of the contract. *Robinson v. Bland* (1 W. Black. 234, 256). *Cooper v. Lord Waldegrave* (2 Beav. 282). *Rothschild v. Currie* (1 Q.B. Rep. 43). *Thomson v. Powles* (2 Sims. 194). *Hodge v. Fillee* (3 Camp. 463). *Roche v. Campbell* (3 Camp. 247). *Ballingalls v. Gloster* (3 East. 481). *Lewis v. Owen* (4 Bar. and Ald. 654). Story's [317] Conf. of Laws, pp. 88, 280, 281, 286, 291. Secondly, the English doctrine of set-off has no application to the present case, as such discharge would operate according to the law of the country where it was enforceable; that by the Dutch-Roman Law in force in Demerara, the law of compensation only takes effect in cases of mutual debts between the parties to the action, while here Mackie was no party. The debt must be of a liquid nature, and due to the party claiming the set-off. Vander Linden, p. 271 (Edit. 1828, by Henry).

The Right Hon. T. Pemberton Leigh (June 28, 1848).—This is an appeal from a sentence of the Supreme Court of Civil Justice in Demerara, by which the Appellants

were condemned to pay the amount of two Bills of Exchange, with damages, interest, and costs, to the Respondents.

The facts are not very distinctly proved, on either side, but they appear to have been these.

Mr. Robert Mackie, who resided at Stranmaer, [? Stranraer] in Scotland, was the owner of a plantation in Demerara. Mr. Carberry, one of the Appellants, who resided in that colony, was his attorney and agent there. Mr. Allen, the other Appellant, was a merchant in the colony.

On the 30th of March, 1841, Carberry drew upon Mackie a Bill of Exchange for £450, in these terms:—

“£450.

“Demerara, March 30th, 1841.

“Six months after sight of this post of exchange, (2nd and 3rd unpaid), pay to the order of Robert Allen, [318] Esquire, in London, £450 sterling, value received, which place to the account of plantation Thomas.

“Edward Carberry.”

“To Robert Mackie, Esq., Stranmaer, [? Stranraer] Scotland.”

This Bill was accepted by Mackie, payable at Smith, Payne and Smiths', in London. It was indorsed by Allen to Troughton Brothers of Demerara, who indorsed it to Ellis John Troughton, of London.

On the 24th of April, a Bill for £1,070. 13s. 4d., exactly in the same form, but payable four months after sight, was drawn by Carberry, on Mackie, accepted by him, payable at Smith, Payne and Smiths'; and indorsed by Allen to Troughton Brothers, and by them to Ellis John Troughton.

The Bill for £1,070. 13s. 4d., became due on the 11th of October, 1841. The Bill for £450 on the 5th of December, 1841.

In the preceding month of August, Ellis John Troughton became bankrupt, having these Bills, thus accepted and indorsed, in his hands, and, thereupon, they came into the possession of the Respondents, who are his assignees.

When the first of these Bills, for £1070. 13s. 4d. became due, Mackie was the holder of a Bill drawn by Troughton Brothers, upon, and accepted by, Ellis John Troughton, the bankrupt, for £1,224. 4s., which had become due on the 14th of August, 1841, and had been dishonoured and protested for non-payment in consequence of his bankruptcy.

Mackie, therefore, as against these two Bills, for £1070. 13s. 4d. and £450, amounting together to £1520. 13s. 4d., had a clear right of set-off to the extent of £1224. 4s. He refused to pay either of the [319] two Bills, and they were respectively protested for non-payment.

Instead, however, of suing Mackie, the assignees of Ellis John Troughton sent out the two Bills accepted by Mackie to Demerara, with instructions to sue Carberry the drawer, and Allen the indorser. Mackie, on the other hand, remitted the protested Bill of Exchange, for £1224. 4s. to Carberry, his attorney; and on the 3rd of March, 1842, Carberry, as such attorney, claimed to set-off the amount of this Bill, against the Bill for £1070. 13s. 4d., of which payment had been demanded by the Respondents.

This claim was resisted by the Respondents, and on the 29th of March, 1842, they commenced their action on the two Bills for £1070. 13s. 4d., and £450. The action was brought against both Allen and Carberry, who were joined as Defendants. They put in separate defences, by which, amongst other things, they insisted, that the Bills sued upon should be considered as satisfied, to the extent of the amount due on the Bill for £1224. 4s. The Court, however, disallowed the claim, and pronounced the following sentence:—

“The Court having heard the parties, and having read and examined the documents and vouchers, filed and produced in this matter, condemns the Defendants, with rejection of their conclusion of exceptions, and answer *singuli in solidum*, the one paying the other to be exonerated to be re-imbursed to the Plaintiffs: and as regards the first-named Defendant, on receiving cession of action, if need be, against the second-named Defendant, the protested Bills of Exchange filed herein

of £450 sterling, and £1070. 13s. 4d. sterling, with damages, for re-exchange, of 25 per cent. and interest from day of citation, until fully paid with costs."

[320] The effect of this is, that if Allen, the indorser, pays the Bill, he is to have a cession of action against Carberry, the drawer: of course, whichever pays the Bill, will have a right of recourse against Mackie, the acceptor. Mackie, as against the holders, the Respondents, has a clear right of set-off, by the law of England, and the question is, whether, by the course of proceeding adopted by the Respondents, of suing in Demerara, the other parties to the Bill, who will afterwards have a right to sue Mackie, their right can be defeated. It must be admitted, that this would not be very consistent with justice, but we are to look only to the rules of law, as they may be applicable to the issue joined between the parties, upon this record.

The Appellants contend, that their liabilities are to be governed by the Roman-Dutch Law which prevails in Demerara, where the Bill was clearly made and signed, by Carberry. It does not appear, in evidence, when the indorsement by Allen was made, but as Carberry's defence, that the Bills are actually paid *pro tanto*, must, if it prevails, protect Allen, the indorser, also, this is not material.

The Appellants then contend, that the principle of compensation, in the Civil law, is adopted by the Roman-Dutch Law, and applied to Bills of Exchange; that by the effect of this principle, a debt due by a debtor to a creditor is compensated, or, in other words, extinguished by a liquid debt, of the same amount due from the creditor to the debtor; that the law operates an extinguishment of the one debt by the other; that a surety is entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; and that the drawer and indorser of a Bill of Exchange are [321] deemed sureties for the acceptor, and are entitled to the benefit of this rule.

To support this doctrine, various authorities were cited, from Pothier, Vander Linden, Heineccius, and other treatises, which appear to us satisfactorily to establish the proposition contended for.

These propositions, indeed, were not much disputed by the Respondents, nor was it denied that when a Bill is drawn, generally, the liabilities of the drawer, acceptor, and indorser, respectively, must be governed by the laws of the countries in which the drawing, acceptance, and indorsement, respectively took place. But it was contended, that when payment is to be made, in a place different from that where the contract is made, the parties must be held to have contracted with reference to the law of the place of payment, and not of the place of contract, according to the maxim of the Civil law—"Contraxisse unus quisque in eo loco intelligitur in quo ut solveret, se obligavit." And it is argued, that this Bill, being drawn payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English Law.

This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a Bill incurs. The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the Bill, according to its tenor, at the place and domicile of the drawee if it be drawn and accepted generally. At the place appointed for payment, if it be drawn and accepted, payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance, or non-payment, the drawer is liable for payment of the Bill, not where the Bill was to be paid [322] by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow. In every case of a Bill drawn in one country upon a drawee in another, the intention and the agreement are, that the Bill shall be paid in the country upon which it is drawn. But it is admitted, that if this payment be not so made, the drawer is liable, according to the laws of the country where the Bill was drawn, and not of the country upon which the Bill was drawn.

What, then, is the consequence of altering in the Bill itself, and by the acceptance, the place at which the acceptor is bound to pay? Can it be more than this, that, as to the acceptor the *locus solutionis* is altered, and, therefore, as to him, the *locus loci solutionis* is altered? But how does this affect the liabilities of the other parties? These Bills are addressed to Mr. Mackie, Stranmaer, Scotland; if no place of payment had been mentioned, they would have been payable by the drawee, according to the law of Scotland. London being fixed as the place of payment, they

are payable by the drawee, according to the law of England: a different law is imported as regards the acceptor, but not as affects other parties.

There is nothing to support the distinction contended for by the Respondents, in two of the three cases referred to by them. In *Robinson v. Bland* (1 W. Bl. 234, 256, and 2 Burr. 1077), and in *Cooper v. Lord Waldegrave* (2 Beav. 282), the case arose on the liability of the acceptors; and, in the latter of these cases, Lord Langdale, after remarking how little is to be found in English decisions, upon subjects of this kind, observes, that, as to the drawer and in-[323]-dorser of the Bill, the law of the place where the Bill was drawn and indorsed, and not where it was made payable, might govern. The case, however, mainly relied upon by the Respondents, was *Rothschild v. Currie* (1 Q.B. Rep. 45). In that case, a Bill was drawn in England, on a party resident in Paris, and made payable in Paris, in favour of a payee resident in England. It was indorsed over in England, by the payee, to a party also resident in England. The Bill having been dishonoured by the acceptor, in Paris, it was held, that protest and notice of dishonour, regular according to the law of France, though alleged to be insufficient, according to the law of England, were sufficient to charge the indorser.

It may be observed, that since the cases above referred to were decided, the whole law upon this subject has been most carefully, elaborately, and learnedly examined by Mr. Justice Story in his treatise on "Bills of Exchange," and he disapproves of the decision in the case of *Rothschild v. Currie* (Story on Bills, note, p. 352); but, without expressing any opinion upon that decision, it is enough for us to observe, that the Court did not profess to depart from any principles of law acted upon in previous cases, and whether those principles were, or not, accurately applied to the particular case, is not, for the present purpose, material.

We are of opinion, upon the whole, that this case must be decided according to the Law of Demerara, and that the amount due upon the Bill for £1070 13s. 4d., which first became due, must be considered as compensated and extinguished from the time it became due by the amount of the Bill for £1224 4s., and interest, and that the remainder of that Bill must be applied as [324] far as it will extend towards payment of the Bill for £450; and that sentence ought to have been pronounced in the Court below only for so much of the Bill of £450 as will remain unpaid after such application, with interest, according to the law of Demerara, but with no other expenses and no costs of suit.

[Mews' Dig. tit. BILLS OF EXCHANGE, B. FOREIGN BILLS AND NOTES, J. *Liabilities of Parties*, 2. *Drawer and Indorser*; tit. COLONY, II. PARTICULAR COLONIES, 3. *British Guiana*; tit. INTERNATIONAL LAW, IV. CONTRACTS, c. *Negotiable Instruments*. S.C. 13 Jur. 287. On point (i.) as to interpretation of drawing, acceptance and indorsement, see *Rouquette v. Overman*, 1875, L.R. 10 Q.B. 540; *Horne v. Rouquette*, 1878, 3 Q.B.D. 523; *In re Commercial Bank of South Australia*, 1887, 36 Ch. D. 525; *Alcock v. Smith*, 1892, 61 L.J. Ch. 161; Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 72; and British Guiana Bills of Exchange Ordinance (No. 13 of 1891), s. 72; (ii.) as to weight assigned to Story's treatise (6 Moo. P.C. 323), cited in *Sheppard v. Bennett*, 1870, L.R. 3 Ad. and E. 256; (iii.) as to re-arguing appeal (6 Moo. P.C. 315), see cases cited in note to *Frankland v. M'Gusty*, 1830, 1 Knapp at p. 310.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE, AT FORT WILLIAM IN BENGAL.

MUTTYLOLL SEAL,—*Appellant*; ROBERT O'DOWDA,—*Respondent* * [Feb. 25, 28, and 29, 1848].

A Bill of Sale and assignment of goods, described as being in certain warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. *Assessor*,—Sir E. Ryan, Knt.

against the assignee of A., who had seized the goods, it appeared, in evidence, that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards: whereupon the Judges of the Supreme Court held, that there had been no valid transfer, and, consequently, no conversion, and gave an interlocutory judgment and verdict in accordance with such view.

Held by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted.

This was an action of trover brought by the Appellant against the Respondent, the assignee of the [325] estate and effects of the firm of Messrs. Tulloh and Co. of Calcutta. The circumstances which led to this action, were as follows:—

In the year 1846, the firm of Tulloh and Co. carried on business, in Calcutta, as merchants and brokers. The firm had, for some time, had extensive dealings in trade with the Appellant, and, on the 30th of April, 1846, was indebted to him in a sum amounting to £70,000, for which he held securities. At that time, they had a pressing occasion for an immediate advance of money, and Mr. Dowleams, one of the partners, in the name of the firm, applied to the Appellant for a loan of Rs. 60,000, who was willing to entertain the request, but required a fresh security for the advance. Dowleams proposed that Tulloh and Co. should give him an assignment, by way of mortgage, of a quantity of wine, ale, and other liquors belonging to the firm. The Appellant had a draft bill of sale, and assignment, prepared, and delivered it to Dowleams, informing him, that if the firm would execute a bill of sale, and give him possession of their own stock of wines and other liquors, he would, at once, advance the sum of Rs. 15,000, which was required immediately, and the balance of the Rs. 60,000, as there was occasion for it. At that time, the wines and other liquors in question, were in two different *godowns*, or warehouses, one called the Mission Row, or Hickey Bailey's *godown*, which contained exclusively their own wines and liquors, and the other called the Bengal Club *godown*, in which the goods belonging to the firm were mixed [326] up with consignments from their constituents, entrusted to them for sale. The value of the wines and other liquors, which were their own property, was between sixty and seventy thousand rupees. Dowleams agreed to the terms required by the Appellant, and, on the next day, the 1st of May, the following bill of sale and assignment (copied from the draft prepared by the Appellant) and memorandum was written out by Mr. Buckland, another of the partners, and signed by him, in the name of the firm, of Tulloh and Co.:—

"We do acknowledge to have this day borrowed and received, from Baboo Muttyloll Seal, the sum of Company's rupees, 60,000; and, in consideration of the same, we do hereby bargain, and sell, and assign, to the said Baboo Muttyloll Seal, all and every the goods, merchandizes, chattels, and effects, now lying and being in certain *godowns* and premises of and belonging to us, in Mission Row, Calcutta, known under the name of Hickey Bailey and Company's *godowns*, to hold and receive, as and for his own goods, chattels and effects: and we do hereby warrant the same to the said Muttyloll Seal, against us, and each of us, our executors and administrators, for ever. Dated the 30th of April, 1846, Tulloh and Co.

"Be it known that, on this day, possession of the said several goods and merchandizes, chattels and effects, was given to the said Muttyloll Seal, Esquire, by delivering to him the keys of the several *godowns*, in which the said goods are stored.

"Witness,

"JOHN HUGHES.

"PETER PALMER."

"Calcutta, 1st May, 1846.

TULLOH AND Co."

Neither Hughes nor Palmer, whose names appeared [327] as attesting witnesses to this statement, and who were at that time clerks in the employ of Tulloh and Co., actually saw it executed by Buckland; but being well acquainted with his handwriting, they added their signatures afterwards on the same day, at the request of Dowleams.

Immediately after the bill of sale was made out and signed, the Appellant advanced to Tulloh and Co. Rs. 15,000. Within two or three days afterwards, he advanced to them two other sums, one of Rs. 10,000, and the other of Rs. 4300; and, on the 9th of May, he accepted a bill of exchange for Rs. 31,611. l. 6., drawn upon him by Tulloh and Co., and payable three days after date, and other large sums were also paid by him on their account. These monies were advanced upon security of the goods agreed to be assigned to the Appellant.

Immediately after the bill of sale was signed by Tulloh and Co., Dowleans gave directions to one of the clerks to make out a correct list of all the goods in question, and transfer them to the custody of the *sircar*, or clerk, of the Appellant. He then, accompanied by Palmer and another of the clerks of Tulloh and Co., took with him Gangooly, the managing clerk of the Appellant, and went to the Mission Row *godown*, and told their warehouseman, Rajoo Dutt, to give possession of it to Gangooly, and also to make over to him all the wines and liquors stored in it, and also those belonging to Tulloh and Co., which were in the Bengal Club *godowns*, but not those which were the property of their constituents. Gangooly then took possession of the warehouses, and sent for two locks, one of which he caused to be placed [328] on the door of the Mission Row *godown*, and the other on that of the Bengal Club *godown*. Some of the goods in the latter *godown* were removed the same day; but as the quantity was large, and the goods belonging to Tulloh and Co., as their own property, could not be immediately separated from their consignments, it took five days to remove them all. Until this was completed, Rajoo Dutt kept padlocks of his own upon the doors of the Mission Row and the Bengal Club *godowns*, and Gangooly stationed every evening a watchman at each door. On the fifth day the Mission Row *godown* was quite full, and a list was made out by Ramdhone Bose, one of the clerks of the Appellant, of all the goods in that *godown*, as well as of those that still remained in the Bengal Club *godown* belonging to Tulloh and Co. The other goods in the Bengal Club *godown*, which consisted of consignments, had in the meantime been removed, and none remained there but those which belonged exclusively to Tulloh and Co. Gangooly then informed Dowleans that the Mission Row *godown* was full, and the keys of the two padlocks, which Rajoo Dutt had kept up to that time, were delivered up to him.

During this interval, Tulloh and Co. sometimes sent for different quantities of the wines and liquors which were in the possession of the Appellant, but, with one or two exceptions, paid in cash for whatever they received out of the *godowns* before mentioned, and a list of these deliveries, and the amounts paid upon each, was kept by Gangooly.

On the 19th of May, the firm of Tulloh and Co. was, under the provisions of the Act, 9 Geo. IV., chap. 73, entitled, "An Act to provide for the relief of Insol-[329]-vent Debtors in the East Indies," adjudged by the Insolvent Debtors' Court at Calcutta to have committed an act of insolvency; and on the following day the Respondent was duly appointed assignee of their estate and effects.

On the 26th of May, the Respondent turned the servants of the Appellant out of possession of the Mission Row and Bengal Club *godowns*, and took away from them the keys of the doors, and seized the goods contained in them, which he refused to deliver up.

The Appellant, on the 9th of June, 1846, brought an action of trover, in the Supreme Court of Calcutta, against the Respondent, and laid the damages at Rs. 100,000. The Respondent pleaded two pleas to the declaration,—First, not guilty; and, Secondly, denial of Plaintiff's possession.

The cause was tried before Mr. Justice Grant and Mr. Justice Seton, on the 13th of July and two following days, when the above facts were established, by evidence, on the part of the Plaintiff. The Court gave interlocutory judgment in the nature of a verdict for the Defendant, on both the issues raised by the pleadings. The following reasons were delivered by Mr. Justice Grant:—"We are of opinion, that there must be a verdict for the Defendant. The assignment which is put in by the Plaintiff, bears date the 30th of April; and dates, in a matter of this sort, are things of great importance. It states, the borrowing and receipt of Rs. 60,000, on that date, when it appears, from the evidence offered by the Plaintiff, that no money was, upon that day, borrowed or received; and it states, that goods in the *godown* in Mission Row, called Hickey Bailey's *godown*, were [330] delivered to the Plaintiff,

when, in fact, it appears, that few of the goods in question were, at that time, in that *godown*, and no goods were then delivered to the Plaintiff. To this document is appended a memorandum, bearing date the 1st of May, signed by Tulloh and Co., to which is annexed a false attestation, the witnesses who attest not being, either of them, present when the signature was affixed. We think, therefore, that the foundation of the Plaintiff's claim fails him, for the document put in to prove this transaction, states one entirely different from the transaction which he has proved. The document being disproved by the evidence, upon the question of law we give no opinion, because it is unnecessary; but, if it were necessary, I should have little difficulty in giving my opinion, that there was no valid transfer of possession, according to the old case in Lord Coke's Reports (Twyn's Case, 3 Rep. p. 80), and every case upon the subject since; all which show, that the transfer of possession must be open and notorious, to prevail against the right of the assignee of the Insolvent Court."

The Appellant afterwards applied for a rule *nisi*, for a new trial, on two grounds:—First, that the verdict was against evidence; and, Secondly, that there was a misdirection in point of law. The Court refused the rule, as it "considered that the verdict was not against evidence, and that there was no misdirection; that the case was decided on the matters of fact solely: viz., that the evidence given by the Plaintiff did not support the written document set up by him as the foundation of his case, but was in contradiction to it."

The Appellant appealed from the interlocutory [331] verdict of the Court, in the nature of a Judgment, and from the Order of the Supreme Court, refusing a new trial to Her Majesty in Council.

Mr. Wigram, Q.C., Mr. Leith, and Mr. Forsyth, for the Appellant.—This judgment cannot stand. The reasoning of the Court, both on delivering interlocutory judgment, and in refusing a new trial, is inapplicable to the case. It was founded on an erroneous view of the law. This is not an action brought on an executory contract contained in a written instrument. The only question was, whether there was a valid transfer of the goods to the Appellant. The evidence was consistent with the Bill of Sale, but the Court, in its judgment, does not profess to consider the difference between the Bill of Sale and the facts proved in evidence, as a badge of fraud, in which view alone it could have any bearing upon the question at issue in the cause; but it treats the difference between the Bill of Sale and the facts proved in evidence, and if it were a variance in itself fatal to the Plaintiff's case. We submit, however, that unless there had been some question of fraud, this difference was wholly immaterial. It made no difference as to the legal effect of the assignment, whether the whole of the money was advanced at one time or by instalments, or whether all or part only of the goods, in question, were, at that time, delivered to the Appellant. The only question for the Court to consider, was, whether the goods were really pledged, for a *bona fide* advance, and this fact is established by the evidence. The Court declined to give an opinion that the transfer was invalid, on the [332] ground of not being open and notorious, although the Judge says, that if it were necessary he would have little difficulty in deciding against its validity on that account. Upon this point, also, we submit that the Court is mistaken, for all the circumstances attending the assignment negatived fraud, and gave sufficient notice of the transfer of the goods. The delivery took place openly, and it was notorious to all. Even if Tulloh and Co. had retained possession, it would have made no difference, as there was no fraud, and the Plaintiff's title was not impeachable under the Indian Insolvent Act, upon their reputed ownership. It is not even suggested by the Court, that the assignment was voluntary on the part of Tulloh and Co., so as to be defeated by force of the 28th section of the Indian Insolvent Act, 9 Geo. IV., c. 73. The evidence established, that the legal property and right of possession in the goods were, at the time of the seizure by the Respondent, vested in the Appellant, that being so, the Respondent was guilty of a conversion. The verdict was entered and judgment signed by the Respondent on both the issues raised by the pleadings, whereas the evidence established the fact of a conversion, and, therefore, even if the Respondent had been entitled to a verdict on the second issue, still the verdict on the issue of "not guilty" ought to have been entered for the Appellant. A new trial ought to have been granted to the Appellant, as the verdict

was against evidence, and there was a misdirection in point of law. They referred to the following authorities. *Laary Arindell v. Phipps* (10 Ves. 139). *Martindale v. Booth* (3 Bar. and Ad. 498). *Manton v. Moore* (7 Term. 67). *Smith v. Topping* (5 Bar. and Ad. 674). Twyne's [333] Case (3 Co. Rep. 80). *Parke v. Mears* (2 Bos. and Pull. 217). *Grellier v. Neale* (Peake's N.P. Cases, 146). *Cadogan v. Kennet* (Cowp. 435). *Fitzgerald v. Elsee* (2 Camp. 635).

Mr. Parker, Q.C., and Mr. Greenwood, for the Respondent.—We submit, that the conversion was not made out, and that, upon the evidence, the goods mentioned in the declaration were not sufficiently connected with the places, times, and goods spoken of by the witnesses. Upon the evidence adduced, the Court could come to no other conclusion, than that the Plaintiff failed to prove any assignment to himself of the goods taken by the Defendant; and viewing the finding of the Court as a verdict of a jury, it ought not to be disturbed. It is clear, that under the circumstances proved, even if the Plaintiff had succeeded in proving an assignment to himself, such assignment would have been void as against the creditors of Messrs. Tulloh and Co., and especially as against the Defendant, as assignee of the insolvents, under the Statute, 9 Geo. IV., c. 73. They cited *Battersbee v. Farrington* (1 Swanst. 106), *Belcher v. Prittie* (10 Bing. 408).

The Right Hon. Dr. Lushington.—Their Lordships are unanimously of opinion, that the Appellant is entitled to a new trial, as they consider that the Court below has not weighed all the circumstances in evidence, with sufficient accuracy to justify the verdict it has given. Their Lordships do not think it right or fit to enter into the particular [334] reasons the learned Judges below have given, but consider that there should be a new trial. The opinion of their Lordships is, therefore, that the Judgment of the Court below be reversed, and that the rule for a new trial be made absolute.

[Mews' Dig. tit. BILLS OF SALE; G. PROPERTY PASSING BY.]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

NATHANIEL COLBY and Others,—*Appellants*; WILLIAM WATSON and Another,—*Respondents* * [Feb. 28, 1848].

The Endeavour.

Upon a tender for salvage-services in getting a vessel off the Newcombe Sand, it appeared, that in order to get the vessel off the Sand, both her bower anchors and chains were slipped, and that the salvors, after getting her off, called in the aid of another boat to recover the anchors. Held that the general salvage was completed, when the vessel was off the Sand, and that the getting up of the anchors formed no ingredient in the salvage services as to entitle those who recovered the anchors to share in the general salvage of the ship and cargo [6 Moo. P.C. 340, 341].

Where the salvors took no step in the Admiralty Court to issue a Commission of appraisement of the vessel proceeded against, this Court, as the Court of final appeal, will not admit affidavits appraising the vessel [6 Moo. P.C. 338].

This was an appeal from a Decree of the High Court of Admiralty, in a cause of salvage, in which that Court pronounced that a tender of £100, made on [335] behalf of the owners of the ship *Endeavour* and her cargo, to the respective owners and boatmen belonging to the yawls *Welcome Home*, and *Happy Return*, was a sufficient remuneration for the services rendered by them in rescuing her off the Newcombe Sand. The cause was brought under the following circumstances:—

On the 29th of January, 1846, the *Endeavour*, on a voyage from Hartlepool to London, with a cargo of coals, was run into and damaged in her rigging by a brig in Corton Roads, and soon after, missing stays, she grounded on the Newcombe Sand, off the coast of Suffolk, about four o'clock P.M., an hour after low-water. The weather was fine, the wind very light. All sail was immediately hove back, with a

* Present: Lord Langdale, Lord Campbell, the Right Hon. Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

view of backing her off, but without effect, and the small bower anchor, weighing 9 cwt., was let go, and twenty fathoms chain veered away. About five o'clock, a fishing smack came alongside, and offered assistance, which the Master declined. The *Welcome Home*, with eighteen men, and a galley, afterwards came alongside, and the Master of the *Endeavour* inquired the charge of running an anchor away. The crew of the *Welcome Home* refused to make any specific charge, and the Master engaged their services. The *Welcome Home* ran away the *Endeavour's* best bower anchor, weighing ten cwt., and fifty fathoms of chain; and her small bower being slipped, she was, at high water, hove off to the best bower; her kedge with two warps was run away to the eastward, and she was hove further off the ground, slipped from her best bower and chain, and brought up by her kedge until the *Endeavour's* anchors and cables were recovered, and at half-past ten she [336] was brought up in Cotton Roads. In recovering the anchors and chains, the other yawl, the *Happy Return*, with eighteen men, was employed at the instance of the crew of the *Welcome Home*. The whole number of men engaged in actual salvage-service was twenty-nine. The value of the ship, cargo, and freight, was sworn at £1834. The owners of the *Endeavour* tendered £100, which the salvors rejected, when an action was entered by them at £400.

The salvors relied upon the number of hands employed, contending, that it was owing to that circumstance alone, that the vessel was got off that tide. The owners of the *Endeavour*, on the contrary, insisted that such numerical force was wholly unnecessary, and altogether unauthorised by the Master, who only engaged the crew of the *Welcome Home*, to carry out an anchor and heave at the windlass; and that this yawl's crew could have recovered both anchors and chains, as they were engaged to do, and, that if an unlimited number of persons were permitted by the original salvors to assist in doing that for which the latter were solely engaged, and quite competent to perform, the owners were not legally rendered liable to remunerate such persons as salvors.

The learned Judge of the Admiralty Court (the Right Hon. Dr. Lushington), by his sentence, held the tender to be sufficient; that when the vessel got off the Sand, there was an end of the salvage-service; that the *Happy Return* was not a salvor; and that, if she was entitled to be paid at all, it was simply for work and labour done in getting up the anchors, and condemned the salvors in £15, *nomine expensarum*.

[337] From this sentence the salvors appealed, and, by their reasons of appeal, submitted that the sentence ought to be reversed,—

Because, it appeared from the proofs in the cause, that the *Endeavour*, and her cargo, were rescued from a state of peril at sea, by the united exertions of twenty-nine men; and

Because the vessel, having lost both her bower anchors and cables, and being merely held by her kedge anchor, was not in a state of security; and, consequently, that the weighing of the two bower anchors and cables, formed a most important ingredient in the salvage services.

The Respondents, on the other hand, contended, that the sentence appealed from was proper, for the following reasons:—

1st. Because the only salvage-service received by the *Endeavour* were, in fact, performed by one boat's crew, the eighteen men of the *Welcome Home*, and were terminated by the *Endeavour* being hove off the Sand, without any difficulty, danger, or extraordinary exertion, by about two hours' labour, and during fine weather.

2nd. Because the boat's crew of the *Welcome Home* were alone engaged by the Master to perform the whole necessary service, including the picking up and putting on board both the anchors and chains, which they might easily have done, and that no necessity existed for sending on shore for, and employment of, the *Happy Return*, and such additional men, and such employment, not having been ordered or authorised by the Master, the Appellants were not liable to remunerate those men as salvors.

3rd. Because the getting the *Endeavour* off the [338] Sand, and recovering her anchors and chains, under the circumstances, were such ordinary and slight salvage-services, and required for their performance so small an amount of skill, labour,

or time (by whatever number of men performed), as to be amply compensated by the £100, especially considering the value of her cargo.

At the opening of the appeal, the Counsel for the Appellants applied to be admitted to bring in affidavits of the actual value of the ship, upon the ground that the salvor's agent, in the Court below, believing that the owners would give a fair value, did not think it necessary to extract a commission of appraisement, but that it had been discovered that the vessel and cargo was of greater value. That the Court below awarded £100 upon an estimated value of £1834; they cited, in support of the application, the *Oscar* (2 Hagg. Adm. Rep. 257).

Sir Herbert Jenner Fust.—We cannot entertain this application. The Appellants ought to have applied to the Court below, and have made it a part of the appeal, whereas no step has been taken in this matter, and you now ask a Court of final appeal to receive further evidence. The Appellants have let the proper time go by, and this Court cannot help them.

Mr. Serjeant Shee, and Dr. Robinson, for the Appellants.—The Court below has allowed nothing for recovering the anchors, but we submit that the recovering [339] the anchors, in such circumstances, was a salvage-service. They were lost in the course of the salvage-service, and the *Endeavour* could not go away without them. The salvage was not complete until the anchors were safely on board.—[Lord Langdale.—Do you contend that after the ship was salvaged, there was another salvage-service for recovering her anchors?—The Wreck and Salvage Act, 9 and 10 Vict., c. 99, s. 19, recognizes as salvage-service, the recovery of an anchor.—[Lord Langdale.—The anchors were not derelict, it was known where they were.]—It is a question of principle, whether, when an anchor is lost in the course of a salvage-service rendered to the ship, and the recovery of the anchor is necessary, in order to place her in a place of safety, it is not a salvage-service, and entitled to reward. The *Westminster* (1 W. Rob. jun. 229), shows the modes of estimating the salvage. Independent of salving the anchors, the value of the service was not sufficiently considered; only £100 is given out of £1800, to twenty-nine men.

The Queen's Advocate (Sir John Dodson), and Dr. Harding, for the Respondents, were not called upon to address their Lordships.

Sir Herbert Jenner Fust.—Their Lordships entirely agree in the opinion of the learned Judge of the Court of Admiralty. The facts of the case lie in a very narrow compass. The *Endeavour*, bound to London from Hartlepool, with a cargo of coals, about half-past three o'clock on the afternoon of the 29th of January, got on the Newcombe [340] Sand, off the coast of Suffolk, and remained there for some time, the Master having, at first, refused to accept the assistance offered him, thinking his own crew would be sufficient to get the ship off the Sand. The services of the salvors were accepted, and twenty-nine men were engaged, as stated by the salvors, from half-past five, and by the owners, from eight o'clock until about ten or eleven at night. Therefore, these twenty-nine men, in two vessels, were employed this time in doing what was necessary for the purpose of getting this vessel off the Sand: the whole salvage-service was completed. Two anchors were afterwards recovered, and it is contended, that this was part of the salvage-service, and the question is, whether the persons employed in getting up the anchors are entitled to be considered as general salvors.

The first question is, where was the necessity for employing them at all? Were not the crew of the *Welcome Home* sufficient for the purpose? It is not stated, in any one of the affidavits, that they were not sufficient to recover the anchors with the aid of the crew of the *Endeavour*.

Their Lordships are of opinion, that the general salvage of the ship and cargo was completed, when the vessel was got off the Sand, and that the getting up of the anchors ought not to be considered as part of the salvage service. The learned Judge of the Court below, was of opinion, taking the value of the property at £1834, that the tender of £100 was sufficient. He did not adjudicate this to be the proper sum, but he adjudicated that it was amply sufficient, and that the salvors were not entitled to more. Their Lordships, considering that they are not bound to look to the services of the *Happy Return*, unless [341] they were necessary for salving the ship and cargo, are of opinion, that this sum was properly pronounced to be suffi-

cient, and will recommend Her Majesty to pronounce against the appeal, and affirm the sentence, with costs.

[Mews' Dig. tit. SHIPPING, A.; XVIII. SALVAGE; 13. *Award*; a. *Generally*. S.C. 6 N. of C. 27. On point (i.) as to salvage (6 Moo. P.C. 340, 341), cf. *The Wilhelmine*, 1842, 1 N. of C. 376, 378; *The Cargo ex Woosung*, 1875, 3 Asp. Mar. L.C. 50: (ii.) as to reception of additional evidence by Judicial Committee, cf. *Jones v. Godrich*, 1844, 5 Moo. P.C. 16; *Anonymous*, 1855, 9 Moo. P.C. 434; *The Newport*, 1857, 11 Moo. P.C. 155; *The Laura*, 1865, 3 Moo. P.C. (N.S.), 181; *The Scindia*, 1866, 4 Moo. P.C. (N.S.), 84. By s. 18 of the Judicature Act 1873 (36 and 37 Vict., c. 66), and s. 4 (3) of the Judicature Act 1891 (54 and 55 Vict., c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to Prize, transferred to the Court of Appeal.]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HENRY WARING.—*Appellant*; THOMAS WARING and Others.—*Respondents* *
[June 30, and July 1, 3, and 4, 1848].

Exposition of the doctrine of monomania and partial insanity, as applied to Wills [6 Moo. P.C. 350].

If the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities: any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind [6 Moo. P.C. 350, 351, 352].

Delusion is the belief of things as realities, which exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind [6 Moo. P.C. 353, 354].

To constitute a lucid interval, the party must freely and voluntarily, and without any design at the time, of pretending sanity and freedom from delusion, confess his delusion [6 Moo. P.C. 354].

Where delusions are proved to have existed, both before and after the *factum*, the presumption is, that they existed at the time of the *factum*, and in such case, proof of a lucid interval, at the time of the *factum*, is thrown upon the party propounding a Will. It is immaterial that the delusions do not appear on the face of the Will [6 Moo. P.C. 358].

A Will written in 1834, by a widow, without children, a person originally eccentric, and, in after-life, developing unsound delusions, conferred great benefit on a stranger, the Will not betraying, on the face of it, marks of insanity, in the circumstances, pronounced against.

This was a cause, brought in the Prerogative Court of Canterbury, of proving, in solemn form of the law, [342] a Will, bearing date, the 1st of March, 1834, with a Codicil thereto, without date or signature, of Sarah Gibson, late of Weybridge, in the county of Surrey, widow, who died in November, 1844, promoted by the Appellant, one of the executors named in the Will, against the Respondent, Thomas Waring, the sole executor named in a former Will of the deceased, in 1821.

The deceased was a widow, and died without issue, leaving property, real and

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

personal, to a considerable amount. She left two brothers, and five sisters, her next of kin. The Respondent, Thomas Waring, was her eldest brother, and heir-at-law. The deceased made a Will in the month of June, 1821, whereby she appointed Thomas Waring her sole heir and executor. In the year 1841, an inquisition, *de lunatico inquirendo*, was held, with respect to the deceased's state of mind, and, after the examination of witnesses, and the production of documents, the jury found that she was insane, and had been so from the month of September, 1838.

The Will and Codicil, in question, were propounded by the Appellant, Henry Waring, a stranger to the family. By this Will, the Appellant was named an [343] executor, and took a larger benefit under it, than the deceased's relations. The Will was in the handwriting of the deceased, with an attestation clause, without witnesses, and dated the 1st of March, 1834. The Codicil was also in the handwriting of the deceased, but without date or witnesses. The Will and Codicil was opposed by the Respondents, Thomas Waring, and other next of kin, on the ground that, at the time of writing them, she was of unsound mind, and had been so for several years before, and continued so till the time of her death.

The allegation, propounding the papers, pleaded the above facts, and that when the commission, *de lunatico inquirendo*, was executed, the papers were found locked up in the repositories of the deceased, and taken into the custody of Thomas Waring, who was appointed the committee of the estate, and that the first intimation the Appellant received of the existence of the Will and Codicil was in February, 1845.

The allegation, pleaded by the Respondents, was in substance as follows:—

That in May 1821, the deceased, then a widow, married again; and that a few months after her second marriage, she became very strange and eccentric in her conduct, very irritable in her temper, and extremely suspicious of those about her, especially her servants; talked in a wild and incoherent manner, laboured under a constant apprehension that she was the object of persecution, and that some scheme was afloat to endanger her personal safety: that, in October 1821, she entertained (though without any rational foundation) a suspicion that her husband was endeavouring fraudulently to obtain her property and to poison her; that in 1825 she had an impression (contrary to the [344] fact), that certain ladies were making faces at her at church, and she went before Admiral Stirling, a magistrate, and complained of the conduct of these ladies; that in December, 1825, and January, 1826, she laboured under the delusion that she was considered by her friends and neighbours as a person of meretricious habits, and declared that her conduct had been animadverted upon from the pulpit, under which erroneous impression she wrote letters to Sir Richard Frederick, a magistrate, requesting his influence to rescue her from such opprobrium; that in 1833 she imagined that various persons were in love with her, and making overtures of marriage to her, one being a married man, and another her medical attendant, to whom she wrote under such delusion; that, in 1830, she hired a girl, named Jane, from the Foundling Hospital, who used to sleep in her room at night, and in the day was locked up in a room at the top of the house by the deceased, who carried up her meals; that before and after the date of the Will, she imagined that her relations and friends, including her brother, Thomas Waring, appeared to her in disguise, or in the likeness of some other persons; that, in 1836, she imagined that her house was surrounded by persons in disguise, and under such delusion caused the windows, doors, and gates to be fastened, in which case she remained for more than a year a close prisoner; that, from 1825, she was in the habit of sending letters, evincing that she was labouring under delusions, to James King, a grocer; that, during her residence at Weybridge, she was in the habit of conversing familiarly with her female servants in the most disgusting and indecent manner, and during the same period she frequently declared to them that one "Will Deans" was constantly persecuting and annoying her, stealing her wine and breaking her windows, and in consequence of such persecution, she had a close wooden paling erected in front of her house; that, in 1838, and subsequently thereto, she often asserted that a man who came to Weybridge with a basket on his head, hawking fish, was Lord Melbourne in disguise, and when beggars called at the house, she declared that they were persons in disguise; that she was in the habit of remaining up and walking about the house during the greater part of the night, opening and shutting doors and windows, and talking to herself, and that she would frequently fire off pistols at night; that, in

August, 1841, Mrs. Nash, one of her sisters, went to visit the deceased, and found her alone, without any servant or other person in the house; and her conduct and conversation were so violent and incoherent, that a petition was presented to the Lord Chancellor, who issued a commission, under which the deceased was found insane; that neither at the date of the Will, nor for some years before, nor afterwards, was the deceased of sound mind, or capable of executing a Will, and that Henry Waring (the Appellant) was in no way related to, or connected with, the deceased, who never corresponded with him, nor was he ever personally known to, or seen by, her.

The allegation filed by the Appellant, admitted that she was naturally of penurious habits, and eccentric in her general conduct and behaviour; and pleaded, that the apprehensions she might have entertained of being persecuted, from spiteful, or mischievous, or interested, motives, were no proofs of insane delusions; that the deceased, on the contrary, conducted her own affairs, pecuniary and domestic, [346] with singular prudence and propriety; that she introduced herself to his family in 1828, and that the immediate occasion of her writing to his family was, her having seen his, the Appellant's, name in the newspapers, as presiding at a meeting of the Brunswick Club, at Newry, at which strong resolutions were passed, in favour of what she was devoted to, the cause of Protestant ascendancy.

The effect of the evidence respecting the delusions, habits, and conduct of the deceased, are sufficiently set forth in the judgment.

The learned Judge (Sir Herbert Jenner Fust) pronounced against the validity of the Will and Codicil, as she was not a person of sound mind at the time the Will and Codicil were made.

From this judgment the present appeal was brought, and now came on for hearing.

Sir Fitzroy Kelly, Q.C., and Dr. Addams, for the Appellant, in support of the appeal.—The Will and Codicil were the spontaneous acts of the testatrix, and made by her at a time when she was competent to dispose of her property. The law of England admits the existence of mental delusion, on one particular subject, with sufficient degree of mental capacity to conduct the ordinary affairs of life (1 Williams "On Executors," p. 17, 3 Edit., 1841). The principles upon which the Court determines the validity of testamentary dispositions made by persons of unsound mind, are clearly laid down in *Dew v. Clark* (3 Add. Rep. 79; S.C., reported by Dr. Haggard, 1826). Sir John Nicholl thought, in that case, that the Will of a person, partially insane, might be good, unless it was the [347] offspring of the particular insanity. Now, in the present case, the delusions had nothing to do with the Will, and it could not be considered as the offspring of those delusions. The evidence proves, that the testatrix, in all her acts and habits, in the ordinary course of life, was perfectly businesslike and sensible. Suppose she had committed a criminal offence, would she not, upon this evidence, be held liable to a criminal prosecution? We submit, that there is no distinction between the degree of insanity which will be held to exonerate a person from liability to a criminal prosecution, and that which will invalidate a Will, where the insane delusion was not the immediate cause of the Will, and, in fact, had no connection with the Will. The real question is, not whether the testatrix was under delusions, but whether she was of testate capacity at the time of making her Will. *Chambers v. Yatman* (2 Curt. 415). *Mudway v. Croft* (3 Curt. 671). *Cartwright v. Cartwright* (1 Phill. 90).

The Queen's Advocate (Sir John Dodson), and Sir Frederick Thesiger, Q.C., for the Respondents, were not called upon to address their Lordships.

Lord Brougham (July 17, 1848).—This was an appeal from the sentence of the Prerogative Court of Canterbury, refusing probate to the Will of Sarah Gibson, published, or purporting to be published, on the 1st of March, 1834. The refusal was grounded on the testatrix being of unsound mind when the Will was made and published. There [348] is, appended to the Will, a clause of attestation, but no witnesses are subscribed. Hence, according to the undoubted and unquestioned law of the Ecclesiastical Courts, this would have rendered the instrument an unfinished Will, unless subsequent acts recognised it and affirmed it, as a completed instrument; and a Codicil, bearing date some time in 1836, as is proved by circum-

stances and affidavit, might have been relied on, as having this effect, had the testatrix, at that time, been possessed of her faculties, which she was, in a considerable less degree than in March, 1834.

This issue, however, though clearly raised on the pleadings, was not disposed of by the Court below, the learned Judge having deemed the evidence of unsoundness, as early as March, 1834, sufficient to authorise him in his refusal to admit the Will to probate. It becomes necessary, therefore, at least, it is convenient, that we should direct our attention, in the first instance, to an examination of the grounds upon which he comes to this conclusion—a conclusion on which we have so fully agreed that we did not think it necessary to call upon the Respondents for an answer to the case made by the Appellant.

The principles which must govern a case of this description are sufficiently clear, and they may be regarded as well settled by the current of former decisions. Indeed, they flow easily, from considering the nature of the inquiry in which such cases engages us.

The question being, whether the Will was duly made by a person of sound mind or not, our inquiry, of course, is, whether or not the party possessed his faculties, and possessed them in a healthy state. His mental powers may be still subsisting; no disease may have taken them away; and yet they may have been [349] affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound.

Again, the disease affecting them may have been more or less general; it may have extended over a greater or a less portion of the understanding; or, rather, we we ought to say, that it may have affected more, or it may have affected fewer, of the mental faculties. For we must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when we speak of its different powers, or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is remembering, fancying, reflecting, the same mind in all these operations being the agent. We, therefore, cannot, in any correctness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection, but being morbid when it fancies; and so its owner may have a diseased imagination, or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases, we do not mean that the mind has one faculty, as consciousness, sound; while another, as memory or imagination, is diseased; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining, or casting the retrospect, called recollecting.

This view of the subject, though apparently simple, and almost too unquestionable to require, or even to [350] justify, a formal statement, is of considerable importance, when we come to examine cases of what are called, incorrectly, "partial insanity," which would be better described by the phrase "insanity" or "unsoundness" always existing, though only occasionally manifest.

Nothing is more certain than the existence of mental disease of this description. Nay; by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by Physicians, "Monomania," on the supposition of its being confined, which it rarely is, to a single faculty, or exercise of the mind: a person shall be of sound mind, to all appearance, upon all subjects save one or two; and on these he shall be subject to delusions, mistaking for realities, the suggestions of his imagination. The disease here is said to be in the imagination; that is, the patient's mind is morbid, or unsound, when it imagines; healthy and sound when it remembers. Nay; he may be of unsound mind when his imagination is employed on some subjects, in making some combinations; and sound when making others, or making one single kind of combination. Thus, he may not believe all his fancies to be realities, but only some, or one; of such a person we usually predicate, that he is of unsound mind only upon certain points. I have qualified the proposition thus on purpose, because, if the being, or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at

all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested, by believing in the sugges[351]tions of fancy as if they were realities, would break out; consequently, it is as absurd to speak of this as a really sound mind: (a mind sound when the subject of the delusion is not presented;) as it would be to say, that a person had not the gout, because his attention being diverted from the pain, by some more powerful sensation by which the person was affected, he, for the moment, was unconscious of his visitation.

It follows, from hence, that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be. The act in question may be exactly such as a person without mental infirmity might well do. But there is this difference between the two cases; the person uniformly and always of sound mind, could not, at the moment of the act done, be the prey of morbid delusion, whatever subject was presented to his mind; whereas, the person called partially insane,—that is to say, sometimes appearing to be of sound, sometimes of unsound mind,—would inevitably show his subjection to the disease the instant its topic was suggested. Therefore, we can, with perfect confidence, rely on the act done by the former, because we are sure that no lurking insanity, no particular, or partial, or occasional delusion, does mingle itself with the person's act, and materially affect it. But we never can rely on the act, however rational in appearance, done by the latter, because we have no security that the lurking delusion, the real unsoundness, does not mingle itself with, or occasion, the act. We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness always exists, but it requires a reference to the peculiar topic. [352] else it lurks and appears not. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound, and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind.

Unless this reasoning be well founded, we cannot account for the unanimity with which men have always agreed in regarding as the acts of an insane mind, those acts to all appearance rational, which a person does who labours under delusions of a plainly extravagant nature, though there is nothing in the act done, and nothing in the conduct of the party while doing it, at all connected with the morbid fancies. If these fancies only affect the party now and then; if for some months he is free from them, labouring under them at other times, then his acts apparently rational would not be regarded as those of a person mentally diseased. But if we were convinced, that at the time of doing the acts the delusion continued, and was only latent by reason of the mind not having been pointed to its subject, and would have instantly shown itself, had that subject been presented, then the act is at once regarded as that of a madman. Thus, there have been many cases of persons labouring under the delusion that they were other than themselves; some have believed themselves deceased Emperors or Conquerors; others, supernatural beings. Suppose one, who believed himself the Emperor of Germany, and on all other subjects was apparently of sound mind, did any act requiring mind, memory, and understanding. Suppose he made his Will, and either did not sign it, (before signing was required), or if he did, signed with his own name; but suppose we were quite convinced that had any one spoken of the Germanic Diet, or [353] proceeded to abuse the German Emperor, the testator's delusion would at once break forth, then we must at once pronounce the Will void, be it as officious and as rational in every respect, as any disposition of property could be: of course, as no one could propound such a Will with any hopes of probate, if it happened, that, while making it, the delusion had broken out, even although the instrument bore no marks of its existence at the time of its concoction, it must always be a question of evidence, on the whole facts and circumstances of the case, whether or not the morbid delusion existed at the time of the *factum*; that is, whether, had the subject of it been presented, the chord been struck, there would have arisen the insane discord, which is absent to all outward appearance, from the chord not having been struck.

The principles which have been laid down do not at all differ from those on which the Courts have acted, which text writers have construed, and which scientific men, both moralists and physicians, have approved. In the well-known case of

Dew v. Clark, reported, 3 Addams, 97, but also reported, with the great advantage of the learned Judge's corrections, and published separately, by Dr. Haggard, we find Sir John Nicholl stating, that mere eccentricity is not enough to constitute mental unsoundness, nor great caprice, nor violence of temper, but that there must be an aberration of reason; and he adopts a definition of delusion given by the learned Counsel in the cause, (now a member of this Court,) deeming it well described by the expression, that "it is a belief of facts, which no rational person would have believed." Perhaps, in a strictly logical view, this definition is liable to one exception, or at least exposed to one criticism, [354] namely, that it gives a consequence for a definition; and it may be more strictly accurate to term "delusion," the belief of things, as realities, which exist only in the imagination of the patient. The frame or state of mind which indicates his incapacity to struggle against such an erroneous belief, constitutes an unsound frame of mind. Sir John Nicholl justly adds, that such delusions are generally attended with eccentricities, often with violence, very often with exaggerated suspicions and jealousies. Lord Hale lays it down, that insanity may be general, and it may be partial. "There is (says he) a partial insanity of mind, and there is a total insanity;" and the former, he says, is expressed by the phrase "*quoad hoc vel illud insanire*" (1 P. C., c. 4, s. 2). But Sir John Nicholl (and Lord Hale does not differ) speaks of partial insanity as only that which is occasionally called forth, and not that which only exists occasionally. The authority of Lord Hale is quite consistent with the position, that the disease is always present, and only not apparent by the accident of the proper chord not having been struck at the time; and Sir John Nicholl more expressly says, in explaining what he means by occasional,—a delusion not called forth except under particular circumstances. In all the cases there are delusions occasionally manifested, and a state of mind incapable of mastering them. (Hagg. 6.)

Dr. Willis, on Mental Derangement, p. 151, clearly states, that men often mistake, for a lucid interval, the mere absence of the subject of delusion from the mind; he says, no madman can be said to have recovered his reason, unless he freely and voluntarily confesses his delusion; to which I take leave to add, that the confession or admission must be, not only freely and voluntarily made, but made without any design at the time [355] of pretending sanity and freedom from delusion, according to the known or suspected view of the inquirer, and acting a part accordingly. There is a noted instance of the power, sometimes possessed by lunatics, to restrain for the moment, and for a purpose, their imagination, and conceal their delusions. It occurs in a case tried at Guildhall, by Lord Mansfield, where one Wood, who had indicted Dr. Munro for detaining him in his madhouse, was able completely to evade all questions on his delusions, though some time before, in another indictment, tried at Westminster, he had readily fallen into them, when examined. The Defendant, accordingly, was obliged to give evidence, at Guildhall, of what had taken place at Westminster (27 Howell's State Trials, 1316, note).

If these are the principles upon which all cases of this description must be decided, there are others applicable to all cases whatsoever, but especially to such as rest upon circumstantial evidence. The burthen of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, by leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment, than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a latter Will, undertakes to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the *factum* is regular, will suffice; and they who impeach the instrument [356] must produce their proofs, should the party actor, (the party propounding,) choose to rest satisfied with his *prima facie* case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again. So, where any circumstances of grave suspicion arise at the outset of a case, as that a Will is shown in the outset, to have been made and published in a lunatic asylum, (which I have known to happen,) the burthen of proving, and very satisfactorily proving, the testator's sanity would be so clearly on the

propounding party, that no further proof would be required to impugn it. In the present case, there is a circumstance of a somewhat similar description. It is not denied, that some years after the *factum*, that is, in 1841, the testatrix was found a lunatic by inquisition, that she died undoubtedly insane, and that the madness was found by the jury to go back to within four years of the date of the Will. This clearly made it incumbent on the party propounding, to show the sanity by much clearer proof than would have been required had no such disease been admitted, on all hands, to have clouded her understanding towards the close of her life.

But it is also to be observed, that insane delusions are very clearly shown to have taken possession of her mind, previously to the date of the Will: and, although the degree of disease which then existed has been made the subject of dispute, no one can pretend that there was perfect soundness of mind some few years before March, 1834. This renders it still more necessary for the Court of Probate to be satisfied, that these delusions had ceased, and the mind recovered its healthy state before the *factum*.

Nor is this all: the delusions which existed at an [357] early date, are proved to have increased after the Will was made. They gathered force, until it became necessary to sue out a commission: and the result of the inquisition was, that in 1838 she had become perfectly insane.

Thus it becomes quite impossible to disconnect the different periods of this unhappy person's history: there is every probability that the diseased state, which commenced before the *factum*, continued up to its date; the likelihood is, that the delusions, of which evidence exists, before and after, continued during the intermediate time, although no proofs may be obtained of the precise fact: and all the presumptions which would otherwise have been in favour of sanity at that date, are turned the other way by these important circumstances. Hence it is not at all a just and correct view of this case, which affirms, that the presumption is in favour of the testatrix's soundness, and the proof of continued delusion is thrown upon those who deny it, merely because there is no evidence directly applicable to the date of the Will. No one who finds a person labouring under the same kind of delusions before and after a given period, can be justified in refusing his belief to their continuance during the interval, unless clear evidence be produced of their having ceased for a time, and then returned. The very great probability is, that they existed all the while, and were only not apparent, because the subject with which they were connected did not happen to be openly mentioned before others, who might give evidence. The very great probability is, that the patient laboured under them all the while, although she did not openly declare her belief in them, and act or speak under that belief.

[358] Another observation remains to be offered, before proceeding to a more minute commentary on the evidence. The existence of delusions being proved, and their continuance proved or assumed, at the date of the *factum*, so that the Court is satisfied of the testatrix then labouring under their influence, it is wholly immaterial that they do not appear in the Will itself. The party propounding, often approached this point in argument, and repeatedly adverted to the fact—perhaps we should rather say, the assertion or the assumption—that this Will betrays no marks of the alleged delusions, or generally, of an unsound mind. There was a manifest disposition to lay down a rule, that no person labouring under monomania, or partial insanity, can be deemed intestable, unless the kind of insanity appears on the face of the Will. But there was wanting the courage to lay down a position which would, at once, have been rejected, and must have been met by the question, Could any Court admit to probate the Will of the man who said, (in the case cited by Sir John Nicholl, in *Dew v. Clark*,) “I am the Christ,” although that Will bore no marks whatever of an unsound mind, still less, of the dreadful delusion under which the party laboured? It is hardly possible, on the other hand, that any Will can be so framed as to rebut all presumptions of insanity arising from proved facts. Of the present Will, it is enough to say, that it wholly fails to do so, as shall presently be observed.

In making these general observations, which have been applied to the case before us, we have adverted to its principal points: but we may now dwell somewhat more in detail upon the evidence: and although the letters form the most important

portions of it, the [359] testimony of the witnesses is far from immaterial, and might be deemed to prove the case, even if the letters were laid aside.

Mr. Stilwell, a respectable medical practitioner, as I am entitled to term him, from the very intelligent and sensible evidence he has given, speaks to his intercourse with, and observations upon, Mrs. Gibson, from 1825 to 1831, inclusive; and Mr. Neville, also a medical man, brings the history of the case down still nearer the *factum*, for he speaks to 1833 and 1834. Mr. Stilwell attended Mrs. Gibson from June, 1826, to September, 1831. From the first, he found her irritable, strange, and eccentric in her conduct, working herself up, on trifling occasions, as he phrases it, and sometimes, from imaginary causes, very suspicious of those about her, always complaining of her servants plotting against her. These plottings formed the general subject of her conversation; and it seemed uppermost in her mind. Now, these traits of character, and behaviour, do not amount to indications of insanity, yet they, doubtless, show a mind prepared for aberrations of reason, and a control of the judgment, so feeble, as to make it easy for mere delusions to take possession of it; accordingly, Mr. Neville goes on to say, that she suspected, not only her servants of plotting, but "some persons about her in disguise." On this, he says, she would talk wildly and irrationally, her fears being imaginary, and mere delusions; on other subjects, she would talk rationally, when she could be got to speak on them, but she soon recurred to the imaginations that disturbed her. He adds, that from the first to the last of attending her, she never was free from the delusion of some plot endangering her [360] personal safety. Several times she told Mr. Stilwell, whispering as if she was communicating a secret, that Lord Melbourne and Lord John Russell frequented the neighbourhood, disguised as fish-dealers. But he adds a remarkable observation, that he paid the less attention to them, because her fancies were so numerous, that he never once saw her that she had not some extraordinary story, some evidence of delusion, and that he only recollected this particular one, from its relating to public men. Another subject of her alarms was broached early in Mr. Stilwell's attendance; it was, that ladies of the name of Walker, made ridiculous, grinning faces at her, in church; a delusion of which the instances are, I believe, not very infrequent, and she had applied to Admiral Stirling, a magistrate, about it. Mr. Stilwell says, that the Misses Walker were, to his knowledge, highly respectable, amiable, and benevolent ladies, so that their having so demeaned themselves, must have been a pure imagination; the freak of a deluding and deluded fancy. It may further be stated, that Mr. Stilwell having, at first sight, only supposed her eccentric, after a few visits considered her to be insane, and this conviction continued all the time he knew her, namely, till September, 1831, and has continued to this time, he having considered the verdict wrong in not going considerably further back than 1838. This, he says, was his decided impression. An interrogatory was put to him, as to the truth of the supposition, that the Misses Walker made faces at her in church, the suggestion being, that they really might have done so. He answered, that he never knew any ladies more unlikely to do so—"I consider it to have been absolutely impossible."

[361] Mr. Neville attended her from July, 1827, to February, 1834, that is, regularly from 1827 to June, 1833, when he saw her several times, and several times after, in February, 1834. On many occasions, he observed nothing particular, but at other times her conversation and manner exhibited (he says) strong indications of her being a person of unsound mind. Her fancy was, that men in general, and her own servants among others, were in love with her. "Her manner and expression of countenance (says Mr. Neville) corresponded with her declarations, and were such as to establish the undoubting conviction of her being under a delusion, and insane." It occurred again and again, so recurring as to show, that it was permanent, "a confirmed, and established delusion." Nay, Mr. Neville himself was one of the subjects of the delusion. After an ordinary visit, in which nothing material had occurred, she wrote him a long letter, remonstrating with him, and desiring him to recollect that he only attended her as a professional man. He saw her again, as usual, the following day, and neither he nor she took any notice of the matter; she had forgotten it, and he, treating her like a mad person, overlooked it. This occurred early in his attendance on her. But his opinion generally, from the

delusions she so often referred to, is, that it was "permanent, confirmed and established," and he has not sworn truly, if he has any reason to doubt its continued existence in 1833 and 1834. Nothing that he observed in these years had contributed to alter his fixed opinion on this subject, though he refers to the earlier period of his acquaintance, as the time when she spoke to him of the annoyance she was undergoing from lovers.

[362] There are other witnesses who speak to the same delusion. Frances Bishop lived with her from June, 1832, to March, 1833, and says, that she was decidedly mad, and gave, as one reason, her supposing people were in love with her; she described the conduct, especially, of two, Sir Edmund Nagle and Mr. Thesiger, as particularly indecent; using such language in giving an account of it, that the witness could not bear what she calls, "its offensive and disgusting indecency," and was forced to quit the room. Now, this must have been a mere fancy, for, independent of the character of these gentlemen, she said, they had asked her hand in marriage, and that she had refused them on account of their indecent conduct and language; a thing wholly impossible in the case of suitors in their station in life. Another witness, Jane Jenner, who was with her from October, 1829, to November 1832, except six months in 1830, gives the same account of her obscene expressions and indelicate attitudes, when falsely charging the witness with unchaste conduct. It is to be observed, too, that she suspected her of having connection with men, for the purpose of their getting hold of her, the testatrix's, money, about which she, a foundling apprentice, could know nothing. I may observe, in passing, that these fancies were accompanied with very violent, indeed most cruel behaviour to this poor girl; according to both her own history and Frances Bishop's. But, as often happens in mental derangement, there were paroxysms of kindness, alternating with those of cruelty. The indecency of language and gestures wound to by all the witnesses, is, in a person well brought up, and of a chaste life, itself a plain and melancholy indication of mental disease; another indication of a kind [363] often observed in the insane, was her extraordinary vanity; she had such ideas of her own importance, she would say, that the officers came to the parade, and the band played near her house, in order to show her respect; and to the same head may be referred her fancying that the clergyman of the parish preached at her; and, on that ground, and of the faces made at her, she left the church.

These, and indeed all the witnesses, swear to her constant suspicions of every one; her fancies of plots and violence; her keeping a loaded pistol near her, and often firing it from the window in the night.

The last witness, of whose testimony it is necessary to speak, is one of great respectability, and, like all the others against the Will, wholly free from any bias of interest, or, indeed, of feeling, in the cause. Sir Richard Frederick gives a clear and unhesitating opinion, that in 1825 Mrs. Gibson was deranged; she wrote him a letter asking him to call; and when he did so, she told him that Sir Edmund Nagle had been with her; that he was deranged; that he had got her up into a corner of the room, but that she had escaped from him; that he had then jumped out of the window, and that she had followed him, and pacified him; that as he was going to live in a house where the windows were higher, and his jumping out would be dangerous, she had written to Lord Liverpool. She then showed him the letter she had written. Sir R. Frederick says, it was very well written, allowing her to be right as to Sir Edmund Nagle's state and conduct. This delusion was in 1825; so were the others of which mention has been made, as to Lord Melbourne and Lord John Russell haunting the neighbourhood in disguise. But other witnesses speak to that delusion, as well as her universal suspicion being continued, after the *factum*. [364] Thus, Jane Hunter says, she would talk of Lord Melbourne, and Lord John Russell, and Lord Lake, being about the house all night, and wanting to come in for the purpose of having an improper connection with her. The abominable indecency of her conversation, is also spoken to at the same period.

The testimony of the witnesses who have been examined in support of the Will, is liable to the remark, that some, indeed most of them, only speak to negatives, saying, they never observed such and such aberrations; never heard her speak of Will Dean prosecuting or annoying her, or Thomas Waring being in disguise, or

having turned Catholic, as others had sworn; but several, indeed most of them, prove too much, deposing to her perfect rationality at the time when we have evidence from her own letters that she was insane; generally speaking, too, their means of knowledge were but scanty, compared with those of the witnesses against the Will. Thus, Mrs. Avarne visited her once in 1827, for four months, once in 1837, for three weeks; and during the interval, but of ten or eleven years, only for a fortnight, or a few days, at a time. Susanna Elers saw her in 1830, for two or three days; in 1833, 1834, and 1837, one day each year; in 1836, two days. Of course, as might be expected, she saw nothing particular, for the case is, that nothing particular appeared, at every moment, but only occasionally. There is, however, another objection to the testimony of several of these witnesses, and of all those who most strongly supported the Will: they support it too strongly, and they differ among themselves. Thus, Elizabeth Akehurst says, that during twenty years, no change whatever was observable, and Sarah Gibson was always quite rational, and so equally rational. But Joseph Marter [365] positively swears, that the longer he knew her, the more eccentric she was. It is true he ascribes her eccentricities to drink, as does Julia Willison; but this witness admits the eccentricities described by Elizabeth Akehurst. John Marter further says, that though she did take odd fancies, as he terms it, he never doubted her sanity, and expected a different verdict of the Jury accordingly. Now, he speaks of her down to 1840. Thomas Miller speaks to after 1838, and maintains her to be rational; yet, that she was mad before 1838, her letters clearly prove; indeed, Miller is aware of her eccentricities, and qualifies his statement by saying, when not excited she was rational. That she was extremely irritable long before 1834, is clearly proved; yet Augusta Avarne and Sarah Roots declare, that they never saw either any eccentricity, or any irritation at all; and the former speaks to 1837. Many witnesses for the Will having denied ever having heard her speak of Thomas Waring being a Catholic, and, no doubt, truly so denied it; one James Hunt, gives a remarkable confirmation to this part (and a very material part it is) of the case, against the Will; not only he allows her to have been very eccentric, never having seen any one more so; not only, he says, she would run on talking nonsense by the hour; not only does he say, "I don't think she was quite right at times; sometimes she was very rational, indeed, sometimes she was not;" but he says, that in 1833, the year before the *factum*, she complained of Thomas Waring coming to Weybridge, and putting up his horse at the Queen's Head, and having become a Catholic. She then very sharply said to Hunt, "You know it, and he goes down in his carriage to the Queen's Head. I'll go next Sunday, and see when he does come." She [366] added, "He shall have nothing from me; he shall never be the better for my money." This she repeated several times, in the same year, 1833; and this is all related by a witness for the Will.

As to Miss Lee, she appears to have had a bias on her mind, which, though it might not influence her testimony as to facts, nay, probably did not, may well have swayed her opinion. The Will, if set up, trebled her limited income, and she must have wished well to the case; she never saw any jealousy or suspicion in her, but says, she was a very cautious person; and so indeed is this witness, for she says, "perhaps you may say she was a little eccentric," and by eccentric, it turns out that she means only "being retired." She says, "she was more mild than otherwise." It is very possible, that before this respectable lady she could control herself, more than before her inferiors.

When we take all the witnesses together, which are called to support the Will, surely there can be no inference drawn from their testimony, sufficient to answer the case on the other side. They had inferior opportunities of observation; they differ materially among themselves; they sometimes prove too much, and give evidence inconsistent with the admitted facts in the case; sometimes they give very material evidence against the Will; and finally, where they are consistent with each other, and with themselves, the only result of their testimony is, that what others saw and heard, and positively swore to, they did not happen to see and hear, and so cannot swear to; but of course cannot negative. For be it observed, there is not one single contradiction; there is no witness for the Will, who contradicts the things sworn to against it, at the time and place where they are so [367] stated by the witnesses against the Will. Nothing can be more clear than that, as far as the parole evidence goes, the case for the Respondents is unanswered.

Nothing more clear than that the balance of the testimony is wholly against the Appellant, nay, that we can hardly weigh the testimony on the two sides against each other; inasmuch as all that the Appellant's witnesses swear may be true, while the depositions of the Respondent's witnesses are entirely credited.

But the documentary evidence is yet more remarkable, and to that we may now advert. Her suspicions appear to have begun very early. In 1821, she expresses them of her husband; whom she supposes capable of poisoning her. Next year she writes to bring down her brother; telling him her husband is very ill; and evidently expecting an immediate funeral; for she speaks of the churchyard as near, conveniently near, and that it would be conducted without expense, though respectfully. In her letter of the 11th of December, 1825, she is certainly more a prey to delusion, and her mind wanders; she fancies she is preached at. She saw a Colonel Frederick, but has lost all recollection of him from the misery she has been in ever after. On the 22nd of December she writes to Sir Frederick, that she is suspected of "meretricious habits." The letter of the 11th of January, 1826, to the same gentleman, is wilder still. Other letters occur in 1827 and 1829, full of strange suspicions and surmises, betokening a bewildered mind. On the 18th of September, 1830, she is quite wild.

As we approach the date of the Will, these delusions and wanderings, far from disappearing or lessening, [368] become more striking. That the letter of November, 1831, concerning the indication of a Revolution, is the work of an unsound mind, who can doubt?

It may be observed, in passing, that whenever unsoundness of mind is found to exist, a continuance of the same unhappy state may be safely presumed on much slighter evidence of aberration than might have been required to prove its commencement: such indications in this case are clear enough. In 1833, she says a lady abused her furiously before the servants, and not the lady, but the servants, she was thus obliged to send away.

We have seen, then, how unsound her mind was down to the end of 1832, by the letters which she wrote, as well as by her conversation and demeanour, as spoken to by the witnesses. In 1833, we have repeated indications of a like kind, and some spoken of by the witnesses for the Will; particularly her delusion as to her brother, Thomas Waring, coming to the Queen's Head and turning Catholic, and that Hunt, who denied it, must know it.

The case for the Will requires us to believe her reason quite restored between November, 1833, and March, 1834; yet, soon after this latter date, we find these delusions and that wildness continued in her letters. That of October, 1834, is a proof of this; all these symptoms of insanity continue, and are on the increase in 1835. Her letters now speak of plots, and of attempts on her life, and of persons in disguise, and of those who assume the faces of others.

The result of the whole evidence, when examined and compared, is, that this testatrix was of unsound mind some years before the *factum*; and that she was of the same unsoundness after the *factum*, a prey to delusions, [369] and of unsteady, unsound, wandering, intellect. In most things, and especially in matters relating to the care of her property, she conducted herself with great prudence and discretion, and apparently as a person of sound mind; but, for a long series of years, delusions, manifestly insane, occasionally appeared;—and this so frequently and under such a variety of circumstances, as to prove them to have a continually existing cause; and to be so, for what has been called habitual, as to turn the *onus probandi* on those setting up any act done, or instrument executed, by her, after this malady was established. Therefore, the Appellant must, in this case, prove her to have had a lucid interval between November, 1833, perhaps we should rather say between February, 1834, and the date of the Will, and March of that year, and that this lucid interval continued to, and included, the 1st of March. Now, by a lucid interval, is not meant a concealment of delusions, but their total absence; their non-existence in all circumstances; a recovery from the disease and a subsequent relapse: of this we have not any proof whatever *dehors* the Will; but is there anything in the Will which can furnish such needful proof? Or, indeed, is there anything in the Will which can even tend to shake the inference from all external evidence, that the disease continued during the whole period, from 1833, to autumn, 1834, when

it plainly manifested itself! Very far from it. The Will, if it does not confirm that inference, is perfectly consistent with it. The Will is in favour of a person unknown to the testatrix, though bearing her name, except by having made a Protestant speech in Ireland, of which she read an account in a newspaper. To him, for no other reason, she leaves £39,000, or £40,000, setting aside her [370] brother, Thomas Waring, to whom she had before given it, and towards whom, one of her most remarkable delusions pointed (according to the testimony of a witness called in support of the Will) towards whom, seized by this delusion, that he was turned Catholic, she declared a diminished affection on that score, and from whom she took the sum to give the Protestant speaker. We are all clearly of opinion, that the inferences of unsoundness rather gather strength from the *factum*, and are nowise impaired by it.

Lastly, the Will is an incomplete instrument: and requires subsequent confirmation, by being recognized. The Codicil made in or after 1836, we know not how long, may have been made after the inquisition found her insane; but, at any rate, it was made when her unsoundness of mind had become more generally manifest, than at the date of the Will, and it is past all possibility of doubt: any acknowledgment at the time is plainly nugatory.

We, therefore, entirely agree with the Court below, in refusing probate to this Will. Though satisfied with the elaborate reasoning of the learned Judge, who so fully, and so ably, dealt with the case, we have deemed it right to enter much at large into the whole subject here, and to give, at full length, the reasons of which our judgment of affirmance is grounded: stating the principles of the law, and the result of the evidence as to facts, because the law respecting what is called partial insanity has never before been laid down in the Superior Court, and because the Respondents having been stopped, the evidence had not been examined, except on one side in the argument at the Bar. The appeal is dismissed, and the sentence, refusing probate, affirmed, with costs.

[Mews' Dig. tit. WILL; I. TESTAMENTARY CAPACITY; g. *Soundness of Mind*. S.C. 12 Jur. 947. Lord Brougham's view that—the mind being one and indivisible—any degree of mental disorder rendered it unsound (6 Moo. P.C. 350, 351, 352), was adopted by Sir J. P. Wilde in *Smith v. Tebbitt*, 1867, 1 P. and D. 398; and *Hancock v. Peaty*, 1867, 1 P. and D. at p. 351; but was disapproved of by the Court of Queen's Bench in *Banks v. Goodfellow*, 1870, L.R. 5 Q.B. 549, and is now accepted as correct: see *Boughton v. Knight*, 1873, 3 P. and D. 64; *Burdett v. Thompson*, 1893, *ib.* 72 n. (1); and cf. *Roe v. Nix* (1893). P. 55; *Pilkington v. Gray* (1899), A.C. 401; and the American case, *Delafield v. Parish*, 1862, 25 N.Y. 9.]

[371] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THOMAS PETLEY and Others. — *Appellants*: WILLIAM CATTO and Others. —
Respondents * [July 4 and 5, 1848].

The CHRISTINA.

A steam-tug entered into a verbal agreement with the master of a vessel, having a licensed pilot on board, to tow her to London; in coming up the river they came across a brig near a tier of vessels; the pilot hailed the tug to go to the westward of the brig, but the master of the tug disobeyed the order, and went to the eastward, and thereby caused a collision between the vessels. The tug afterwards completed the towage, and brought the vessel to her destination: Held, in such circumstances, that the disobedience of the orders of the pilot was not justifiable, and that the towage was forfeited.

* Present: Lord Langdale, Lord Campbell, Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

Quere, Whether, notwithstanding such conduct, the tug could recover towage from the owners of the vessel under the contract, and leave the vessel towed, to a cross-action for the damage.

This question not having been properly raised or discussed in the Admiralty Court, the Judicial Committee, sitting as a Court of Appeal, refused to entertain it [6 Moo. P.C. 378, 379].

This was a cause, civil and maritime, brought by the Appellants, the owners of the steam tug *Lass o'Gourie*, against the barque *Christina*, to recover the sum of £8, for towage services rendered by the tug to the *Christina*.

[372] The facts, as alleged in the Act on Petition, were shortly these:—that about 1 o'clock P.M., on the 31st of August, 1847, the tug being in the lower part of Sea Reach, in the river Thames, following her avocation of towing vessels, spoke the barque *Christina*, a vessel of 250 tons, homeward bound to London; that a verbal agreement was made by the masters of the barque and tug, that the latter should tow the former up to London for the sum of £8; that a rope from the barque was thereupon made fast to the tug, which then proceeded towards London with the barque in tow, and, on passing Gravesend, a duly licensed Trinity House pilot was taken on board the barque to navigate her to London; that about 6 o'clock P.M., in consequence of the tide failing, the barque was brought to anchor off Woolwich, by direction of the pilot, and on the flowing of the tide at 3 o'clock A.M., of the following day, the barque was again got under weigh in charge of the pilot, and having been again made fast to the steam-tug, the latter towed her to the entrance of the Surrey Canal Dock, whither the barque was bound when the tug left her; that application had been made to the master and owners of the *Christina*, for the payment of the towage money, but without their being able to obtain it.

The answer of the owners of the *Christina*, admitted that their vessel spoke the tug *Lass o'Gourie*, and engaged her to tow the barque in a careful and [373] skilful manner into dock, which she undertook to do, for the sum usually paid for towage by vessels of such burthen and description as the *Christina*; that on the arrival of the barque in tow of the steamer off Gravesend, the sea pilot left her, and a duly licensed Gravesend pilot was taken on board, who, about 7 P.M., brought her to anchor off Woolwich; that, on the following morning, the wind being W.N.W., with light breezes and cloudy weather, the barque weighed anchor, in tow of the steam-tug, and proceeded up the river; that about 4 A.M., when in Limehouse Reach, the crew of the barque being on the look-out, the pilot on the starboard side, the master on the larboard side of the barque's poop, and the mate on the larboard side of the fore-castle, saw a vessel a-head with her sails set, but apparently having her anchor down (which proved to be the brig *Mary Clark*, at such time drudging by her anchor into a tier in Limehouse Reach): that the pilot seeing there was not sufficient room for the barque to go to the eastward of the brig, in consequence of the tier of vessels there stationed, immediately and loudly called out several times to the master of the tug, to tow to the westward (Limehouse Reach being situate about S.S.W. and N.N.E.), thereby meaning to tow the barque to port, and at the same time gave orders to starboard the helm of the barque, and immediately afterwards to port the helm hard a-starboard, both of which orders were promptly obeyed: that the master of the tug, instead of obeying the orders of the pilot, and taking a course to the westward of the brig, continued to pursue a course to the eastward, which was improper by reason that there was no room on that side of the brig; that the pilot seeing the error of the tug called out, "Where are you going with the ship, why [374] don't you tow to the westward?" and directed the mate of the barque to stand by the anchor; that the master of the tug, however, still took no notice of the repeated orders of the pilot, but persisted in attempting to pass to the eastward of the brig, when, all at once, the helm of the tug was put a-starboard, and she came right on the larboard bow of the barque, whereupon the pilot called to the master to "go on," and repeated such order, but when the barque was within a cable's length of the brig, the tow-rope was cast off by the tug, which left the barque in her then perilous situation, to be drifted by the flood tide then running strong; that the pilot immediately ordered the mate of the barque to let go her anchor, which was instantly done, but too late to avoid collision with the brig, whereby both vessels sustained considerable injury: that, had the master of

the steam-tug attended to the orders of the pilot, or towed the barque in her proper course to the westward of the brig, or not cast off the tow-rope, no accident would have occurred; that the collision was not in the least degree attributable to the pilot or crew of the barque, but was occasioned solely and entirely in consequence of the carelessness, want of skill, mismanagement, or inattention to the orders of the pilot, by those on board the tug, by reason whereof the owners of the barque refused and declined to pay the £8 claimed; that the owners of the barque had incurred a heavy expense in repairing the brig as well as their own vessel.

The owners of the tug, in reply, denied that the tug had been under any special engagement to tow the barque in a careful and skilful manner; and denied that the *Mary Clark*, when in Limehouse Reach, was drudging by her anchor into a tier, for that she was [375] riding at her anchor, and at least 100 yards below the tier; and denied that there was not sufficient room for the barque to go to the eastward of the brig, which was the proper course, and the tug could have safely towed her to the eastward, but the pilot called out to the tug to tow the barque to the westward, whereupon the tug's helm was immediately put hard a-starboard for that purpose, and the tug herself went westward, clear of the brig, but which the master of the tug saw the barque could not do, owing to the flood-tide running very strong, and so, of necessity, he cast off the barque when about ten fathoms from the brig, loudly hailing the barque to go to the eastward, which might have been safely done, by putting the barque's helm a-port, whereas it was kept so long a-starboard that she came in contact with the brig. And they further alleged, that the pilot in charge of the barque infringed a regulation of the Trinity Board, by getting the barque under weigh in Woolwich Reach, and proceeding up with her, in the dark, the collision having occurred full an hour before daylight.

On the hearing of the cause on the 13th of January, 1848 (case reported, *nom. The Christina*, 3 W. Rob. Adm. Rep. 27), the learned Judge of the Court of Admiralty (the Right Hon. Dr. Lushington), was of opinion, that although the pilot might not have exercised a sound discretion in the orders he gave, yet that it was satisfactorily established, that there was no justification for the steam-tug refusing to obey and carry into effect these orders; and that being the case, that the master did not fulfil the contract on which he was suing, and that as he did not fulfil the contract, he was not entitled to recover; and upon these grounds, pronounced against the claim with costs.

[376] From this judgment and decree the present appeal was brought by the Appellants, the owners of the steam-tug, and now came on for hearing.

Sir Frederick Thesiger, Q.C., and Dr. Addams, for the Appellants.—It is of great importance to ascertain, whether it is to be a rule that, in all cases such as the present the towage is to be forfeited. Surely, even assuming there was some negligence on the part of the tug, that will not justify the owners of the *Christina* refusing to pay towage under the contract. The contract was to tow the barque to London, and that service having been performed, the claim for the sum stipulated undoubtedly attached. If there was any negligence on the part of the towing vessel from which damage arose, that would be a ground for a counter-claim by a cross-action. This is the principle at Common law. Thus, in *Farnsworth v. Garrard* (1 Camp. 38), it was laid down by Lord Ellenborough, that "if there has been no beneficial service, then there shall be no pay; but, if some benefit has been derived, though not to the extent expected, this shall go to the amount of the Plaintiff's demand, leaving the Defendant to his action for negligence." And this decision has been adopted and acted upon, in *Denew v. Daverell* (3 Camp. 451), and *Duncan v. Blundell* (3 Stark. 6). In the present case no specific damage is alleged, and it was incumbent upon the owners to show that the damage suffered by the *Christina* was greater than the sum claimed. But if negligence on the part of the tug would afford an answer to the claim, the question then will be, whether the proper [377] course was to be eastward or westward of the *Mary Clark*. The master of the tug, when he was ordered to go to the westward, was proceeding to do so, but seeing that the barque could not go to the westward he cast off the tow-rope, and the *Christina* might easily have gone to the eastward by porting her helm, whereas she dropped her anchor and occasioned the damage. Although *prima facie*, the master of a steam-tug is bound to obey the orders of a pilot on board the vessel towed, there are cases in which it is his duty to disobey them, and this was a case in which he

was justified in the course he pursued. Here the pilot could not see what the master of the tug did, namely, that the barque could not go to the westward of the brig. If this judgment stands, there will be two suits against the steam-tug for collision with the *Christina* and the *Mary Clark*. The pilot was alone to blame, for he, contrary to the Trinity House regulations, weighed before daylight, and the collision occurred before daylight. Even if negligence might bar the claim of the tug, it was necessary for the owners of the *Christina* to establish that fact, and that there was none on her part. If that point be doubtful, as the *onus probandi* is upon them, their case fails. Assuming that the tug was in error in casting off the tow-rope, it was the duty of the *Christina* to do all in her power to avoid the collision, whereas, instead of porting her helm, she dropped anchor and actually occasioned the collision.

The Queen's Advocate (Sir John Dodson), and Mr. Martin, Q.C., for the Respondents.—The Appellants' arguments raise two points: one of law, and one of fact. The point of law is, whether a steam-tug, hired to tow a vessel, no matter how [378] gross her negligence, is still entitled to towage.—[Lord Campbell: Was this question raised in the Admiralty Court?—No.—[Lord Campbell: Then it ought not to be made in the Court of Appeal. It is not the function of a Court of the last resort to decide points not raised in the Court below.]—This argument is a plea in bar raised here for the first time. The cases cited by the Appellants, however, would not be binding upon the Admiralty Court, which is invested with an equitable jurisdiction. The true question is, what was the contract or agreement? The Appellants assume that it was properly fulfilled; but it was not an agreement merely to tow the vessel up to the Surrey Dock, at their discretion, and as they saw fit; it was an essential part of the contract, that they should tow her in obedience to the directions of the pilot on board the *Christina*. The general rule is admitted, that the steam-tug is bound to obey the orders of the pilot on board the vessel towed; but the Appellants say, that this is an exception to the rule. It is clear, however, that they did not fulfil this contract. First, they did not promptly obey the orders of the pilot to go westward of the *Mary Clark*; and secondly, when they did obey the order they did not persevere; even when they cast off the tow-rope, they might have towed the barque to the westward. The argument of the Appellants that there was a right course and a wrong course is fallacious; the tug had only to obey the orders of the pilot. We were not to blame for dropping our anchor, as this was done in hope of stopping the vessel, but the tide drove her.

[379] Lord Langdale.—This is a suit for the recovery of the sum of £8, for towage service rendered by a steam-tug, named the *Lass o'Gourrie*, to the barque *Christina*.

This is the first case in which the Court has had a discussion upon a point of law of considerable importance, namely, whether, admitting that there had been misconduct on the part of the master of the steam-tug, the owner could still proceed for the recovery of the towage, under the contract. In considering the judgment of the Court below, we are of opinion, that that question was not properly raised, and not discussed in that Court, so as to make it proper for us to decide it, or to entitle the party to put the point to us here, sitting as a Court of Appeal. And, therefore, upon this ground, we are of opinion, that we must lay that question out of our consideration; we express no opinion upon that part of the case, until the question is brought before us in a proper manner.

Now, it is said, that there was no misconduct on the part of the steam-tug; that it did the towage, and fully performed what it engaged to perform, and consequently that the owners are entitled to recover the sum due for that service. Upon this there is a considerable conflict of evidence. The facts appear to be these: The steam-tug was taking the barque up the river, and had come to Limehouse Reach, a part of the river in which was a vessel, called the *Mary Clark*, near a tier of ships. It appears that the *Mary Clark* was so situated that a passage might have been had by the eastward or the westward of her. The master of the tug was proceeding to the east-[380]ward; the pilot on board the barque thought fit to order him to go to the westward. It was some time after the order was given before it was obeyed; and it is a matter of contest between the parties, whether the order was heard by the steam-tug before the time when it was

ultimately obeyed. There seems very strong reason to think, that the order must have been heard before it was obeyed, because it was heard before that time by a witness who was placed at a greater distance than the tug from the barque, and who heard the call. The master of the steam-tug says, that as soon as he heard the order it was instantly obeyed; that he passed to the westward, but as it was impossible for the barque to go to the westward, he cast off the tow-rope, and that he acted as far as he could in obedience to the orders he had received. Imperfect obedience, is disobedience, and the question is, whether such disobedience was justifiable under the circumstances. It has been argued as a justifying circumstance, that if he had not cast off the tow-rope the *Christina* would have been dragged by the *Mary Clark*; and that is a circumstance respecting which there is also conflicting evidence. It is stated that there was sufficient room for the barque to have passed to the westward even after the time when the tug ceased to tow; and that if she had continued to tow to the westward, no collision would have happened.

Now, we have carefully considered the evidence, and our opinion is in concurrence with the judgment of the Court below: we think that the learned Judge of that Court has come to a correct conclusion, and we ought not to differ from him and reverse his judgment, unless we could clearly come to a contrary con-[381]-clusion. This being the case, we must affirm the judgment and with costs. In coming to this conclusion, we cannot help expressing our regret that, as this was a mere question of fact, the owners of the steam-tug should have put themselves to so much more expense by this appeal than their claim amounts to.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; S. *Tug and Tow*. S.C. below, *sub nom. Christina (The)*, 3 Rob. W. 27. See *The Energy*, 1870, L.R. 3 Ad. and E. 52; *The Mary*, 1879, 5 P.D. 17. As to Admiralty jurisdiction, see note to *Colby v. Watson*, 1848, 6 Moo. P.C. 341.]

ON APPEAL FROM THE COURT OF CHANCERY IN JAMAICA.

ROSANNA RICHARDS, ROSANNA (otherwise called ROSY) WHITE, JEMIMA WHITE, EDWARD WHITE, ROSANNA RICHARDS, and EMMA WHITE.—*Appellants*; The ATTORNEY-GENERAL of JAMAICA, JOSEPH GORDON, LAWRENCE GIBSON, CHARLES ANDERSON, WILLIAM FOSSETT, JAMES MITCHELL PARKER, JOHN PUGH JONES, GEORGE APPLEBY, and CHARLOTTE his wife, and THOMAS GROOM,—*Respondents* * [July 7 and 8, 1848].

Testator resident in Jamaica, and seised of plantations and slaves in the Island, by his Will, dated June, 1834, after giving certain bequests, proceeded as follows:—"Also I give, devise and bequeath, share and share alike, unto R. and her children, all my right, title, and claim to compensation such as may be awarded to me, as my portion of the compensation-fund, for the emancipation of such slaves as may belong to me and be living on the 1st of August, 1834." This Will was not attested so as to pass real estate, but was properly executed to pass personalty. By the law of Jamaica, slaves could only be directly devised as real estate. The Act for the Abolition of Slavery (3rd and 4th Will. IV., c. 73, passed on the 28th of August, 1833), provided that, on the 1st of August, 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to compensation, for the loss of their services as slaves. The testator died before this period of manumission arrived. The Court in Jamaica decreed,

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

that the compensation-money partook of the nature of real estate, to the same extent as the slaves, and did not pass under the Will.

Upon appeal,—Held, reversing such decree,—That (treating the slaves as real estate) the Legislature became purchasers, under the 3rd and 4th Will. IV., c. 73, from the date of the Act, giving a limited interest in the slaves for a term of years to the vendor, and that the money to be received under the compulsory sale of the slaves was converted into personal estate, and passed to H. and her children, as specific legatees, under the Will [6 Moo. P.C. 396.]

Although the testator's Will was inoperative as to the real estate, the executors took possession of the real estate, and filed a bill of interpleader against R. and her children, and the heiress-at-law of the testator, for the administration of the compensation-fund; Held that the suit was improperly brought, as the question could have been determined by the Commissioners of Compensation, and the executors refused their costs out of the fund [6 Moo. P.C. 403].

Where costs had been improperly paid out of the compensation-fund, the reversal of the Decree was made without prejudice to the right of the legatees taking proceedings for the recovery of the fund [6 Moo. P.C. 403].

The Rules, made in pursuance of the Act, and, when allowed by His Majesty in Council, declared to have the same force and effect as the Act; must, when made, be construed with reference to the provisions of the Act itself. The second and fifth rules of the Commissioners of Compensation, to be construed and applied upon this principle [6 Moo. P.C. 398, *et seq.*].

In this case, the appeal was brought against two decretal orders of the Court of Chancery of Jamaica. [382] made in a cause entitled "*Brydon et al v. The Attorney-General et al.*" The first of these orders was dated the 5th of September, 1843. By this order, the Vice-Chancellor of Jamaica declared and decreed, that certain compensation-money which had been awarded under the Act of Parliament (3rd and 4th Will. IV., c. 73) for the abolition of slavery, to be paid in respect of 172 slaves, of which James Clayton White, the testator in the cause, was seised in fee simple, did not form part of the personal estate of James Clayton White; but that the compensation-money partook of the nature of real property, to the same extent as the [383] slaves, in lieu of whom it had been substituted; and that the compensation-money did not pass under the Will of White, by reason, that the Will was not executed and attested in the presence of three witnesses, as required by the law of Jamaica, for the passing of real estate by devise, at the time of the making and publishing of the Will. The second decretal order was dated the 27th and 28th of January, 1846, and was made on the rehearing of the cause, so far as related to the order of the 5th of September, 1843, and by this order, the Vice-Chancellor confirmed the order of the 5th of September, 1843.

The facts of the case which led to the making of these orders, were as follows:—James Clayton White was owner in fee of two plantations, and the slaves thereon, in the Island of Jamaica. On the 13th of June, 1834, he made his Will, and thereby, after devising all his real and personal property to his executors, upon certain trusts, he proceeded as follows: "Also I give, devise, and bequeath, share and share alike, unto Rosanna Richards, and her four daughters, together with each of my natural and reputed sons of colour, the children of Rosanna Richards aforesaid, namely, George White, and Edward White, all my right, title, and claim for compensation, such as may be awarded to me as my portion of the compensation-fund for the emancipation of such slaves as may belong to me, and be living on the 1st day of August, in the present year of our Lord 1834." And after bequeathing certain chattels, he continued—"Considering the great change that is about to be expected in the nature and quality of plantation property, through the late measures adopted by the British [384] Government towards the West India colonies, I deem it proper hereby to authorize and empower my executors hereinafter named, to claim and receive, for the benefit of my estate, such compensation as may be awarded as my portion of the compensation-fund for the emancipation of such slaves as may belong to me and be living on the 1st day of August, in the present year of our Lord;" and he appointed William Linwood, James Brydon, and Charles Anderson, executors to his Will.

This Will was attested by two witnesses only. According to the law of Jamaica, slaves were of the nature of real property; and at the date of the Will, it was necessary, in order to pass slaves, or other real property, in Jamaica, by devise, that a Will should be signed by the testator in the presence of, and attested by, three witnesses. The Will was, therefore, void as to the devise of the real estate. The testator died on the 13th of June, 1834.

The Statute, 3rd and 4th Will. IV., c. 73, (by which slavery was abolished throughout the British Colonies, and compensation in money provided for the persons before then entitled to the services of the slaves thereby manumitted,) was passed by the British Parliament on the 28th of August, 1833, whereby it was declared, that from and after the 1st day of August, 1834, slavery was to cease in the British Colonies.

James Brydon and Charles Anderson alone proved the Will, and, in their character of executors, they produced before the valutors, appointed under the Act, for the abolition of slavery, 172 slaves belonging to White, and they preferred before the Assistant-Commissioners of Compensation in the Island, a claim [385] for the compensation-money payable in respect of those slaves, but they did not prosecute the same to adjudication before the Chief Commissioner.

Notwithstanding the insufficiency of the Will to pass the real estates of the testator by devise, the executors, James Brydon and Charles Anderson, soon after the testator's death, entered upon and took possession of the real estates of the testator in the Island; and, on the 12th of January, 1836, they filed a bill in the Court of Chancery in Jamaica, which bill was afterwards amended, against the Attorney-General of the Island, the Honourable Dowell O'Reilly, and against the Respondents, William Fossett, James Mitchell Parker, Thomas Parker, and Sarah his wife; the Appellants, Rosanna Richards, Rosanna White, Jemima White, Edward White, and Emma White; and the Respondents, George Appleby, and Charlotte his wife, and George White. The bill admitted the receipt of personal assets by the Plaintiffs, more than sufficient to pay the debts, and stated that they had claimed compensation in respect of the 172 slaves; but that they disclaimed all interest in the compensation-money; that the Will was insufficient to pass real estate, and that they, the executors, had taken possession of the lands and made advances for cultivation of the plantations, and that a sum of £2000 or thereabouts, was due to them for such advances. The bill then stated, that they were informed that the testator was born out of wedlock, and that his real estate was escheatable to the Crown for want of heirs, and that the Attorney-General of the Island might claim the compensation-money to be awarded in respect of the slaves. The bill then stated that Sarah Parker claimed to be the testator's heiress-at-law, which fact [386] they contested. The bill then went on to state, that Thomas Parker and Sarah Parker had claimed the compensation-money to be awarded in respect of the slaves, and had given notice of a counter-claim; that William Fossett and James Mitchell Parker and Maurice Jones claimed under a deed of trust from Sarah Parker; that Rosanna Richards and the other Appellants had claimed the compensation-money under the Will, and they insisted, that as executors, they ought to receive the same. The bill then insisted, that the parties to the bill ought to interplead and be enjoined from proceeding at law against the Plaintiffs, in respect of the matters aforesaid, and prayed that the parties should interplead together, and that their respective claims and rights in the premises should be ascertained and determined by the Decree of the Court; that an account of the advances made by them might be taken; and that they might be indemnified, that their costs might be provided for, and that they might be appointed receivers of the plantation and of the compensation-money.

The Defendants, Rosanna Richards and her children (the present Appellants), by their answer, objected to the frame of the bill, contending that it ought to have been left to the several claimants to establish their claims, and they submitted, that the Plaintiffs' admission of a sufficiency of personal assets showed, that they had no right to enter upon the real estate or to interplead, and they further submitted, that the Plaintiffs were not entitled, in respect of the compensation money, to have the trusts of the Will in respect thereof, carried into execution under the direction of the Court, the directions in the Will with respect to the compensation-money being of themselves clear and unequivocal, and that the award of the Commissioners [387]

of Compensation, which might long before then have been obtained, would have been sufficient to exonerate the Plaintiffs of all liability in the premises, and obviated the necessity of the bill.

The Attorney-General, by his answer, submitted, that the compensation money was in the nature of realty, and that White having died without heirs, the lands and the compensation-money had become escheatable to, and had devolved upon, the Crown.

Sarah Parker and the other Defendants, by their joint answer submitted, that the Will was not sufficient to pass lands, and that the Plaintiffs were not entitled to receive the compensation-money as personalty, but that it descended to Sarah Parker as White's heiress-at-law, and that White was a legitimate son.

The compensation-money in respect of the slaves of White, amounting to the sum of £3242 7s. 3d., was, by an order made in the cause, dated the 28th of July, 1837, paid to the Receiver-General of the Island.

By an order of the Court, the cause was set down for argument upon bill and answer, as to the rights and interests of the Appellant, Rosanna Richards, and the children and representatives of the children of White, to the bequest of the compensation-money, without waiting the return of a commission for the examination of witnesses, or the regular passing of publication in the cause.

The cause came on for hearing, before His Honour Edward Panton, Esq., the Vice-Chancellor of Jamaica, and by a decree dated the 5th of September, 1843, it was decreed, that the compensation-money partook of the nature of real estate to the same extent as the slaves, and did not pass under the Will of the testator, [388] James Clayton White, bearing date the 13th of June, 1834, and it was ordered, that the costs of all parties should be paid out of the compensation-money.

In the course of the suit, various orders were made by the Court, directing payment out of the compensation-money for costs, under which the Plaintiffs were paid the sum of £1136 5s. for costs, and the sum of £268 10s. 8d. was paid to the Attorney-General; the sum of £334 16s. 1d. to Fossetts and others; and the sum of £512 9s. for the Appellant's costs. There were other payments also made out of the compensation fund, the aggregate of which amounted to £2582 10s.; leaving out of the compensation-money the sum of £890 only, in the hands of the Receiver-General, to the credit of the cause.

The evidence under the Commission having been returned, the cause was heard in the month of June, 1845, and the Court by its decree, declared that Sarah Parker was the sole heiress-at-law of White, at the time of his decease.

By an order bearing date the 3rd of January, 1846, made upon the petition of the Appellant, Emma White, the cause, so far as respected the above decree, of the 5th of September, 1843, was directed to be re-heard. The cause was accordingly re-heard, and by a decree of the Court, bearing date the 27th and 28th of January, 1846, it was ordered and decreed, that as slaves would not have passed under the Will of White, so neither did the compensation-fund substituted in lieu of them, and the Court confirmed the order of the 5th of September, 1843.

From the orders of the 5th of September, 1843, and the 27th and 28th of January, 1846, the Appellants Rosanna Richards, and the other legatees under the [389] Will, brought the present appeal, which now came on for hearing.

Mr. Rennalls, for the Appellants.—The Statute, 3rd and 4th Will. IV., c. 73, declared that, from and after the 1st of August, 1834, slaves in British colonies should be emancipated, and that the owners, instead of being entitled to them, as slaves, should from that time be entitled to money as compensation. The 47th section of this Statute, which directs the Commissioners of Compensation to inquire and consider the principles according to which the compensation-money is to be allotted, does not affect the nature of the property in the slaves: it leaves that question open, and has reference only to cases where it is necessary to divide and distribute, as where slaves are held by more owners than one, or where there were estates or interests in possession and succession, or heirs, distinct from and conflicting with the rights of the owner of such slaves: the same principle of construction must apply to the fifth rule of the Commissioners (*Post* [6 Moo. P.C.], p. 393), made under the authority of this Statute, which declares that, in the case of death and intestacy of any person entitled to the compensation-money; before the

award, the succession to the interest in the slaves is to be regulated according to the law of the country in which the slaves were registered. I submit that the slaves, from the moment of the passing of this Act, were impressed with the nature of personality, instead of continuing, as theretofore, real estate. It differs from the case of the owner of an estate contracting to sell it, for then it is well settled, that, from that moment, although the deed of conveyance is not [390] to be executed till a future time, the vendor is not entitled to the estate, but only to the money. It is more analogous to the case of damage done to real estate. In *Parkin v. Blagrove* (16th July, 1847), the Vice-Chancellor of England held, that the compensation-money was personal property, in the nature of damages for injury to real estate. — [Lord Langdale: Money recovered in respect of damage done to real estate was held in *Noble v. Cass* (2 Sim. 343) to be personal estate.]—I submit that, as soon as the Statute passed, there was an instantaneous conversion of the slaves into personality, and the testator being entitled to the compensation-money, it passed under the Will, which was sufficiently executed for that purpose, and that the Appellants are entitled to the compensation-money, as specific legatees. Next, I submit that the suit of *Brydon v. The Attorney-General and others*, was a most improperly-framed suit. It is stated in the bill, that the Plaintiffs, as executors of White, had possessed themselves of personal estate and effects, more than sufficient for payment of the debts; that being so, it follows, that the Appellants and the other legatees of the testator's compensation-money were entitled to receive the same in full, and the executors ought to have prosecuted and followed up their claim to an adjudication before the Chief Commissioner, instead of filing a bill such as this. As they had proved the testator's Will, and taken upon themselves the performance of the trusts and directions contained in it, it was a breach of duty to raise doubts and to call upon others to deny and oppose the right and title of their *cestui que* trusts, for whose benefit the compensation-money had been bequeathed; and seek to shelter themselves, [391] thus wrongfully, in possession, under the allegation that their *cestui que* trusts ought to interplead with strangers. The executors could never be justified in such circumstances, in filing a bill of interpleader. Neither had they any right or authority to appropriate the compensation-money awarded to them: it was specifically bequeathed, and I submit that the Appellants are entitled to have paid to them the full amount with interest, they have lost, by the misapplication of the compensation-fund. Your Lordships will, I apprehend, make such order upon this appeal as is necessary for that purpose.

Mr. Parker, Q.C., and Mr. L. Oliver, for the Respondents.—According to the law of Jamaica at the date of the testator's Will, slaves were impressed with the character of real estate, and could only be devised by a Will attested by three witnesses, as required by the Statute of Frauds; the provisions of that Statute extending to Jamaica. Now, the Will of White was not attested as required by law; and did not pass the slaves of which he died seised, but the same passed to Sarah Parker as his heiress-at-law, and consequently, she being the owner of the slaves at the time of their manumission, namely, the 1st of August, 1834, was entitled to the compensation-money. The Statute, 3rd and 4th Will. IV., c. 73, did not alter the legal character of the slaves, nor were the rights or interests of their owners affected before the 1st of August, 1834; White had not, therefore, any right or interest to the compensation-money provided by that Act, for the slaves at the time of their manumission. It is clear, then, that neither the slaves nor the compensation-money for them, formed part of the personal [392] estate of the testator: they were real estate, and could only be devised by a Will attested by three witnesses. The Appellants' argument must go to this extent, that, if the testator had died without a Will, his administrator would have been entitled to the slaves and the compensation-money. Suppose the case of a Railway Company taking land under their compulsory powers, up to the moment of the actual payment of the purchase-money, the principle of conversion by contract does not apply; and if the owner die before the money be paid, the land goes to the heir-at-law, and the personal representative has no interest in it. This turns upon the distinction between express contract and a compulsory purchase under the authority of the Legislature. In the former instance, there is an immediate conversion, upon the principle of an implied intention to benefit the personal representatives against the interests of the heir-at-

law; but in the latter case, there can be no such implied intention, and the Court will not imply conversion in cases of compulsory sales, in the absence of something to show such an intent. *Midland Counties Railway Company v. Wescott* (2 Railw. Cases, 211); *Rex v. The Commissioners of Compensation for the London Docks* (12 East, 177); *King v. The Witham Navigation Company* (3 B. and Ald. 451). No case is to be found, where a Court of Equity has held, that in cases of compulsory sales the property has been converted against the will of the owner. This intention cannot be supplied in the case of an unattested Will.—[Mr. Pemberton Leigh: In railway cases there is a compulsory conversion.]—We submit that, if the owner live to the completion of the contract, by the payment of the money, there is a conversion; but if he die before the money be paid into [393] Court, the heir-at-law takes the land, but bound by the statutory obligation.—[Mr. Pemberton Leigh: The great distinction here is, that the Legislature has become the purchaser of the slaves by the Act of Parliament; the contract, therefore, was completed on one side on the passing of the Act. In the cases cited, the contract was incomplete; here it is absolute.]—We submit that the person to be entitled to the compensation-money under this Statute, is the person who, on the 1st of August, 1834, should be in possession of the slaves. Suppose the testator had granted the slaves to another before that day, no doubt the alienee would be the party to claim the compensation-money. The 55th section of this Statute points at the period of manumission, as the time to ascertain the parties who should be entitled to the compensation-money; but as the administrator could not be the party entitled to the slaves, it follows, that the administrator could not be entitled to the money. The rules (a) which were [394] compiled by the Commissioners are, by the 53rd section of the Statute, made of the same validity as the Statute itself; and we submit that the second rule is conclusive, as showing that the person who would have been entitled to the slaves on the 1st of August, must be entitled to the compensation-money. Our case is stronger than the case contemplated by the fifth rule, for it contemplates the case of a testator dying after the 1st of August, but before the award; here the testator died before the 1st of August. The words “die intestate” in that rule, must mean *secundum subjectam materiam*, otherwise there would be the incongruity of a person having a sum of money, which if he died without a Will, would go to his heir-at-law; but if with a Will would go to his executors.—[Mr. Pemberton Leigh: If the fifth rule is to operate as a revocation of the Statute, it may be, that it may go to revoke a Will, treating slaves, or compensation-money, as personalty, and altering and making it as realty.]

Mr. Rennalls, in reply:—In *Lumsden v. Fraser* (12 Sim. 263) an agreement was entered into for the sale of an estate, at a future time; before that time arrived, the

(a) Under the authority of the Statute, 3 and 4 Will. IV., c. 73, the Commissioners of Compensation issued certain rules, which were afterwards confirmed by His Majesty in Council on the 10th of March, 1835. See General Rules, printed 3 Knapp, P.C. Cases, 246. The following were the rules referred to in the argument and Judgment.

Rule 2. “That in respect to all persons who, as owners or creditors, legatees or annuitants, may have any joint or common interest in any slave or slaves, or may be entitled to or interested in any slave or slaves, either in possession, remainder, reversion, or expectancy, the compensation-moneys to be awarded in respect of such slave or slaves shall be deemed to be of the same nature, and impressed with the same character for all purposes whatsoever, so far as the same can be so taken and applied, as the slave or slaves in respect of whom such monies shall be allotted, and shall be subject to the same rules of distribution, and to the same charges and liabilities, as the same slave or slaves respectively would have been subject to, according to the several estates and interests of the parties entitled thereto, and agreeably to the law and usages of the particular colony in which such slave or slaves may be registered or settled.”

Rule 5. “That in case of the death of any person entitled to such compensation-moneys who may die intestate before the award of such compensation, the succession to such monies shall be the same as the succession to the interest in the slave or slaves in respect of whom the compensation shall be allotted, according to the law of the particular colony in which such slave or slaves were registered or settled.”

vendor died intestate, and the Vice-Chancellor held, that the rents which had accrued between the vendor's death and the completing the [395] contract belonged to the vendor's heir.—[Dr. Lushington: In the event of their Lordships reversing the orders appealed from, what redress do you seek?]—I ask the Court to order the repayment of the fund to the Appellants.

The Right Hon. T. Pemberton Leigh (July 8).—The main point in this case, is a mere question of law. The testator made a Will in June, 1834, and died before August, 1834. He was the owner of plantations and slaves in Jamaica, and, by his Will, purported to bequeath the money to be awarded to him, under the Slave Emancipation Act [3 and 4 Will. IV., c. 73], in favour of the Appellants. He appointed the Plaintiffs in this suit, his executors, and authorized them to get in the fund in question. His Will was attested by only two witnesses, and the question is, whether it was sufficient to pass this portion of his property. The Court below has decided, that it was not; holding, that the money must be considered as real estate. Against this decision the present appeal is brought.

The Slave Emancipation Act [3 and 4 Will. IV., c. 73] was passed in August, 1833. Previously to that Act, slaves in Jamaica, could only be directly devised as real estate.

The Act provides, that on the 1st of August, 1834, slavery shall cease within the dominions of the Crown, and all persons then slaves, with some exceptions, shall become apprentices to their former masters, that such apprenticeship shall continue for a limited period, after which, they shall be absolutely free; and in order to compensate the owners for the loss of the services of these slaves, of which they will thus be deprived, a sum of twenty millions is provided by Parliament, which the Act directs to be apportioned amongst the [396] Colonies in which there are slaves, and afterwards to be subdivided amongst the slave-owners, in each Colony according to the number and order of their slaves.

What, then, was the interest of the testator in this case, in his slaves at the time when he made his Will? He had a right to their services as slaves, till the 1st of August, 1834; he had a right to their services as apprentices, for a limited period afterwards, and he had a right to receive a sum of money, to be afterwards ascertained, as a compensation for the loss of that portion of the services of his slaves, which was taken from him by the Legislature.

The Legislature, from the date of the Act, became the purchaser of the slaves, as from the 1st of August, 1834, subject only to the right of apprenticeship reserved for a certain period to the owner. Treating the slaves as real estate, the Legislature became the purchaser of it, as from the 1st of August, 1834, giving a limited interest in it, for a term of years, to the vendor.

Now if this sale had been made by the owner by voluntary agreement, if he had agreed in August, 1833, by a valid contract, to sell his slaves as from the 1st of August, 1834, for a sum of money, reserving to himself a partial right over them for the apprenticeship period, it is quite clear that the money to be received from the sale would have been personal estate, and might at any time after the date of the contract, have been disposed of, as such, by Will.

It is extremely difficult to understand upon what principle, a distinction can, in this respect, be made between a conversion effected by a voluntary agreement for sale, and a conversion effected by a sale, which the Legislature has rendered compulsory on the ven-[397]-dor, and which, as far as regards a conveyance of the vendor's interest, it has in effect completed by the operation of the Act itself.

A case before the Vice-Chancellor of England was referred to, which was supposed to favour this distinction, where money paid under a Railway Act for the purchase of real estate, taken under the powers of the Act, was held to be real, and not personal property of the owner. But on referring to the particulars of that case, it really supports no such distinction; for the owner in that case, was a lunatic, incapable of conveying, and the money had been paid into Court under a clause in the Act, which provided, that in such cases it should be laid out in land or applied in payment of charges upon land.

Upon the general principle, that unless there be some provisions in the Act to

a contrary effect, this money must be considered as personal estate of the testator, we can entertain no doubt.

There may, however, be special provisions in the Act, by means of which, either by express declarations, or in some other mode, the character of real estate may be so impressed upon this money, as to exclude the operation of an unattested Will.

Now it is not contended, that there is any express declaration in the Act, to that effect: but, it is said that, for the purpose of distributing the compensation-fund, certain Commissioners were to be appointed, with power to make rules respecting the disposition of the fund: that the authority given by the Act would enable them to declare, that the money should bear the character of real estate, and that they did in fact make such rules, and did thereby provide, that, in each Colony, the money should be impressed with the same [398] character, and go in the same manner, as the slaves for which it was substituted: and that these rules having been approved of by the King in Council, have, under the provisions of this Statute, the force of an Act of Parliament.

Now these rules were not made till 1835, at which time, the testator in this cause had died. If the Act itself constituted this money personal estate, the right to it had vested, before the rules were made, in the executors, and with their assent (if they had assented to the legacy), in the specific legatee. No doubt the Act may be so worded that the right may have vested, subject only to the rules to be afterwards made by the Commissioners, and liable, at their pleasure, to be divested. But it would certainly require very clear and precise words to produce that effect.

The rules relied on are the second and the fifth.

The 2nd rule is in these words (the learned Judge read the rule, *ante*, foot note [6 Moo. P.C.], p. 393). These words, no doubt, are very large, but as they are made under the power of the Act, and to provide for cases mentioned in the Act, we must look to the Act itself, in order to construe them.

On doing this, we find a very important construction given to the rule. Taking the rule alone, it might, no doubt, bear the construction given to it by Mr. Parker, and apply to the case of a single absolute owner in possession of slaves; and if it were so read, it would be difficult to exclude the effect which we give to the subsequent words by which the money is impressed, to all intents and purposes, with the same character as, by the law of the Colony, would belong to the slaves. Even, however, if the rule stood alone, the more natural interpretation of the clause would be, [399] taking all the provisions into consideration, that it was intended to provide for the case where the interest of the slaves was divided amongst different persons, who, as owners or creditors, legatees or annuitants, might have interests in possession, or who, as tenants for life, or intail, in remainder or reversion, might have interests in succession.

But when we refer to the Act itself, and to the 47th section, which specifies the case which this rule is intended to meet, all doubt upon this point is removed: for it enacts, that the Commissioners shall consider the rules by which the compensation-money ought to be distributed amongst the persons who, as owners, creditors, and so on, might be entitled to, or interested in, the fund.

It is clear, therefore, that the Legislature intended to provide for a case of distribution amongst different persons, having different interests, in various characters, in the money, with respect to whom some regulations by the Commissioners might be very necessary, and not in the case of an absolute owner of unincumbered slaves, as to whom no such provisions could be required.

There cannot be reasonably imputed to the Legislature, or to the Commissioners, an intention that an absolute owner, until an award has actually been made in his favour, should have no power of dealing with his interest with this money except as real estate; should not dispose of it except by lease and release, or such other mode of conveyance as was necessary in respect of slaves, and with the same formalities, as to registration, which the law required in the disposition of slaves; and yet, if the rule is to have this construction with respect to testamentary dispositions, it [400] must have the same effect with respect to acts *inter vivos*.

For these reasons, we are of opinion, that the clause in question, extensive as the language certainly is, cannot be properly applied to the case before us.

We come then to the fifth rule. Now, to whatever cases that rule may apply, it clearly is confined to cases of intestacy; and, inasmuch, as we are of opinion that, by the Act, the money was personal estate, and that there is nothing in the rule to alter, in this instance, its character, the Will would clearly be operative, and this clause could have no application.

If we had come to a different conclusion upon the construction of these rules, it would have been necessary to inquire, whether they could have taken effect in this particular case. They are to be valid, so far as they are not repugnant to the law of the Colony in which they are to operate. It would perhaps be difficult to hold, that a rule which not only required the attestation of three witnesses to a Will, disposing of money, but defeated an interest previously created by such Will, was not repugnant to the law of Jamaica.

We think, therefore, that the Court below has come to an erroneous conclusion upon the main points in the cause, and that the Decree, in this respect, must be reversed.

But a very important consideration remains, as to the mode in which justice is to be done to the Appellants.

The suit itself, and all proceedings which have taken place in it, are of a very singular character. The testator's Will being inoperative as to real estates, his plantations in Jamaica, descended upon his heir-at-law. The executors and devisees in his Will had no right to them, legal or equitable. If the compensation-money [401] was real estate, they had no title at all to interfere with it. If it were personal estate, they were bound to claim it for the legatees. If the executors had a right to receive it, there was no question for whom they held it; nobody but the Appellants, as against the executors, had any pretence of claim.

As between the heir on the one hand, and the executors on the other, the case was one of mere adverse legal title to be disposed of by the Commissioners.

Accordingly, a claim was entered by the executors, claiming the compensation-money as personal estate, and a counter-claim was entered by the heir claiming it as real estate. In this manner the whole right to this money would have been determined, in a very short course, and at a very trifling expense. Instead, however, of permitting the case to be thus disposed of, the executors adopted a most extraordinary course.

On the testator's death, they took possession of his real estate, to which they had no title; they remained in possession till January, 1836, when they filed the bill, in this suit, against the Appellants, the legatees of this fund; against the Attorney-General, on a suggestion that the testator died without an heir; against a party claiming, as heir of the testator, to be entitled to the money; against others claiming, by gift from the heir, to be entitled to the plantation. The bill prayed, that all these parties might interplead, that their rights to the money and the real estate may be decided by the Court, and that the executors might be indemnified and be paid their costs.

In this suit, the compensation-money, amounting to £3242 7s. 3d. sterling, was paid to the Receiver-General of the Island, on the 28th of July, 1837.

The present Appellants, by their answer, most reason-ably [402] objected to the whole frame of the record and all proceedings in the suit, and they insisted, that the right to the compensation-fund ought to have been decided by the Commissioners.

A more absurd suit, as an interpleading suit, cannot be conceived. As regarded the real estate, the Appellants set up no sort of right to it, and yet they were involved in a suit, to determine the right to it, as between the Attorney-General and the persons claiming as heirs; and the Plaintiffs, who called upon the parties to interplead, had themselves no right whatever, legal or equitable, but were in possession merely as wrongdoers.

As to the compensation-money, if it was land, the Plaintiffs had no right to it, and if it was money, the Plaintiffs were bound to recover it for the benefit of the Appellants; and yet they file a bill, calling upon their *cestui que* trusts to interplead with persons, claiming adversely both to the trustees and *cestui que* trusts.

The consequences of this suit have been as unfortunate, as the suit itself was irregular. It appears, that in its progress, the whole fund, amounting to above

£3000, together with the interest upon it, except about £890, has been paid under orders of the Court, partly on payment of loans on the plantation, partly on advances to the Appellants, but principally in payment of costs of the suit of the various parties to the record.

Some of these payments appear to have been made by orders, before the hearing of the cause, the particulars of which are not stated, and which are not the subject of appeal. It is impossible for us to deal, therefore, with this part of the case, by any substantive order. The only orders appealed from, are, the original decree of the 5th of September, 1843, and the [403] order on re-hearing on the 27th and 28th January, 1846, confirming the former decree.

The decree so confirmed, after declaring that the money is to be treated as real estate, directs the payment out of it of the costs of various parties; and with respect to payments made under that decree, we can deal with them, and, as far as we may think right, order them to be refunded; but as regards the other sums, we have no authority to interfere. Considering all the circumstances of this case, we think we cannot allow the Plaintiffs in this suit any costs out of the fund in question, and, upon the whole, we think, that the proper order would be, to reverse the decrees complained of, to declare that the compensation-money in question was subject, as personal estate, to the disposition of the testator's Will, and belonged to the Appellants as specific legatees; and, that the fund still remaining in Court ought to be paid to them, and to declare, that no costs ought, by the said decrees, to have been awarded out of the said fund, to any of the parties in the cause, and that all such sums as have been, under the said decrees, or either of them, paid to any such parties, or their solicitors, other than the Appellants, ought to be refunded, and to remit the case to the Court in Jamaica, with directions to give effect to these declarations. In order to prevent any misapprehension of what takes place here, it will be proper to add a declaration with respect to other payments, alleged by the Appellants to have been improperly made out of the fund: their Lordships, upon the present proceedings, have no jurisdiction to consider them; and any order made by Her Majesty upon this appeal, will be, therefore, without prejudice to the [404] right of any of the parties, in case any proceedings should be taken by the Appellants, for the recovery of such monies.

[Mews' Dig. tit. CONVERSION AND RECONVERSION, A. 3, APPLICATION OF DOCTRINE, d. *Act of Parliament*; tit. EXECUTOR AND ADMINISTRATOR, XIII. PROCEEDINGS BY OR AGAINST, i. *Liability for Costs*, 3. *In equity*, b. *Of Executor or Administrator*; tit. SLAVERY and SLAVE-TRADE; tit. WILL, IV. EXECUTION, A. 1. *Under the Statute of Frauds*. S.C. 13 Jur. 197; see *Frewen v. Frewen*, 1875, L.R. 10 Ch. 612, n.].

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM SMEE,—*Appellant*: ARTHUR BLEWERT BRYER,—*Respondent* *
[July 8 and 17, 1848].

The words "signed at the foot or end thereof," in the 9th section of the Statute of Wills, 1 Vict., c. 26, are to be construed strictly.

Therefore, where a holograph Will, written on a sheet of foolscap paper, the dispositive part of which ended on the third side, leaving, at the foot or end of the third side, a space sufficient to have received the signature of the deceased, and also that of the two attesting witnesses, if not accompanied by a formal attestation clause, was signed, with an attestation clause, in the middle of the fourth side, no part of the Will being immediately above it:

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Held not to have been signed "at the foot or end," according to the requisites of the Statute, and the Will declared invalid.

This was a question concerning the signing of a Will, within the intent and meaning, and according to the requisites, of the Statute of Wills, 1 Vict., c. 26, section 9.

The Will, in controversy, was made by Mary Bateman, a spinster of the age of seventy-five years: it was [405] holograph, written on three sides of a sheet of foolscap paper, without any margin being left, certain interlineations being made in the fifth line of the first page. The dispositive part occupied the first three pages, or sides, of the sheet; the writing throughout was uniform, and the lines stood apart, as nearly as possible, three-tenths of an inch. At the foot or end of the third, or last side of the paper, on which the Will was written (the concluding sentence of which terminated about the middle of the line), was a space occasioned by the blank left from the non-completion of the line. This space, in that part where the line was incomplete, was about eight-tenths of an inch deep, and enough to have received the signature of the testatrix. But the remainder of the space on the left hand, being filled by the half line of the last sentence of the Will, consisted only of the bottom margin of the page, and though sufficient for the signature of the witnesses, if written small, and close together, could not, by any possibility, have held the attestation clause. In consequence, as it seemed, of this circumstance, the attestation clause was written on the fourth side; it was also in the handwriting of the testatrix: it was written column-ways, on the left of the page, commencing about the middle, and terminating when the signatures were affixed at the bottom of the sheet. The attestation clause was formal, and complete, attesting not only the due execution of the Will, but setting forth the interlineations made in the first part of it, which were further attested by the words "attested to the interlineation," with the witnesses' signatures annexed, written in the right-hand corner, at the top of the page, being so placed, that when the sheet [406] was spread out, this attestation appeared parallel with the interlineations on the first page of the sheet. The result was, that from the top of this last page to the beginning of the attestation clause, there was a blank, which, except for the words of the attestation last mentioned, was for the space of half the page. The testatrix's signature was against the principal attestation clause.

The Will was propounded in solemn form of law, by the Appellant, the sole executor named therein, and was opposed by the Respondent, the deceased's nephew, and one of her next of kin. The allegation pleaded, that the day before the Will was executed, the deceased showed it to her executor; and, in answer to a question from him, why she had written the attestation clause so low down the fourth side, replied, she had left the upper part of the fourth side blank, to admit the attesting witnesses affixing their signatures opposite to the interlineation on the first side or page; and that, on the day of the execution of the Will, the deceased assigned the same reason to the attesting witnesses.

The learned Judge of the Prerogative Court (Sir Herbert Jenner Fust), by his decree, bearing date the 15th of January, 1818 (case reported 1 Robert, 616), rejected the allegation, on the ground, that if the facts, as pleaded, were proved, they would not show a compliance with the Statute, 1 Vict., c. 26, as it was not signed at the "foot or end thereof," as required by the 9th section of that Statute. From this decree, the present appeal was brought.

[407] The Attorney-General (Sir John Jervis), and Dr. Harding, for the Appellant.—This Will was signed, and attested by two witnesses, in the manner required by the 9th section of the 1 Vict., c. 26. There is nothing in that Statute which defines the amount of space which is to intervene between the last line of the Will and the signature thereto: it simply declares, that it is to be signed "at the foot or end thereof." It does not say there shall not be a blank space. There is nothing in the wording of the Statute which compels the Court to put a very rigorous construction upon the words "foot or end," and to say, that if there is a blank space after the dispositive part of the Will, it is invalid. The object of this clause of the Statute was, to get rid of the construction put upon the Statute of Frauds, 29 Car. II. c. 3, by the Judges, in the case *Lemayne v. Stanley* (3 Lev. 1), where it was held, that

the signature of the testator at the beginning of a Will was, for the purposes of the Statute, as good as the subscription at the end. The Court below assigned two reasons for the introduction of the words, "foot or end," in the Statute, namely, first, to obviate the signature at the commencement of the Will, being accepted as a compliance with the Act; and, secondly, to prevent a testator leaving a blank space to be filled up after execution (1 Robert. 623). The first is the only substantial reason. If the second object had been contemplated, the Statute would have required that each page should have been signed. If the first was the true reason, we have a clue to the meaning of the words, "foot or end," not foot and end, showing that there is a difference, it being in the [408] alternative, and that the signature, though it must be after the dispositive part of the Will, need be at no particular place after it. Is the Court to lay down a rigid rule, as to what is the necessary place for the signature? If the object is to prevent addition, you must say, that it must follow the last word of the Will; but nothing of this is said in the Wills Act. The decision of the learned Judge, in this case, that the Act must be construed strictly, is opposed to a series of cases in which he laid down a different rule. *In the goods of Bullock* (3 Curt. 750). *In the goods of Carver* (3 Curt. 29). *In the goods of Gore* (3 Curt. 758). *In the goods of Powell* (1 Robert. 421). *In the goods of Davis* (3 Curt. 748). *In the goods of Howell* (2 Curt. 342). It is true, these cases were decided upon motion, but motions granted in the Prerogative Court, though *ex parte*, have the effect of very strong decisions; for if the Judge has any doubt, he directs the paper to be propounded in solemn form. The present case is distinguished from *Ayres v. Ayres* (1 Robert. 466), and *Willis v. Lowe* (1 Robert. 618). In those cases, it might be supposed that the testator meant to evade the Act, leaving a space for the purpose of admitting additional legacies. No latitude of construction of the Statute would be introduced by admitting this paper to probate, as each case must stand upon its own merits. If this judgment is to stand, all the cases which have been decided, and probate granted upon motion, are bad, and the probates may be called in; and, as there has been, in fact, in each case, an intestacy, each executor is an executor *de son tort*, and is responsible to the next of kin.

[409] Sir Frederick Thesiger, Q.C., and Dr. Robinson, for the Respondent.—There was ample and sufficient space at the end of the third page, for the testatrix to have signed her name, and the witnesses might have attested the Will there. It was not necessary that there should have been an attestation clause there. The words "foot," and "end," are not, it is true, synonymous, but they must be taken as in connection with each other. The Act of Parliament especially provides, that the signature must be at "the foot or end" of the instrument. Now, the plain meaning of those words is, as near as convenient to the last line of the Will, at the foot, or immediately under the foot, and if that is not possible, then, at the end, though over on the other side, but it never could be meant that it should be left to the discretion of the party to sign it any distance he pleases. The language used by the Legislature is clear and unambiguous, and it is right that it should be strictly interpreted. *Hudson v. Parker* (1 Robert. 14). The arguments used by the Appellant, as to the inconvenience of overturning past decisions, and the authorities cited, go to this extent, that because a stringent construction has not been put upon this section, during the ten years since the Statute has passed, the Court ought to follow the decisions hitherto pronounced, and that, however bad the exposition of the law may be, it must be persevered in; but this surely can be no reason for perpetuating bad law. We submit, therefore, that this paper not having been signed by the deceased at "the foot or end thereof," as required by the 9th section, is invalid, and inoperative in law; so that, if [410] the facts in the allegation were proved, they would not show a compliance with the provisions of the Statute.

The Attorney-General [Sir John Jervis], in reply.—The Statute cannot mean, that if you cannot sign at the foot, you must sign at the end. It gives the option to the party. All that is required is, that the instrument should be so signed as to satisfy the Court that it was intended by the testatrix to be signed at the end of the Will, as required by the Statute.

Lord Langdale.—In this case, the Will of the testatrix, Mary Bateman, is written on three sides of a sheet of foolscap paper.

At the foot, or end, of the third and last side of the Will, there is space sufficient to have received the signature of the testatrix, and also the signature of two witnesses, if not accompanied by an attestation clause, formally expressed.

But neither the testatrix, nor the witnesses, signed the third side of the Will immediately at "the foot or end thereof." Her signature is found about half way down the fourth side of the sheet of paper, no part of the Will being immediately above it; and with the signature, about the middle of the fourth side, is an attestation clause, formally expressed, and signed by two witnesses.

The vacancy above the signature on the fourth side is occupied only by two signatures of witnesses attesting an interlineation made between the fifth and sixth lines of that part of the Will which is written on the first side of the same sheet of paper.

[411] The question is, whether this Will is signed by the Testatrix at "the foot or end" of the Will, according to the true intent and meaning of the Statute.

Now, forms are required for the purpose of preventing spurious Wills. It may happen, even frequently, that genuine Wills, namely, Wills truly expressing the intentions of the testators, are made without observation of the required forms. And whenever that happens, the genuine intention is frustrated by the Act of the Legislature, of which the general object is to give effect to the intention.

The Courts must consider that the Legislature, having regard to all probable circumstances, has thought it best, and has, therefore, determined to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to, or facilitating, the formation of spurious Wills, by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention, in some cases, by requiring forms, is less than the evil probably to arise by giving validity to Wills made without any form in all cases.

When questions arise, whether the prescribed forms have been observed or not, and such cases must frequently occur, it seems to be the duty of the Courts to construe the enactment according to the plain rules of common sense; not to strain the simple meaning of the words, or to be astute in giving special instructions on particular occasions, for the purpose of evading the application of the rule, where its application may seem to us to frustrate or defeat the intention of testators in particular cases. We must act according to the rule as expressed by the Legislature, founded on the principle, that it is more important to maintain [412] the integrity of the general rule, than to give effect to a particular Will, at the risk of acting contrary to the intention of the Legislature, and depriving the public of that benefit which was intended to be produced by the generality of the rule.

And applying these principles to the present case, it appears to us, and we shall so report to Her Majesty, that the name of the testatrix, Mary Bateman, is not signed "at the foot or end" of the Will, as required by the Act, and, therefore, that the Will is not valid. Dismiss the appeal; the costs to be paid out of the estate.

[Mews' Dig. tit. WILL: IV. EXECUTION; A. 2. *Under the Wills Act*. S.C. 13 Jur. 289.

The cases as to the construction of the words "signed at the foot or end thereof" are collected in Stroud, *Jud. Dict. s. v. "Signed;"* and see *In re Anstee* (1893), P. 283; *Royle v. Harris* (1895), P. 163; *In re Fuller* (1892), P. 377.]

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

PETER BROUARD.—*Appellant*: PHILIP DUMARESQ and Others.—*Respondents* *
[Dec. 11, 1848].

Leave to appeal in *forma pauperis* allowed, and sureties for prosecuting appeal dispensed with.

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon. T. Peniberton Leigh.

This was an application, upon Petition, for leave to appeal, in *forma pauperis*, from an Acte, or Sentence, [413] of the Royal Court in Jersey; and that the usual sureties for prosecuting the appeal might be dispensed with. The Petitioner was not worth £50 in the world, excepting his wearing apparel, and his interest in the matter at issue; and that he was unable, by reason of his poverty, to find sureties for prosecuting the appeal.

Mr. Edmund F. Moore, in support of the Petition.

Their Lordships granted leave in the terms prayed for.

[Mews' Dig. tit. COLONY; III. APPEAL TO PRIVY COUNCIL; 6. *Practice*; 1. *In forma pauperis*. See *In re Lempricre*, 1858, 11 Moo. P.C. 398; *Kelly v. Corlett*, 1860, 14 Moo. P.C. 89.]

ON APPEAL FROM THE COURT OF APPEALS FOR THE DISTRICT OF MONTREAL IN CANADA.

THOMAS MCKAY,—*Appellant*; PETER RUTHERFORD,—*Respondent* * [Dec. 11 and 12, 1848].

By the Canadian Act, 25th Geo. III., c. 2, passed by the Legislature of Lower Canada, for regulating proceedings in the Courts of Justice in Canada, it is enacted, that in proof of all facts concerning commercial matters, recourse should be had by the Courts of civil jurisprudence in the Provinces, to the rules of evidence laid down by the laws of England: Held by the Judicial Committee, affirming the judgment of the Court of Appeals for Lower Canada,—

That this Colonial Act revoked so much of the Old French Law, which formerly prevailed in Canada, and was laid down in the *Ordonnance de Moulens*, passed in the year 1566, and subsequently altered by the *Ordonnance* of 1667, whereby parol evidence was excluded from the proof of all *contrats*, or matters, exceeding the sum of 100 livres, except in the case of accident, or where there was a commencement in writing; and that the English law, as to the admission of parol evidence in commercial matters, was substituted [6 Moo. P.C. 427].

A contract entered into by persons in Canada with the Government Commissioner, to supply stone for making a canal, is a commercial matter, and is to be proved by the English law [6 Moo. P.C. 428].

An agreement entered into by a contractor to share in the profits of the undertaking, although the contract was not capable of being completed within a year, is not such an agreement, as by the Statute of Frauds, 29th Car. II., c. 3, s. 4, is required to be in writing, but may be proved by parol evidence.

This was an appeal against a judgment of the Court of Appeals for the district of Montreal, in the [414] colony of Canada, dated the 9th of March, 1846, which affirmed a previous judgment of the Court of Queen's Bench for that district, of the 28th of January, 1846, in an action, *pro socio*, brought on the 29th of September, 1826, in the Court of King's Bench, at Montreal, by the Respondent, Peter Rutherford, against the Appellant, Thomas McKay, for an account of the profits of a partnership between the Appellant and Respondent, and another person, in respect of certain works executed by McKay, under two contracts between McKay and the Commissioners of the Lachine canal, and for payment to Rutherford of a third of such profits.

The declaration in the action set forth, that on the 15th of March, 1821, by an

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon T. Pemberton Leigh.

instrument executed between the Appellant and the Respondent of the one part, and Thomas Porteous, of the other part, after reciting that the Appellant and Respondent had undertaken the construction of a certain public work of great magnitude, at Isle Aux Noix, and that Porteous, in order to induce His Majesty's Government to en-[415]-trust the execution of the work to the Appellant and Respondent, had become their surety for its fulfilment, and that it had been agreed that Porteous should have one-third undivided share of the profits to arise from the undertaking, it was agreed, that the Appellant should, to the utmost of his power, unremittingly attend at Isle Aux Noix to the conducting all the mason work and building required in the fulfilment of the contract, and that the Respondent should exert himself, to the utmost of his power, towards procuring on the spot all the materials necessary for carrying on the work; and, in order that the same might be done with the least delay possible, and in the most workmanlike manner, they, the Appellant and Respondent, should both mutually and reciprocally aid and assist each other in the management thereof, and they should reside at Isle Aux Noix for that purpose. That Porteous should have the receipt and expenditure of all the money derived from the Government for this object, and that after the execution of the contract, the profits arising from the same should be equally divided among the three parties, and that neither the Respondent nor the Appellant should undertake, under any pretext whatever, any other work than the one before mentioned, until the same should be finally completed. That on the 1st of January, 1822, the Lachine Canal being then about to be constructed, the Appellant was desirous of contracting with the Commissioners of that canal, to furnish the stones required for the canal, and to cut and prepare the material; that the Appellant, the Respondent, and one Harry Griffin, then and there knowing that the contract would not be granted except to such person as would give security for the performance thereof, did agree [416] together, that the Appellant should offer to contract with the Commissioners for providing the material, and performing the work, and should offer as his surety such person as Griffin should afterwards procure, and induce to become such surety; and it was agreed that Griffin should become surety, or provide other sufficient surety for the fulfilment of the contract, and that Griffin should also procure Porteous to permit the Respondent and Appellant to enter into the agreement for the Lachine Canal; and it was further agreed between the Appellant, Respondent, and Griffin, that after the contract and undertaking should have been entered into between the Appellant and the Commissioners of the Lachine Canal, they, the Appellant, and Respondent, and Griffin, should be jointly concerned and interested in the contracts and undertakings of the Appellant with the Commissioners, and divide the profits thereof share and share alike; and that it was further agreed between the Appellant, and Respondent, and Griffin, that the Respondent should give his attention to carry on and complete the works at Isle Aux Noix, and that the Appellant should superintend and execute the contracts to be entered into with the Commissioners of the Lachine Canal; and that it was further agreed that the rights, duties, and obligations of the Appellant, and Respondent, and Griffin, in this association, should in all things, as nearly as circumstances would permit, be conformable to the aforesaid agreement in writing between the Appellant, and Respondent, and Porteous, respecting the works at Isle Aux Noix. The declaration then averred that Griffin did cause Porteous to permit the Appellant and Respondent to contract for the delivery and cutting of [417] stone for the canal, and that he did procure James Leslie to become surety for the performance of such contracts. Then followed a recital of the contract executed before notaries on the 21st of January, 1822, between the Appellant and the Commissioners of the Lachine Canal, for the delivery of a quantity of stones at certain prices therein set forth, to which agreement Leslie became a party, as surety for the fulfilment thereof by the Appellant; and a recital of another contract, executed before public notaries on the 26th of June, 1822, between the Appellant and the Commissioners of the Lachine Canal, to cut the stone required for the locks of the canal, and deliver the same according to specifications in the agreement set forth, to which contract Leslie also became a party, as surety for the performance thereof by the Appellant. The declaration, then, after alleging the performance by the Respondent of all things by him to be performed under the agreement between him, the Respondent, the

Appellant, and Griffin, averred the performance of the two contracts entered into with the Commissioners of the Lachine Canal, and that in consequence thereof the Appellant received £30,000, and stating a breach of the Appellant to account for the profits of the undertaking, concluded in the usual form for an account.

The Appellant, by his plea, admitted the agreement of the 15th of March, 1821, between Respondent, Appellant, and Porteous, and alleged, that on the 23rd of August, 1826, by act made and executed before notaries, the Respondent, and Appellant, and Porteous, did declare, that whereas they jointly had been concerned in certain contracts or agreements made with His Majesty's Government, for the performance by [418] them of certain public works at Isle Aux Noix, as appeared by the agreement of the 15th of March, 1821, which public works had long since been completed. And that, whereas the parties, in order to settle all their accounts, and reckonings of every description, touching the performance and completion of the public works, and their respective interests therein, did, by act under seal, dated the 8th of July then last past, agree to meet and produce all their accounts and statements, touching and relating to the pursuance and fulfilment of all public works done by them, and on their account, at the Isle Aux Noix aforesaid, for His Majesty, and of their business and joint concerns at Isle Aux Noix, and thereunto settle and adjust the whole thereof amicably, under the provisions and conditions set forth and declared in the last-mentioned Act. And that, whereas they had frequently met, and after examining all the accounts, etc., and all claims produced by them respectively, relating to the joint concern, they came to the final conclusion and arrangement set forth at the time, at the foot of the last-mentioned agreement, whereby it appeared, that after each party allowing his share of the loss sustained, the Appellant stood indebted to Porteous in the sum of £51 16s. 3½d., and the Respondent stood indebted to Porteous in the sum of £737 8s. 11d., which sums were then paid, declared to be paid and discharged, and in consideration of the premises, they, the Respondent, and Appellant, and Porteous, acquitted and released, and they did then and there, in and by the act of the 23rd day of August, reciprocally acquit, release, exonerate, and for ever discharge each other of and from every claim, pretension, and demand which they ever had, for the works done and performed for [419] His Majesty at Isle Aux Noix aforesaid, and for and by reason of all and every matter, or thing, or transaction formerly had between them at Isle Aux Noix aforesaid. And the Appellant averred, that the agreement and discharge between the parties reciprocally made, was bar to the Respondent's demand, in so far as the same was founded on the agreement of the 15th of March, 1821, or any other agreement connected therewith, which might have taken place between the parties since that time, such as alleged by the Respondent in his declaration. The Appellant also pleaded the general issue.

The Respondent, by his replication, as to the allegations in the plea, insisted, that they were untrue, and unfounded in fact, and did not bar his action.

To prove his case, the Respondent, after having put in the agreement of the 15th of March, 1821, and the contracts of the 21st of January and the 26th of June, 1822, tendered the evidence of Griffin, who was objected to by the Appellant's Counsel, on the ground of interest: but Griffin having stated that he had executed an acquittance, which finally settled his dealings and obligations towards the Appellant, by reason of their agreement respecting the contracts, and that the Respondent had executed in his favour a release, and he, Griffin, had executed a release in favour of the Respondent, the objection to his competency was overruled. Griffin proved, that the Commissioners of the Lachine Canal, having advertised for tenders to furnish stone for the canal, the Respondent and Appellant called on him to join them in the undertaking, and furnish the security required: that, after some conversation on the subject, he consented, and procured Leslie to become the security; that tenders were, in consequence, made [420] and accepted by the commissioners, and the contracts entered into. That this arrangement between Respondent, Appellant, and himself, which took place about the latter end of the year 1821, or beginning of the year 1822, comprehended all undertakings that might be thereafter entered into in the works of the Lachine Canal, in which they might be jointly interested, and were to be performed on their joint account, upon terms similar to those entered into by Respondent, Appellant, and Porteous, for the per-

formance of the public works at Isle Aux Noix. That, according to the agreement between the Respondent, the Appellant, and him, the Respondent was to superintend and manage with the assistance of a foreman, the work undertaken by him, the Respondent, and the Appellant and Porteous, with His Majesty's Government at Isle Aux Noix. That the considerations given by him for participating with the Respondent and Appellant in the two contracts with the Commissioners of the Lachine Canal were—first, the procuring from Porteous his consent to the Respondent and Appellant entering into the contracts, that being required by the agreement of the 15th of March, 1821; and, secondly, obtaining security for the performance of the contracts with the Commissioners of the Lachine Canal, he, Griffin, being also held for an equal portion of any loss that might be sustained, and that the respective shares to be received or borne by him, the Respondent, and the Appellant, were equal shares of profit and loss.

In confirmation of this evidence, it was proved by Porteous, that by the Government contract at Isle Aux Noix, the Respondent and Appellant were bound not to enter into any agreement until the contract at Isle [421] Aux Noix was finished, and that when the contract for the Lachine Canal was advertised, the Respondent and Appellant met him, Porteous, at his house in Montreal, and after deliberating whether the Appellant could be spared from the works at Isle Aux Noix, without loss to the concern, they concluded that Respondent could conduct them without the Appellant, and Porteous agreed, on his part, to allow the Appellant to contract for the Lachine Canal, leaving him to make such arrangement with Respondent as they, the Appellant and Respondent, should see fit.

It was also proved, by various witnesses, that after the contracts relating to the Lachine Canal had been entered into, the Appellant quitted Isle Aux Noix, to superintend the Lachine contracts, and the Respondent took up his residence entirely at Isle Aux Noix, and superintended the Government contract to its completion. Griffin's evidence was also confirmed by witnesses, who spoke to conversations at different times with the Appellant, in which expressions were used by the Appellant, amounting to an admission of the Respondent having an interest, as partner, in the Lachine contracts, and circumstances most consistent with such a partnership were also sworn to by several persons, and letters from the Appellant to the Respondent were also put in, further confirmatory of the existence of the partnership interest.

In answer to the Respondent's case, witnesses were called on the part of the Appellant, whose evidence amounted to little more than that they were ignorant of, and had never heard of the Respondent having any share or interest in the Lachine contracts.

The Appellant's counsel objected to the reception of parol evidence, to prove the partnership agreement [422] spoken to by Griffin; and the Court of King's Bench, by its judgment of the 19th of February, 1831, declared all the oral proof which had been taken on the Respondent's part, to be illegal, and inadmissible, to establish the existence of such a partnership.

From this judgment the Respondent appealed to the Court of Appeals, which Court, on the 20th of January, 1837, reversed the decision of the Court of King's Bench, and being of opinion that a co-partnership had existed, as alleged in the declaration, ordered the Appellant to render an account as prayed, and that the record should be remitted to the Court below, for further proceedings.

The Appellant, in conformity with the judgment of the Court of Appeals, rendered an account in the Court of King's Bench, which was formally accepted by the Respondent; and thereupon the Court of Queen's Bench, by its judgment of the 28th of January, 1846, adjudged the Appellant to pay to the Respondent the sum of £720 12s. 4½d., current money of the Province of Canada, together with interest and costs of suit.

Against the judgment of the Court of Queen's Bench, the Appellant appealed to the Court of Appeals, which Court, by its judgment bearing date the 9th of March, 1846, affirmed the judgment appealed against. The Appellant then appealed to Her Majesty in Council, and the appeal now came on for hearing.

Mr. Twiss, Q.C., and Mr. Hetherington, for the Appellant.—No such partnership, as is stated in the declaration, was ever constituted respecting the Lachine Canal. [423] Griffin alone speaks of the agreement to enter into a partnership, but his

evidence is contradicted by the Respondent's witnesses, and is, in itself, upon the face of it, improbable; but even if his testimony is admissible, we submit, that no sufficient proof was given, in the action, of any such partnership having been constituted. If Griffin's testimony be true, the case then resolves itself into two questions of law: First, whether, according to the present law of Canada, the alleged partnership contract could be proved by parol evidence; and, secondly, whether, if the English law of contracts was to prevail, this case was not within the exception contained in the 1th section of the Statute of Frauds (29 Car. II., c. 3), the contract not being capable of being completed within one year.

First, there can be no doubt that, according to the French law, which was in force in Lower Canada, prior to the passing of the Canadian Act, 25 Geo. III., c. 2, parol evidence would not be admissible to prove the alleged partnership. The law upon this point, is thus laid down in the *Ordonnance de Moulins*, in the year 1566, art. 54 (*Recueil Général des Anciennes Lois Françaises*, Ed. Paris, 1829, tom. xiv. p. 203). "*Pour obvier à multiplication de faits que l'on a vû ci-devant estre mis en avant en jugement, sujets à preuve de témoins, et reproche d'iceux, dont adviennent plusieurs inconvéniens et involutions de procès: avons ordonné et ordonnons, que d'oresnavant de toutes choses excédans la somme ou valuer de cent livres pour une fois payer, seront passez contrats par devant notaires et témoins, par lesquels contrats seulement, sera faite et reçüe, toute preuve des dites matières, sans recevoir aucune preuve par témoins, outre le contenu au contrat, ne sur ce qui seroit allégué avoir esté dit ou convenu avant icelui, lors et depuis.* [424] *En quoi n'entendons exclure les preuves des conventions particulières, et autres qui seroient faites par les parties sous leurs seings, sceaux et écritures privées.*" This *Ordonnance* was extended by another *Ordonnance*, passed in 1667. The second Article says (*Nouveau Commentaire sur l'Ordonnance Civile du Mois d'Avril, 1667*; Vol. 1, tit. 20. Ed. Paris, 1767), "*Seront passés actes par-devant notaires, ou sous signature privée de toutes choses excédent la somme de valeur de cent livres, même pour dépôts volontaires, et ne sera reçu aucune preuve par témoins, contre et outre la contenu aux actes, ni sur ce qui seroit allégué avoir été dit avant lors, au dupuis les actes, encore qu'il s'agit d'une somme ou valeur moindre de cent livres sans toutefois rien innover pour ce regard en ce qui s'observe en la justice des juge et consuls des marchands.*" The third Article excepts the cases of accidents, and cases where there was a commencement of proof by writing. The *Ordonnance* of 1566 had the word "*contrats*," and it is doubtful whether it is not confined to agreements; but this latter *Ordonnance* omits the word "*contrats*," and has the word "*choses*;" and it is clear, from the French authorities, that all things, with the exception of the cases excepted, are within its meaning. Pothier on Obligations (by Evans, P. IV., c. 2; arts. 1 and 2). *Toullier Droit Civil Français* (Tom. 9, tit. 3, c. 6, art. 1, pp. 17, 18). Nothing *dehors* the contract is to be received. It was to get rid of the inconvenience arising from the extensive and inconvenient operation of the *Ordonnance* of 1667, that the Canadian Act, 25 Geo. III., c. 2, was passed, admitting the rules of evidence as laid down in the Courts in England. That part regulating the admission of evidence is in these words: "*Dans la preuve de tout fait concernant les affaires de com-*[425]*-merce, ou aura recours dans toute les cours des jurisdiction civile en cette province aux formes admises quant au témoignage par les lois Anglaises.*" We submit however, that the operation of this Colonial Act is confined to matters of commerce or commercial contracts. Now, this agreement between the parties was not a commercial affair, it was a mere building contract: until the Act, 6 Geo. IV., c. 16, builders were not within the Bankrupt laws.—[Lord Campbell.—Wherever capital is to be laid out on any work, and a risk run of profit or loss, it is a commercial venture.]—[Mr. Pemberton Leigh.—Each act of buying and selling is an act of commerce; a number of such acts would make a trader.]

Secondly, Rutherford has not brought himself within the rule of the French law, which allows proof *dehors* the written contract. It was not intended by the Canadian Act, 25 Geo. III., c. 2 (1 Rennard's Acts and *Ordonnances* of Lower Canada, 1845), to let in parol proof of agreements relating to mercantile matters: but only of facts relating to mercantile matters; and thereby, in effect, get rid of the *Ordonnance* of 1667, and leave the French law as it was under the *Ordonnance*

de Moulins.—[Lord Campbell: The Court below held, that the law of England, as to the admission of evidence, applied; you argue that the Canadian Act respecting the admission of evidence did not apply, but that the case ought to have been decided by the old French law.]—Yes. The only remaining point, then, is this: if the English law prevails, then parol evidence was inadmissible, because the contract was not performed within a year. The fourth section of the Statute of Frauds, 29 Car. II., c. 3, says, that where an [426] agreement is not to be performed within a year, it cannot be proved by parol evidence. Now here the contract was not performed until the year 1826, and if the contract for the works could not be performed within the year, the same objection would apply to any contract relative to the profits to be derived from the works. *Boydell v. Drummond* (11 East. 142; S.C. 2 Camp. 157).

Mr. Martin, Q.C., and Mr. Temple, appeared for the Respondent; but

Their Lordships, without calling upon them, delivered judgment as follows:—

Lord Campbell:—Having heard the very elaborate and able argument on the part of the Appellant, their Lordships have come to the clear conclusion that this judgment ought to be affirmed.

It is admitted, and very properly admitted, that if the parol evidence be received, and be believed, it supports the declaration; the question between the parties being, whether the declaration is supported or not. Now, if the evidence is received, ought it not to be believed? We see no reason why it should not be believed. It has not been discredited by any Court to which the case has hitherto been submitted. The Court of Queen's Bench at Montreal thought it was inadmissible, but gave no opinion at all against the credibility of the witnesses. When the case came before the Court of Appeals of Lower Canada, they thought the evidence was admissible, that it was credible evidence, and that it supported the declaration. We [427] think they came to a right conclusion; for, notwithstanding some discrepancies which appear, there is a strong body of evidence to support the allegation in the declaration, and to show that Rutherford and McKay were to be jointly concerned in this adventure. It is admitted by the Appellant's counsel, that if the evidence of Griffin be believed, it supports the case; and we think there is no gross improbability in anything that he states, and he is strongly supported by some facts spoken to by the other witnesses.

Then, the great question is, whether the contract which is alleged in the declaration, must be proved by writing? If it must be proved by writing, certainly there has not been that proof given.

Now, two questions have been raised. First, with regard to how it would be according to the French law; and, Secondly, how it would be with regard to the English law, if the English law is to prevail? Their Lordships are of opinion, that it is unnecessary to consider the first question, with regard to the construction of the *Ordonnance de Moulins*, or of the subsequent *Ordonnance* of 1667, because their Lordships are all clearly of opinion, that, according to the Canadian Act, the question is to be determined by the law of England. In the 25th of Geo. III., an Act passed the Legislature of Lower Canada, which was to regulate the proceedings in the Courts of Justice, and, among other things, it was expressly enacted that in the proof of all facts concerning commercial matters, recourse should be had, in all courts of civil jurisdiction in the Province, to the rules of evidence laid down by the laws of England. Is or is not this a case concerning a commercial matter? It seems to us that the Legislature intended, that all feudal matters there, which concerned the customs of the Canadians, though they are now subject to the [428] rule of England, should remain untouched; and with respect to contracts to be entered into by Englishmen who were settled there, or between them and natives, or between natives amongst themselves, all such contracts should be enforced according to the rules and law of England.

Now, this is a contract for the making of a canal, whereby a large capital is to be laid out, and a considerable risk is to be run, and we think that it is a matter within the meaning of this section concerning commerce; and that being so, we think, by this enactment, the contract is to be proved by the rules of evidence laid down by the English law.

We cannot for a moment listen to the distinction which was attempted at the bar, between proof of a contract, and proof of the performance of a contract. It would be very strange if such a distinction had been made by the Legislature of Lower Canada, but it seems to us, it is not made, because it speaks of all facts concerning commercial matters, and the facts by which a contract is constituted, are facts concerning commercial matters, as much as the facts respecting the performance of the contract.

That being so, we come to consider whether, according to the law of England, the evidence adduced in support of his declaration is admissible in this case. Now, it is not disputed that it would be so, unless under the 4th section of the Statute of Frauds, it is inadmissible. The 4th section of the Statute of Frauds enacts, "That no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such [429] action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, to be lawfully authorized." The question, therefore, is, is the agreement which is set out in this declaration, such an agreement as is here struck at, an agreement that is to be performed within the space of a year? No case has been cited which is at all in point, and none could be cited, because we believe no such case is to be found in the books. *Boydell v. Drummond* [11 East, 142; 2 Camp. 157], and the class of cases to which the Appellant's counsel referred, are confined to contracts as between the contracting parties for the work that is to be done: but this contract is not as between the contracting parties who are to do the work: it is of a totally different nature, namely, as was very properly, and in very correct language, expressed at the bar, this is the vendition of a right. Then, why is it not to be performed within a year? McKay agreed he would let in Rutherford as a partner. Instead of being performed within a year, it was performed instantly, when the agreement was struck. That being the case, it was not such an agreement as is not to be performed within a year, but it is an agreement which is to be performed *instantly*. The moment the parties entered into this agreement, they had all the mutual rights and liabilities which belonged to them as joint partners in the concern. Then, the Statute of Frauds not applying to this case, by the law of England parol evidence would be admissible, and by the law of England, we think the case must be determined.

Their Lordships, therefore, have come to the conclusion, that the judgment of the Court of Appeal was right, and that it ought to be affirmed, with costs.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4 *British North America*; tit. CONTRACT, A. FORMATION OF CONTRACT, 2. *Statute of Frauds*, h. *Not performable within a year*. S.C. 13 Jur. 21.]

[430] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

RICHARD BROWNING.—*Appellant*: HENRY BUDD,—*Respondent* *

[Dec. 12 and 13, 1848].

The principles expounded in the cases of *Paske v. Ollatt* (2 Phill. 323), and *Barry v. Butlin* (2 Moore's P.C. Cases, 480), that the burthen of proof lies upon the party propounding a Will, and that the Court is not bound to pronounce in favour of a Will, unless it is judicially satisfied that it is the last Will of a free and capable testator, considered and affirmed [6 Moo. P.C. 431].

The execution of a Will, by a competent testator, being duly proved, the presumption is, that the testator was cognizant of its contents, and that the

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon. T. Pemberton Leigh.

instrument expresses his will, unless there be other circumstances to lead to a different conclusion, or to render it doubtful for the Court to act upon that presumption [6 Moo. P.C. 435].

Exaggeration of the conduct of a party benefited by a Will, towards the testatrix, though it induce her to revoke the Will, and the bequest made in his favour, and to execute another Will, to his exclusion, is not such a fraud as to destroy free agency, and render the Will invalid [6 Moo. P.C. 439].

Neither does such conduct amount to undue influence or importunity [6 Moo. P.C. 440].

The facts of this case sufficiently appear in the judgment.

The appeal was argued by the Queen's Advocate (Sir John Dodson), and Sir Frederick Thesiger, Q.C., for the Appellant; and Mr. Turner, Q.C., and Dr. Addams, for the Respondent.

[431] Mr. Baron Parke (Feb. 12, 1849).—This case was heard at the last sittings of the Judicial Committee, at which were present the Lords Langdale and Campbell, the Chancellor of the Duchy of Cornwall, and myself. It came before us on appeal from the sentence of the Judge of the Prerogative Court of Canterbury, admitting probate of the Will of Mary Budd, a *femme covert*, the Will bearing date the 6th of March, 1846, which was propounded by the Respondent, and opposed by the Appellant, the executor, under a Will of the deceased, dated the 11th of March, in the same year. We have had laid before us the Judgment which was pronounced by Sir Herbert Jenner Fust, stating his reasons at length. It has been commented upon on both sides, as the principal part of the evidence in the Court below, and, after full consideration, their Lordships are of opinion, that the judgment of the Court below should be reversed, and the Will of the 11th March admitted to probate.

Their Lordships have to apply to the facts of the case, the established rule on this subject laid down in *Paske v. Ollatt* (2 Phill. 323), and fully explained in the case of *Barry v. Butlin* (2 Moore's P.C. Cases, 480), viz., that the burthen of proof lies upon the party propounding a Will, and that the Court of Probate is not to pronounce in its favour, unless it is judicially satisfied that the instrument propounded is the last Will of a free and capable testator.

In applying this rule we have come to a different conclusion from that to which the very learned Judge of the Court below has arrived; we have formed our opinion, however, not without difficulty, for the case is full of suspicion, but on the balance of the evidence [432] we feel satisfied, that the Will of the 11th of March expresses the true intention of the testatrix, and that she was, undoubtedly, competent to execute it at that time.

The learned Judge, in forming his opinion, seems to have been materially influenced by the consideration, that the testatrix had been led into a mistake as to the legal effect of her Will, in consequence of having been misinformed by one who took no interest under it, as to the provisions of her marriage settlement giving her the power to make a Will. The learned Judge supposed, that when she made the Will in question, she was under an erroneous impression innocently occasioned, that, by the terms of her settlement, her husband, the Respondent, would take a life interest in all her property, and that he could not be deprived of it. Whereas, the fact was, that she had the entire disposal of her fortune, and her husband would take nothing, unless she made a Will in his favour. This ignorance of the operation of her Will, appears to have been a point greatly relied upon by the learned Judge, and tended much to lead him to the conclusion, that there was a deficiency of proof of the Will propounded. It is unnecessary to consider whether if this misinformation and mistake of the testatrix were established in evidence, it ought to produce any effect in invalidating the Will; but it appears to us that the evidence fails to make out that the testatrix was under the influence of any false impression on that subject. The testimony of Mr. Leach, in particular, leaves no doubt in our minds that she perfectly knew at a prior time, that her husband would take nothing unless she made a Will, and she expressed herself so clearly as to the reasons of her knowledge, that it is not at all [433] likely that the letter of Mr. Browning, which is suggested to have been the cause of an erroneous impression, could have that effect.

Indeed, the counsel for the Respondent did not at all insist upon this supposed misapprehension, as a ground for supporting the judgment of the learned Judge, but contended, that it might be sustained on the evidence in the case. So that irrespective of this consideration, there was so much grave suspicion of unfair conduct, and such a doubt of the veracity of some of the witnesses, that the Court ought to treat it as a cause of deficient proof, and pronounce that there was not enough to satisfy its conscience that this instrument procured was a valid Will.

There does not appear to be any dispute as to most, if not all, of the material facts of the case. Mrs. Mary Budd married the Respondent in June, 1844, against the wish of her friends. By the settlement of the 27th of May, in that year, her fortune, about £2000 in money lent, and a share of leasehold and freehold property of less value, was vested in trustees, with a power to her to appoint, if by Will, notwithstanding her coverture, and in default, in trust for her next of kin, as if she had not married. According to the evidence, she lived on the best of terms with her husband, though he was not well received by her family. It is plain she intended, at an early period, to make a Will in her husband's favour, and she duly executed such a Will on the 6th of March, bequeathing to him the £2000 absolutely, and the rest of the trust property for his life, with remainder to her niece and god daughter Mary Jane, for whom she professed to entertain great affection, according to the evidence of Mr. Sharp, a solicitor, who prepared that Will. Of the validity of this Will, if it had not been revoked by [434] a subsequent one, not the shadow of a doubt can be entertained. The facts in evidence anterior to it, render it highly probable that such a testamentary disposition would take place, and the proof of the instructions for, and preparation of, the instrument, and its due execution, are perfectly satisfactory.

The question is, whether this Will was revoked by another, executed on the 11th of March, by which she left the whole of her property to her mother. A Will was prepared by her brother, Frederick Chesterman, without any instructions from her, on the 10th of March. She had spent a fortnight at her mother's (with her husband's concurrence), ending on the 28th of February; after her return home, namely, on the 6th of March, she executed the Will in favour of her husband. On the 7th she went again, with her husband's approbation, to her mother's, it being intended that she should go to her brother's at Reading, for a change of air.

She never left that house, and died there on the 16th of March; and whilst she was under her mother's roof, and in her last illness, a Will of the 10th of March was executed. This Will being shown by Mr. Browning, the executor, to Mr. Surman, a solicitor, was thought irregular in the attestation clause, and also informal in not referring to the power contained in the marriage-settlement. A new Will was prepared by him, in substance, the same as that of the 10th, but unobjectionable in point of form, and was executed on the 11th, in the presence of two witnesses, Mr. Hambey, a medical gentleman known to the family, and Mr. J. Browning, a friend of the family.

Both these Wills stand on the same footing, and the question may be, considered to be, whether the Will of the 11th of March is proved to our satisfaction valid.

[435] That the testatrix was then perfectly competent to execute a Will, is a matter which is, in our judgment, beyond all doubt.

She had been afflicted with erysipelas in October and November, 1845, and during that illness she was for some days delirious, and her head was affected for some weeks afterwards; but before any of the Wills were made she had entirely recovered from that disease. Afterwards, in the beginning of the following year, 1846, she took cold, which produced a pulmonary complaint, and she had an enlargement of the spleen; but these diseases certainly did not affect her understanding; and, with the exception of about twenty minutes, on the evening of the 9th of March, during which she was much excited, and appeared not to be herself, there is not the least evidence that she was not perfectly competent to any rational act, though from her weakened state of body her mind might be less active, and she might be less able to guard against fraud or that species of duress which is commonly called undue influence, but her mental powers were otherwise unimpaired.

What then is the proof of the *factum*? for if the execution of a Will, by a competent testator, be duly proved, the presumption is, that he was cognizant of the

contents, and that the instrument expresses his will, unless some other circumstance leads to a different conclusion, or renders it too doubtful for the Court to act upon that presumption.

Now, if we reject from the case the evidence of doubtful witnesses whose connection with the legatee is alleged to render their testimony suspicious, the members of the Chesterman family, for instance, we will find satisfactory proof of the execution of the Will.

[436] The subscribing witnesses, Messrs. Humley and T. Browning, both prove that the testatrix executed the Will in their presence, appearing to be perfectly competent, and after the execution she expressed her satisfaction to the former, saying, "she was glad she had done it." The testimony of the same witness proves the execution of the Will of the 10th of March. The credit of both these witnesses is unimpeachable, and the fact of the execution of a Will about that time, is confirmed by the evidence of the Respondent's witness, Frances Holland, who appears to have deposed to all she knew with perfect impartiality. She speaks of the testatrix desiring Frederick Chesterman, who certainly prepared the Will of the 10th, to write something for her, on the 9th; of her desiring her sister to bring pen, ink, and paper; and Frederick Chesterman afterwards asking her to be a witness to the Will. Mr. Sharp, the surgeon, who deposes to the fact that, on the morning of Tuesday the 10th, when he was inquiring after her health, she told him she had passed a sleepless night, and had been occupied in the alteration of her Will. Now, upon this evidence to the *factum* of the Will of the 11th, bearing in mind, that the general competence of the testatrix is established, and without at all relying upon the testimony of Frederick Chesterman, and his sister, there would be no doubt that the Will was proved, if there were no circumstances, on the other side, to impeach it; and to raise such a reasonable doubt, as to call on the Court to pronounce that, on the whole, it was not satisfied with the proof of it.

The circumstances relied upon, on the part of the Respondent, and which it is insisted upon ought to be sufficient to prevent the Court being judicially satisfied [437] of the instrument being the testatrix's Will, are several.

First, the change of the testatrix's mind, between the 6th of March, when she deliberately executed an unquestionable Will in her husband's favour, without adequate cause, as it is said, and without any cause, for the total exclusion of her god-daughter.

Secondly, the prohibition of the husband from all access to his wife during her last illness, when the Will was made.

Thirdly, the conduct of Mr. Frederick Chesterman prior to the execution of the Will, in misrepresenting the Respondent's behaviour, and giving a false impression of it to his wife.

It cannot be denied that there are circumstances of suspicion in this case. The change of opinion, after a testamentary act long premeditated and deliberately adopted, is of little weight, because persons, though quite competent, are often governed by caprice in the selection of the objects of their bounty; but when such a change takes place so suddenly, and at a time when the husband is carefully excluded from all intercourse with his wife, and that in the last moments, and by the family the head of which is so much benefitted by the change, those who are guilty of such an improper act expose themselves to the most serious suspicion of fraud or undue influence in procuring the Will, which it has evidently been their object to obtain.

But, on the other hand, though we cannot avoid entertaining some suspicions, and though, after all, blame cannot but be attached to the family in preventing all access of the Respondent to his dying wife, and though it is evident from the testimony of [438] Mr. Frederick Chesterman himself, that so far from extenuating the conduct of her husband in his representations to his wife, he rather aggravated it, and certainly made no effort to heal the breach between them: yet we think that there are circumstances proved in the case which may reasonably account for the change of opinion in Mrs. Budd towards her husband, and which do not depend upon the testimony of Mr. Frederick Chesterman alone.

We do not mean to say that we disbelieve that gentleman's evidence; but as it is alleged to be such as ought to be doubted, we think it more satisfactory to see in

what respects the case may be proved without it; and where that proof coincides with his testimony, we arrive at a safe conclusion. The account which Mr. Chesterman gives is, that the change of opinion commenced in consequence of a letter addressed to Mr. Sharp, the surgeon, and sent unsealed, complaining of the vacillation and loss of time in not sending Mrs. Budd into the country. This letter he alleges to have been received in the presence of his mother, his sister Jane, his brother Charles, his brother Joseph, and his brother's wife. The witness then stated to her, that Dr. Copland's opinion was, that she could not last a week, that it was unkind in him, knowing, as he did, of that opinion, to hurry her off into the country before she could have further advice; that the deceased then said "she could plainly see why he wished to hurry her off, that it was her money, and not her, that he wanted;" that she then declared she would send for her Will, and that if he did not send it, her opinion would be confirmed, and she would leave her property to her mother: and the witness goes [439] on to say that, in consequence, he proceeded to prepare a Will for her.

Now it is observed on the part of the Respondent, that there is no allegation stating this letter and annexing it, which would have given the Respondent an opportunity to contradict it, and that in those parts, in which the witness vouches others as being present, he is not confirmed by them; and this observation is just, and creates a doubt as to this part of his testimony; but the fact of the demand by Mrs. Budd of her desk, containing her Will, the refusal of Mr. Budd to deliver it up, accompanied by two letters calculated to excite her anger, and to induce her to believe that he cared for her property rather than her person, is deducible from the testimony of Frances Holland, and that this impression had been formed in her mind in consequence of something that had passed, is clear from Mr. Sharp the surgeon's evidence, to whom she said, "he did not appear to be worthy of what she had done for him, and seemed not to care what had become of her, after she had signed the other Will;" and to the same witness she had said before, that she had altered her Will, and it is also clear that her affection for her husband had changed, by her refusal to see him, proved both by Mr. Sharp and Frances Holland. After this evidence, how can we say that she had not reasons which were sufficient in her mind to induce her to alter her intention as to her husband?

How can we take upon ourselves to say, that it is doubtful whether the last Will expresses her real intentions? And though we may believe that Mr. Chesterman has even purposely exaggerated the opinion of Dr. Copland (and it appears from that gen[440]-tleman's testimony that he did certainly somewhat exaggerate it), how can we come to the conclusion that he has been guilty of such a fraud as would invalidate the Will? or how can we say that he has used undue influence or importunity, that is, according to the definition of those terms by Sir John Nicholl, something in the nature of force, or fear, destroying free agency. *Williams v. Gonde* (1 Hagg. 581).

With respect, however, to the change of the testatrix's mind as to the god-daughter (niece), to whom she had professed to be so much attached, no explanation is suggested. But if the change of opinion as to her husband is accounted for, this is of trifling importance.

It may be that on further reflection, as she had determined to withdraw the bulk of her property from him, she thought it better that her mother should distribute the whole according to the exigencies of her family. It may be that she had forgotten her former reversionary bequest, and yet that simple act of forgetfulness cannot be considered as amounting to incapacity, or throwing any doubt on the evidence of her general competence.

The result is, that, though suspicions have been excited in our minds by the mode in which the testatrix was kept apart from her husband, and the sudden change of her intention towards him, there are reasons for the change, sufficiently proved; and on the whole we feel satisfied, that the instrument of the 11th of March, 1846, does express the free will of the testatrix: and of her competence there never was any doubt.

We shall, therefore, advise Her Majesty to re[441]-verse the sentence of the Court below, and grant probate to the Appellant, of the Will of the 11th of March; but, under the circumstances, we shall recommend that the costs here and below be paid out of the estate.

[Mews' Dig. tit. WILL. I. TESTAMENTARY CAPACITY: *b. Undue Influence and fraud.* VIII. ESTABLISHMENT OF WILLS, ETC.: *d. Proof of Will; 3. Ours of proof.* See note to *Barry v. Butlin*, 1838, 2 Moo. P.C. at p. 492.]

In Re HARDY'S PATENT * [Feb. 12, 1849].

Extension of term of Letters Patent granted to assignees of patentee.

The inventor and patentee had lost largely by the patent, but his assignees had lately made very considerable profits, and from their position in the trade, were likely to command a very large sale of the patent article. The patent was of high merit, and of great service to the public safety. In such circumstances, a prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; and, secondly, that the patented article should be sold by the assignees to the public, at a certain fixed price.

In estimating the profits made under a patent, the profits arising from the sale of the patented article for exportation must be included.

This was an application for an extension of the term of Letters Patent, dated the 4th of April, 1835, granted to James Hardy, for improvements in manufacturing iron axletrees for railway carriages. The petition was presented by Charles Geach and Thomas Walker, to whom Hardy had assigned his interest in the patent for the sum of £500 per annum. It appeared, that the patentee had made his invention known to the different railway companies, but could not succeed in getting it into general use, though his axles were better than those then in use, and he sold them at a less rate than common axles, and [442] that he ultimately assigned the patent to the Petitioners, having lost upwards of £3000 by it. The assignees had spent about £36,000, at different times, in establishing works, buying plant, etc. The axles had now become extensively used for railway carriages in England and abroad, and it appeared that the assignees had realized about £23,000 profit on them, during the last four years. A caveat was entered, but no opposition was offered at the bar.

Mr. Hill, Q.C., and Mr. Webster, for the Petitioners—After proving the formal notices, were stopped.

Lord Brougham.—Their Lordships feel great commiseration for Mr. Hardy, who has really obtained nothing for his meritorious invention, but has lost a considerable sum by it, and think, that if they should extend the term, it would be only upon the patentee receiving a large share of the profits derived during the term; otherwise, we should be putting very great profits in the pockets of the assignees.—[Mr. Hill: Terms will be agreed upon by the assignees, with Mr. Hardy, as was done in *Russell's Patent* (2 Moore's P.C. Cases. 496).]—If it had not been for Mr. Hardy's position, and for the clause in the Act of Parliament, which gives us power to grant an extension, either to the patentee alone, or to the assignee alone, or to the patentee and assignee jointly, there has been such great profits by the assignees, that no extension would have been granted. You must make an offer to be submitted to us.

A question arose, whether, in estimating the amount [443] of profits already made, the Petitioners had rightly deducted from the estimate, presented by them, a certain sum for profits on axles, sold to English carriage-makers for exportation. They had altogether omitted the profits on axles directly imported.

Mr. Hill.—The profit derived from the sale of axles made in this country, and intended for exportation, ought not to be included, as that profit is not derived in any way from the protection of the patentee.—[Lord Brougham: It protects you in the foreign market, for nobody can make the patented article here, and export it, because making is as much an infringement as uttering. The patentee, or his

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

assignees, have had the benefit of the foreign market, protected by the patent, and the profits on axles made for exportation ought to be included.]

Mr. Phipson for Mr. Hardy, and Mr. Welsby for the Crown—Submitted to any order that might be made by the Committee.

Judgment was delivered by

Lord Brougham.—Their Lordships having fully considered the merits of this case, which are incontestably very great, the ingenuity of the contrivance, its perfect success, its great importance to the welfare and safety of the public, on the one hand; and on the other hand, the profits which have actually been made, which are very considerable, and very much more considerable than in any former case within our recollection, in which [444] a patent was ever extended,—taking all these circumstances into consideration, but deducting always, and striking out of the deductions, the £5440 alleged very properly to have been the proportion of the profits gained from any patent axles sold to English customers for the purpose of exportation to order, or otherwise, and adding to the profits, for a similar reason, the sum of £8200, in respect of the profits gained by making under the patent in this country, though not selling under the protection of the monopoly in this country, but selling to foreigners,—taking all these facts into consideration, their Lordships are of opinion that they ought to advise the Crown to grant an extension of four years, upon condition, in the first place, on behalf of the public, that a proper arrangement should be made to prevent the raising of the price of the article to the public after the grant, the limitation of the price being in proportion, in some way or other, to the price of iron, or some such arrangement as that; and in the next place, taking into consideration the high merit and the deplorable loss of the ingenious patentee, a public benefactor if ever there was one, we shall make it a condition precedent to this recommendation, postponing for that purpose the final decision of the case for some days, that there should be a binding deed entered into by the assignees, who are now applying for an extension, along with the patentee, for giving him a moiety of the profits of the patent during these four years, and we shall postpone the final advising of the Crown until we have a draft of the two instruments laid before us. With respect to the prices, there will be some difficulty which will require consideration; the case, therefore, will stand over. We do not complain [445] of the conduct of the assignees at all: on the contrary, they have performed their part well, in taking all the risk upon themselves, and a very large amount of capital, amounting to near £14,000; it is true they have made large profits, but at the same time there has been some risks; our object is, in the first place, to protect the public, because the profits hitherto made have not been made at the expense of the public, for the axles have been sold at less than the price of common axles, and to protect the ingenious but unfortunate patentee, and we think we shall accomplish both these objects, provided the proper instruments be prepared.

An arrangement was afterwards entered into between Mr. Hardy and Messrs. Geach and Walker, the substance of which is contained in the following report, which was confirmed by Her Majesty.

“Their Lordships have considered the minutes put in by the parties in this case, and agree to report, that Her Majesty be advised, that new Letters Patent be granted to the said Charles Geach and Thomas Walker, for a term not exceeding four years from the date of the expiration of the original Letters Patent, upon condition, that the said Charles Geach and Thomas Walker pay to the said James Hardy the sum of £1000 before sealing of the said Letters Patent, and that the said Charles Geach and Thomas Walker, secure and pay to the said James Hardy the sum of £250 on the 5th of July, the 5th of October, the 6th of January, and the 5th of April, in each year, during the subsistence of the said new Letters Patent; and also upon further condition, that the said Charles Geach and Thomas Walker or their assigns shall not [446] charge for axles made according to the said invention, any sum or sums of money greater than after the rate of the sums hereinafter mentioned over and above the price of bar iron, per ton, as fixed by the Staffordshire ironmasters at their quarterly meeting last preceding the date of any contract of sale; that is to say, for axles up to and not exceeding 3 cwt. in weight, the sum of £11 10s. per

ton, and for axles up to and not exceeding 4 cwt. in weight, the sum of £12 10s. per ton, and for axles up to and not exceeding 5 cwt. the sum of £13 10s. per ton, and for axles up to and not exceeding 6 cwt. in weight, the sum of £14 10s. per ton."

[Mews' Dig. tit. PATENT: F. CONFIRMATION. ETC.; 2. *Renewal and Extension*: b. *Grant of, to Assignees*. S.C. 13 Jur. 177. As to (i.) consideration given to nature of invention as bearing on merit, cf. *Woodcroft's Patent*, 1846, 2 Web. P.C. 32; *Houghton's Patent*, 1871, L.R. 3 P.C. 461, 7 Moo. P.C. (N.S.) 309; *Lee's Patent*, 1856, 10 Moo. P.C. 226; *Herbert's Patent*, 1867, L.R. 1 P.C. 399, 4 Moo. P.C. (N.S.) 300; *Joy's Patent*, 1893, 10 R. P.C. 89; (ii.) account of foreign profits, cf. *In re Newton's Patent*, 1884, 9 A.C. 592; *In re Pieper's Patent*, 1895, 12 R. P.C. 292; (iii.) conditions annexed to grant to assignee, distinguished in *In re Bodmer's Patent*, 1849, 6 Moo. P.C. 469; and, cf. *Markwick's Patent* 1860, 13 Moo. P.C. 310; *Herbert's Patent*, *ubi. sup.*; *Pitman's Patent*, 1871, L.R. 4 P.C. 87. See also s. 25 of the Patent's Act, 1883 (46 and 47 Vict. c. 57)].

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Rev. JOHN KERSHAW CRAIG.—*Appellant*: GEORGE ROOKE FARNELL,
—*Respondent* * Feb. 13, 1849].

After the institution of an appeal from the Arches Court, in a suit against a clergyman, for adultery, fornication or incontinence, this Court refused to receive additional articles charging acts of adultery, alleged to have been committed subsequently to the close of the case in the Arches Court, or to examine, *viva voce*, the witnesses examined in the Court below, upon the allegation that they had been tampered with previous to their examination.

In this case, (an appeal having been brought against a sentence of suspension, *ab officio et a beneficio*, pronounced by the Judge of the Arches Court, against [447] the Appellant, in a suit promoted by Letters of Request from the Lord Bishop of Winchester, by the Respondent, against the Appellant, for having been guilty of the crime of adultery, fornication or incontinence, articles having been exhibited, and proofs produced in support of such charges,) an application was made, on the part of the Respondent, first, to rescind the conclusion of the cause, for the purpose of receiving additional articles; and, secondly, that their Lordships would direct the attendance of witnesses, produced in the Court below on behalf of the Appellant, in order that they might be examined *viva voce*.

These proposed additional articles, alleged the commission of acts of adultery, subsequent to the conclusion of the cause in the Court below, and were supported by affidavits. The second branch of the application was also supported by affidavits, alleging that the promovent had discovered, since the date of the sentence of the Arches Court, that the witnesses had been tampered with by the Appellant, and instructed by him previously to their examination as to the depositions made by them on his behalf.

The Attorney-General (Sir John Jervis), and Dr. Haggard—In support of the motion, relied on the facts disclosed in the affidavits, and cited *Price v. Clark* (3 Hagg. 263-5), *Middleton v. Middleton* (2 Hagg. Sup. 134), *Hamerton v. Hamerton* (2 Hagg. 618), *Sluts v. Hodgson* (1 Add. 318), 1 Brown's Civil Law, 499. 1 Oughton's *Ordo Judiciorum* (Lib. 1. tit. cccxvii. de appellationibus), and Statute, 3 and 4 Will. IV., c. 41, s. 7.

[448] Sir Frederick Thesiger, Q.C., and Dr. Addams, for the Appellant, opposed the application.

Lord Brougham.—This Court ought to be slow to re-examine witnesses; besides, the affidavits in support of the motion furnish no facts on which the Court can

* Present: The Bishop of London [Bishop Blomfield], Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

rely; mere suggestions only are offered. There is no direct swearing as to the actual occurrence of the alleged tampering, and we are asked to try a question of fact, as to the conduct of a party towards witnesses, which fact could not have been in the knowledge of the Court below. If a principal witness had, in the interim of the decision in the Court below, and the appeal here, been convicted of perjury, there might be ground for such an application as is now made; but in the present instance, it is a most inconvenient course that this Court is asked to adopt, and one greatly calculated to prejudice the case before us. Has there ever been a case, between the decision of the Court below and the appeal, in which this Court, or any Court of appeal, has been called upon to question evidence that must materially prejudice the case on appeal? No case, or authority, has been shown us in support of this application, that we have power to do what is asked; and even if we had such power, it has not been shown, that the circumstances are such as to justify the exercise of it. We have no hesitation whatever in refusing both applications, and with costs. We say not a word upon the merits of the case, we only dispose of this interlocutory application (a).

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, g. *New Evidence*; tit. ECCLESIASTICAL LAW, II. CHURCH OF ENGLAND, 10. *Discipline*, a. *Generally*. S.C. 13 Jur. 217, 6 N. of C. 682. See *Berney v. Norwich (Bishop of)*, 1867, 36 L.J. Eccl. 10.]

[449] ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLAND OF BERMUDA.

The HON. ROBERT KENNEDY,—*Appellant*; JOHN HENRY TROTT, Esq.—*Respondent* * [Feb. 15 and 16, 1849].

The Colony of the Islands of Bermuda, was settled by a Chartered Company of adventurers, under a grant from King James the First. Under the Government of this Company, three officers were appointed, for the local administration of the Islands, namely, a Sheriff, Secretary, and Provost-Marshal. Each of these officers were paid, partly by fees, and partly by grants of certain parcels of public lands, made to each officer respectively. In 1688, the Company was dissolved, and their charter evicted, and the government of the Islands became absolutely vested in the Crown. From that period, one person only had been appointed to perform the duties of the three offices, and the Crown appropriated these emoluments, and made certain alterations from time to time in their amount: this state of things continued down to the year 1819, when the office of Provost-Marshal was separately appointed, and some division of the lands was made. In 1839, the Respondent was appointed Provost-Marshal, and in 1846 he filed a Bill in the Court of Chancery, in the Island, against the Secretary of the Island, for an account of the rents and profits of the lands, and other monies received by him, in respect thereof, as appertaining to the office of Sheriff, which office was included in that of Provost-Marshal. The Court at Bermuda sustained the Bill, and ordered an account to be taken.

Held, reversing such Decree, that supposing a right to exist in the Respondent, the Court of Chancery had no jurisdiction to entertain such a suit, as such right or title to the office of Sheriff was not of an equitable nature, and

Semble—The only ground for coming into Chancery was the existence of several offices in one individual during a long series of years, and a consequent confusion of boundaries of the lands respectively allotted to the several offices.

(a) The case was subsequently argued upon its merits, and judgment delivered by Lord Brougham, reversing the Sentence of the Court below. The decision turned entirely on the examination of the evidence and proofs in the cause, and did not involve any new question or rule of Law.

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

The Appellant, in this case, was the Colonial Secretary of the Islands of Bermuda. The Respondent was the Provost-Marshal General of those Islands.

The appeal arose out of a suit instituted in the Court of Chancery of Bermuda, by the Respondent, against the Appellant, for an account of sundry rents and profits, and other monies, alleged to have been [450] received by the Appellant, in respect of certain lands claimed by the Respondent, as appertaining to the offices of Sheriff and Provost-Marshal in the Islands, and as belonging to him, in right of his office of Provost-Marshal General, in which the office of Sheriff was included.

The suit was brought under the following circumstances:—

By Letters Patent, dated the 12th of March, 1612, granted to a chartered company of adventurers, by King James the First, for the purpose of establishing a colony or plantation in the Islands of Bermuda, it was ordained and established, that there should be chosen out of the Company, thereby created and incorporated by the name of the Governor and Company of the City of London for the plantation of the Somer Islands, one Governor and his Deputy, with four-and-twenty assistants, for managing the general business and affairs of the Islands; and that they, the Governor and his Deputy and Company, or the greater number of them, should have full power, from time to time, and at all times thereafter, to nominate and appoint such officers as they should think fit, for the government and managing the affairs of the Company; and that a just and equal division of the Islands and the lands thereof should be made by the Governor and Company, whereof one part, not exceeding a fourth part of the Islands, should be allotted to the Governor and Company in common, for the maintenance and defraying of general and public charges.

Shortly after the grant of these Letters Patent, three offices were established in the Colony; namely, that of Sheriff, Secretary, and Marshal, or Provost-Marshal. These offices were held by different persons [451] down to the time of the dissolution of the Bermuda Company.

The Bermuda Company was dissolved, and their Charter evicted in the year 1688; and, shortly afterwards, on the 15th of November, 1688, King William and Queen Mary, by Letters Patent, granted unto Henry Fiefield, the offices of Secretary and Provost-Marshal General, with full power to execute and perform all such acts and things which, to the several offices of Secretary, Sheriff, and Provost-Marshal, in the time of the late Company, respectively belonged; and it was declared, that Fiefield should hold and enjoy all such houses, shares of land, profits, and advantages which the Secretary, Sheriff, and Provost-Marshal of the late Bermuda Company had enjoyed or received.

From the date of these Letters Patent, no person appeared to have been separately appointed Sheriff of Bermuda, but that office had been included in the appointment of Provost-Marshal General, which officer performed the duties of Sheriff. It appeared that the offices of Secretary, and of Provost-Marshal General (which latter office included the office of Sheriff), had been held by one person, and been conferred by one instrument, from the date of Fiefield's appointment down to the year 1808. In that year, the Appellant was appointed, by two separate warrants, to the offices of Secretary and Provost-Marshal General, and he held the same until the year 1819, when he resigned the office of Provost-Marshal General, and Mr. Foster Cooper was appointed to that office, on the 11th of September following, by the then acting Governor.

In the year 1839, Mr. Foster Cooper died, and the Respondent was, on the 16th of January in that year, [452] appointed to the office of Provost-Marshal General, by the then Governor, Sir Stephen Chapman, in the following terms:—"By virtue of the power and authority to me given and granted, by the Queen's Most Excellent Majesty, and reposing especial trust and confidence in your loyalty, integrity, and ability, I have constituted and appointed, and by these presents do constitute and appoint, you, the said John Henry Trott, to be Provost-Marshal General of these Islands, in the room of Foster Cooper, Esquire, deceased, to have, hold, exercise, and enjoy the same by yourself, or your sufficient deputy, or deputies (for whom you shall be answerable), for and during pleasure, with all such fees, rights, profits, and emoluments as are incident thereto, for and during your continuance in the said office."

From the early settlement of the Islands, certain lands were allotted to the

several offices of Secretary, Sheriff, and Provost-Marshall, namely, to the Sheriff, as belonging to his office, four shares of land, containing, by estimation, 100 acres; to the Secretary, as belonging to his office, two shares, containing, by estimation, fifty acres; to the Marshal, as belonging to his office, two shares, containing, by estimation, fifty acres; and this allotment of land appeared, from an ancient map, called Norwood's map, made by authority, in the years 1662 and 1663. It was admitted, that this map had always been treated, in the Islands, as entitled to great weight, and as conclusive evidence as to all claims to lands allotted to public offices in the colony. By this map, it also appeared that the various allotments were numbered from east to west, and in the book of reference to the map, it was mentioned, that the numbers against each parcel had [453] reference to those parcels as they were described in the map; and it further appeared, that the glebe was distinguished, or designated, on the map, by the number 2; that the lands allotted to the Sheriff were distinguished, or designated, on the map, by the number 3; that the lands allotted to the Secretary were distinguished, or designated, on the map, by the number 4; and that the lands allotted to the Marshal, or Provost-Marshall, were distinguished, or designated, on the map, by the number 7. It further appeared, by the map, that the lands designated by the No. 2, adjoined, and were situate, immediately upon the west of the town of St. George; that the lands designated by the No. 3, were situate immediately to the west of the lands designated by the No. 2; that the lands designated by the No. 4, were situate to the west and south-west of the lands designated by the No. 3; and that the lands designated by the No. 7, were situate further to the west, and separated from the lands designated by the Nos. 3 and 4, by two intervening parcels designated by the Nos. 5 and 6.

From the time at which the lands were originally allotted, down to the year 1758, they appeared to have remained in the possession of the holders, or holder, of the offices to which they were so allotted; but, in the year 1758, the then Governor Popple, received instructions from the Home Government for the sale of these lands (with the exception of fifty acres, which were to be reserved), in the following terms:—"Whereas, certain parcels of lands, estimated at six shares, lying and being in our Island of St. George, are allotted to the use of our Secretary, Sheriff, and Provost-Marshall for the time being:—It is our will and pleasure, that all those lands (except fifty acres) be [454] disposed of, and that the interest to accrue from the money paid, or agreed to be paid, for the same, shall be paid to our Secretary, Sheriff, and Provost-Marshall for the time being."

Similar instructions were given as to the sale of certain shares allotted to the Governor and other officers of the Islands; and, in the same instruction, the Provost-Marshall of the Islands was directed to collect and receive all monies that should arise from the disposal of these lands, and to keep a fair book of account, in which he should enter all and every sum and sums which he should so receive, and pay thereout the several proportions of interest which should accrue and become due to the Governor, Secretary, Sheriff, and Provost-Marshall for the time being.

These instructions were acted on by Governor Popple, and in the year 1760, he proceeded to sell certain parts of the allotted lands. The portion of the lands which was not sold under the above instructions, adjoined the township of St. George, in the Islands.

No further alteration in the allotted lands took place until the year 1811, when Governor Cockburn received additional instructions from the Home Government, by which he was authorised to sell thirty acres of the fifty acres so reserved, as aforesaid. By virtue of these last instructions, and of further instructions, dated in July, 1815, various other sales of the allotted lands were made in the year 1813, and subsequently. The sales which were made under the foregoing instructions to Governor Popple, and Governor Cockburn, included the lands allotted to the Provost-Marshall, and interest was, from time to time, regularly paid on the proceeds of the sales of these lands. The [455] Appellant, whilst he held the offices of Secretary and Provost-Marshall General, received this interest, amounting to £31 13s. 3d. per annum, and he continued to receive the same, together with the rents of the other lands unsold, after he had resigned the office of Provost-Marshall General, in the year 1819.

In the year 1846, the Respondent, having been appointed to the office of Provost-Marshall General, filed his Bill in the Court of Chancery, at Bermuda, stating to the effect above stated, and further stating, that under the Royal Instruction given to Governor Popple in 1758, the greater part of the lands therein referred to was sold and disposed of, and that the sales commenced with the parcels most remote from the town of St. George, and proceeded from west to east, and that as more than one hundred acres of the lands were then sold, those sales must have comprised the land originally allotted to the Provost-Marshall (and called No. 7), and that of the Secretary, called No. 4, each consisting of fifty acres, and also a portion of the land of the Sheriff, called No. 3, as the land reserved from the sales, in conformity with Royal Instruction, was less than one hundred acres, the quantity originally allotted to the Sheriff. That the overplus of the lands, or part remaining unsold as aforesaid, adjoined the glebe land and township of St. George, and consisted exclusively of the land of the Sheriff, which, since the offices of Sheriff and Provost-Marshall General were united, belonged to the Provost-Marshall for the time being. That from the year 1760, no part of the reserved lands was sold until the Appellant was appointed Secretary, and as until then the offices of Secretary and Provost-Marshall General were united under one commission, [456] and held by the same individual, no question as to the division or apportionment of the rents and profits of any of the lands so allotted could have arisen, but that the circumstances of both these offices being held for so long a period by the same person, and that of Secretary being his more usual designation, appeared to have occasioned the misapprehension as to the offices, and led to frequent misdescription of the lands attached to them respectively. And the Bill further stated, that the Appellant had continued to receive the quit-rents on the Crown-lands, which the Provost-Marshall General was entitled to do by virtue of his office, and that the Respondent having, by virtue of his office of Provost-Marshall General, a beneficial interest in the greater part of the lands in question, or the annual income arising therefrom, had applied to the Appellant to settle and adjust the claims of the Respondent, to the emoluments derived from the lands, and also for an account of all sums of money which had ever come to his hands, or under his direction or control, for or in respect of the lands so allotted to the offices of Sheriff, Secretary, and Provost-Marshall, or any part thereof, and how the same had been applied and disposed of, and that the Appellant had refused to comply with such applications. And the Bill prayed, that the Plaintiff might have a full account, disclosure, and discovery of all and every the matters and things aforesaid, and that he might have such further and other relief in the premises as might seem meet, and the nature and justice of the case might require.

The Appellant put in his answer to the Bill on the 11th of April, 1846, in which he admitted the fact of the Respondent's appointment to the office of Provost-Marshall General, and of his having performed the [457] duties thereof, but disputed the validity of such appointment as being contrary to the provisions of certain Statutes referred to in the answer. And the Appellant further admitted that, after the appointment of Mr. Foster Cooper, he (the Appellant) continued in the receipt and management of the quit-rent revenue and custody of its balances, awaiting the appointment of a permanent Provost-Marshall, to whom he could with propriety hand over the accounts of that revenue and its balance; or until he should receive further instructions thereon from the Lords Commissioners of the Treasury. That no such appointment having been made, and no such instructions having been conveyed to the Appellant up to the period of Mr. Foster Cooper's death, and the appointment of the Respondent not having been superseded from England up to the period of 1841, the Appellant's special proposition, under date of the 31st of May, 1841, addressed to the then Governor Reid, embodying a wish to be relieved from the duties of the receiver of quit-rents, was acceded to by his Excellency early in June, 1841, and the balance due to the Crown, then in the Appellant's hands and custody, was turned over by his Excellency's directions to the Respondent, as Provost-Marshall General, and the Appellant was by his Excellency's directions from thenceforth relieved from the duty of receiving the quit-rents; and the Appellant further admitted that there was great difficulty in ascertaining the boundaries of the allotments so made to the office of Sheriff, Secretary, and

Provost-Marshal, and stated his reasons for placing the boundary-lines differently from those stated by the Respondent in his Bill. And the Appellant admitted the separate existence of the three offices of Secretary, Sheriff and Provost-Marshal, [458] with distinct duties and emoluments appertaining to each, as stated by the Bill, but contended that the lands originally allotted to the Sheriff did not adjoin the glebe-land and township of St. George, but that the latter was adjoined by the lands said to have been allotted to the Secretary; and for this purpose he referred to a book of record of the Crown Grants of land in the Colony, and stated therefrom the particulars of fifteen grants, made in May, 1760, in pursuance of the instruction first hereinbefore referred to. The Appellant also referred to the Patent of Pitfield, and contended that the office of Sheriff was abolished thereby. The answer also admitted the receipt by the Appellant of various sums in respect of the allotted lands.

The answer was replied to, and both the Plaintiff and the Defendant entered into evidence.

The cause came on for hearing in the month of September, 1846, when it was declared by the Court, that the Respondent was lawfully appointed to the office of Provost-Marshal General of the Islands, and by virtue of that office was entitled to the lands originally allotted to the Sheriff of Bermuda, and designated by the number "3" on Norwood's original map, or to the emoluments accruing from those lands from the time when the Respondent was appointed Provost-Marshal General; and that the Respondent was also entitled to the lands originally allotted to the Marshal of Bermuda, and designated by the number "7" on the same map, or to the emoluments accruing from the last-mentioned lands from the time when he was appointed Provost-Marshal General. And the Court further ordered, that it should be referred to the Masters to ascertain and report to the Court what had [459] been the emoluments from the lands of Marshal and Sheriff, from the date of the Appellant's resignation of the office of Provost-Marshal General in 1819, and that the Respondent was entitled to receive the annual profits thereof from the date of his commission, the 16th of January, 1839.

On the 2nd of October, 1846, the Masters made their report, whereby they reported that the emoluments from the lands of Marshal and Sheriff, from the date of the Appellant's resignation in 1819, to the 30th of September, 1846, were £2403 4s. 3d.; and that the emoluments from the lands since the appointment of the Respondent to the office of Provost-Marshal General, to the 30th day of September, were £517 7s. 5½d., of which sum the Respondent had received into his hands £108 8s. 8d.; and that the Appellant then had in his hands, arising from the sale of one lot of the land, the sum of £132, and, as discount, not accounted for in bills received by him in payment of another portion of the land, and remitted to England for investment, the sum of £167 7s. 5d., and a further sum of £1033, purchase of lands sold under instructions from Lord Stanley, while Secretary for the Colonies (subject to a deduction for the incidental charges of sale).

This report was confirmed on the 6th of October, 1846, and on the 9th of that month, the Court ordered and decreed, that the Appellant should pay over to the Respondent, £438 18s. 9¼d., the balance appearing to be due to him by the Masters' report; that the Respondent should retain to his own use yearly, while in office, the annual sum of £15 0s. 4¼d., old currency, equal to the sum of £9 0s. 2½d. sterling, being the amount which it [460] appeared by the report had been paid since the year 1783, as interest for the Marshal's land, sold in 1760, in the time of Governor Popple; and also that the Respondent was entitled to receive (while in office) the sum of £50 a-year, to be calculated from the 30th of September, 1846, being the annual sum which had been paid and allowed to the Appellant by Her Majesty, in lieu of interest on £1350, 3 per cent. stock; and also the sum of £167 7s. 5d., being the amount appearing by the Masters' report, of discount on the sum of £2020, currency of Bermuda, taken to England in bills of exchange; and also the sum of £132, also appearing by the report as the amount of sales of a lot of land sold in August, 1819, and received by the Appellant, on the 8th of September, 1823; the two sums of £167 7s. 5d. and £132, to be invested in such manner as may be directed by Her Majesty or the Court, as a fund pertaining to the office of Provost-Marshal General: and further, that the net amount of the sales which may have

been made of any other portion of the land originally allotted to the Sheriff, viz., the land designated by the number "3" in Norwood's map, and not specially mentioned in this decree, was also to be deemed to constitute a part of the fund pertaining to the office of Provost-Marshal General: and, further, that the Appellant should pay to the Respondent his costs in the cause.

The Appellant appealed from the decree of the 29th of September, 1846, and the order made on further directions, on the 9th of October, 1846, to Her Majesty in Council, and submitted that the same were erroneous, and ought to be reversed, for the following reasons:—

I. Because the Court of Chancery of Bermuda had [461] no jurisdiction over the offices and official emoluments of the Secretary and Provost-Marshal General of Bermuda, or either of them, or over the public lands in Bermuda heretofore appropriated by the authority of the Crown towards the remuneration of those officers, or either of them, or the proceeds of such of the lands as had been sold from time to time, or the profits arising from the lands or their proceeds, or the payments made from time to time out of the public revenues to the Secretary and Provost-General of Bermuda, or either of them.

II. Because, if the Respondent had any right or title to the official emoluments claimed by him, such right or title was, at all events, not of an equitable nature; and, if legal, ought to have been asserted by action in a Court of Law.

III. Because the matters to which the decrees related, were matters in which the Crown was directly interested; but the decrees had been made in a suit in which the Crown was not represented upon the record.

IV. Because, even if the relief given by the decrees, or any part of it, was such as might have been granted by the Court below, upon pleadings properly framed for that purpose, the Respondent's bill did not state a case, or contain a prayer, upon which such relief could properly be given.

V. Because no part of the official emoluments which by these decrees were adjudged to belong to the office of Provost-Marshal General of Bermuda, had ever been so appropriated by any competent authority, since the dissolution of the Bermuda Company, as to entitle the person holding the office of Provost-Marshal General for the time being, to claim or receive the same without [462] an express grant to himself from the Crown: and no grant of any part of those emoluments had ever been made by the Crown to the Respondent.

VI. Because the whole of the official emoluments, in question, had been, during the period, covered by these decrees, and then were subject to be appropriated and to have their appropriation altered from time to time, according to the absolute discretion and pleasure of the Crown, or (as to such sums as had been voted by Parliament) according to the pleasure of the Imperial Parliament of the United Kingdom; and the only appropriation of those emoluments, or any part of them, to the remuneration of any particular person or officer which since the year 1811, had been made or recognised and allowed by the Crown, or by the Imperial Parliament, had been an appropriation to the use and profit, either of the Appellant personally, or of the Secretary of Bermuda, for the time being.

VII. Because the whole of the emoluments of which the decrees direct either an account or payment against the Appellant, were received by him for his own use under the orders and directions, or with the knowledge and assent, of the Crown.

VIII. Because if any account could properly have been directed against the Appellant in this cause, such account ought, at all events, to have been limited to the period subsequent to the filing of the Respondent's bill.

IX. Because there was no evidence in the cause sufficient to establish either of the propositions:—First, That after the dissolution of the Bermuda Company, the former duties, rights, and emoluments of the Company's Sheriff of Bermuda were annexed [463] specifically to the office of Provost-Marshal General, as distinguished from that of Secretary; or, Secondly, That the official lands which in the year 1808, remained unsold, and the emoluments arising from which had since been received by the Appellant, were identical with the lands which in the time of the Bermuda Company were allotted to the Sheriff of Bermuda; on which two propositions both the decrees appealed from are altogether founded.

X. Because the appointment of the Respondent to the office of Provost-Marshal

General by the Governor of Bermuda in 1839, was invalid, as not being made conformably with the provisions of the Acts of the 22nd George III., cap. 75, and the 54th George III., cap. 61: or if not invalid, such appointment was, at all events, insufficient to vest in the Respondent any title to the official emoluments adjudged to him by these two decrees.

XI. Because the decree, made on the 29th of September 1846, directed an account against the Appellant, not only of the emoluments received by him and claimed by the Respondent during the period subsequent to the 16th day of January, 1839 (the date of the Respondent's commission as Provost-Marshal General), but also of all the earlier emoluments previously received by him from the same sources from the date of the Appellant's resignation of the office of Provost-Marshal General in 1819, in which last-mentioned account the Respondent had not and could not have any interest.

The Respondent, on the other hand, contended that the judgment was right, and in support of which relied upon the following reasons:—

I. Because the Respondent, having been duly [464] appointed to, and vested in, the office of Provost-Marshal General, and having performed the duties of that office, and having been recognised and treated by the Appellant as entitled to the same, was and is entitled to all the emoluments derived from or payable in respect of the lands allotted to the offices of Provost-Marshal and Sheriff, both of which offices were included in the office of Provost-Marshal General.

II. Because it clearly appeared that the emoluments and profits by the decrees directed to be paid to the Respondent, were emoluments and profits derived from the lands allotted to the offices of Provost-Marshal and Sheriff.

Mr. Parker, Q.C., and Mr. R. Palmer, Q.C., for the Appellant; and Mr. Turner, Q.C., and Mr. Steward, for the Respondent.

The following authorities were cited, and referred to in the course of the arguments: *Penn v. Lord Baltimore* (1 Ves. Sen. 444), *Dormer v. Fortesque* (3 Atk. 130), *Alexander v. The Duke of Wellington* (2 Russ. and My. 35), *Barclay v. Russell* (3 Ves. 424), *Nichol v. Goudall* (10 Ves. 155), and Statutes, 22 Geo. III., c. 75, and 54 Geo. III., c. 61.

The Right Hon. T. Pemberton Leigh.—It appears to their Lordships, that the case has been very much mistaken in the Court below.

It is admitted on all hands, that the only question that can now be considered as substantially be-[465]-fore us, is this; whether this decree can be maintained, to the extent to which it gives an account of the quit-rents, and unsold lands.

Now, the first objection, and a very strong objection, to this decree, pressed at the bar, is, that supposing the title to exist, there is no ground for coming to a Court of Equity to assert it.

We think that might probably be a good ground upon which this matter might be overturned, but we don't think it desirable to rest our decision upon that ground, when we see that the merits are substantially against the party who commenced this suit. The case appears to be this: that shortly after 1612, when this Colony was founded, by a chartered Company, they appointed three distinct officers, the Sheriff, the Provost-Marshal, and the Secretary; and it appears, by an old map of 1663, that there were lands appropriated to the Secretary, lands appropriated to the Sheriff, and lands appropriated to the Provost-Marshal.

In the year 1688, it is asserted that the Company was broken up, and the Charter was avoided; and from that time, the Colony remained in the hands of the Crown. From that time down to 1819, the same person was appointed to discharge the duties of Secretary, Provost-Marshal, and Sheriff, and he appears to have received the income of the several lands, the sources of revenue attached to those offices.

In 1819, the offices were so far separated, that a Provost-Marshal was appointed, independently, on the resignation of that office by Mr. Kennedy.

At that time, some division (but what, does not distinctly appear) was made in the emoluments belonging to these several offices, between the Secretary [466] on the one hand, and the Provost-Marshal on the other, and amongst the sources of emolument which, upon that division, were assigned to the Secretary, was the sum of £31 13s. 3d., the interest arising from the sale of a portion of the lands originally

assigned to the office of Provost-Marshal, and also the rents of other lands unsold, which are now in question. He continued to receive these same emoluments for twenty-three years, or at least, until the period when the present Provost-Marshal was appointed.

In that interval, it appears, the Crown had distinctly recognized, without any interruption, his enjoyment of these several sums of £31 13s. 3d., and the rents of the unsold lands, as part of his income. The Provost-Marshal acquiesced in that result, and the Crown acquiesced in it also; and it appears, with respect to a part of the lands standing in the same situation, after the offices of Provost-Marshal and Secretary were separated, that a sum was voted annually, by Parliament (as an item in the estimates for Bermuda), to the Secretary, in his character of Secretary, as a compensation for the lands so sold.

In this state of things, in 1833, it was proposed to reduce the salary of the Secretary, which then amounted to £1100 a-year, to £800, but that was not to take place to the full extent, or more than to one moiety, during the continuance in office of the then Secretary. In order to make up that sum of £1100, Parliament voted a sum of £500 a-year, to make up the Secretary's income. It appears to us, that amongst the sources of income calculated upon that occasion, as belonging to the Secretary, was the £31 13s. 3d., and the rents of the lands.

This being so, in 1839, Mr. Trott is appointed; [467] and now, he says that appropriation which has thus been made, and existed for twenty-three years, is a wrong appropriation, and that the rents of those lands belong to him. In what mode is his title made out? It is made out by nothing more, so far as we can see, than this, that in that old map of 1663, these lands, from which the disputed sources of revenue arose, are described as the Provost-Marshal's or Sheriff's lands, and it is urged that the Sheriff must be considered as Provost-Marshal, because the offices are identical. Supposing that to be so, it does not follow that the Crown ever appropriated; indeed, it is admitted it never had appropriated, the lands of the Secretary's office, and the lands of the Sheriff's and Provost-Marshal's office, to the Provost-Marshal's office.

It appears to us, therefore, that whatever may be right for the Crown hereafter to do, the Plaintiff has entirely failed to make out any title, as an apportionment of the appropriated revenue belonging to his office, and, therefore, supposing the jurisdiction of the Court of Chancery to exist, he would have entirely failed in making out a title, upon which he would be entitled to a decree. The only ground upon which a title existed to come into Chancery, is that of the existence of these several offices in one individual, during a long series of years, and a consequent confusion of boundaries between the several lands originally allotted for the offices respectively; but as we think there is really no issue upon which, if jurisdiction existed, any right is to be maintained, it is not necessary to go into a consideration of that question.

We think, therefore, that the decrees of the Court below must be reversed, and the Bill dismissed with costs.

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 2. *Bermuda*.]

In re BODMER'S PATENT * [March 16, 1849].

Where the executor of the surviving assignee of a patentee, petitioned for an extension of the term of the Letters Patent, and it was established, that a

*Present: Lord Brougham, Lord Langdale, and the Right Hon. Dr. Lushington (*a*).

(*a*) This case was heard before three Privy Councillors, under the Statute, 6th and 7th Vict., c. 38, s. 1. A warrant under Her Majesty's sign manual, directed to three members of the Judicial Committee, to hear and report on the Petition, was read at the Council Board, before the Petition was opened.

valuable consideration had been given for the assignment, and that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension of the term, refused to impose terms upon the petitioners, in favour of the patentee.

This was an application for a prolongation of Letters Patent, for improvements in carding cotton. The petition was presented by the executor of the surviving assignee of the patentee. There had been a loss, by the petitioners, of nearly £6000. The patentee had been largely indebted to the assignees, and had, in a great measure, liquidated his debt, by the proceeds arising out of the assignment of the Letters Patent.

Mr. M. D. Hill, Q.C., for the Petitioner.

The Attorney-General (Sir John Jervis), for the Crown, suggested, as the Petition was by the executor of the assignee of a patentee, whether the Letters Patent ought to be extended without imposing terms for the benefit of the original inventor. He referred to Russell's Patent (2 Moore's P.C. Cases, 496), and *In re Hardy's Patent* (*ante* [6 Moo. P.C.], p. 441).

[469] Lord Brougham.—This case is quite different from Russell's and Hardy's cases: terms are only imposed on the assignee, where the inventors and patentees have made nothing by their invention.

Evidence was given of the novelty and usefulness of the invention, and of the loss incurred by the assignees, when their Lordships granted an extension of the term, for five years.

[Mews' Dig. tit. PATENT: F. CONFIRMATION, etc.; 2. *Renewal and Extension*: b. *Grant of to assignee*. See note to *In re Hardy's Patent*, 1849, 6 Moo. P.C. 446.]

In re PATTERSON'S PATENT * [June 21, 1849].

A patentee entered into an agreement with certain parties, to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of the Letters Patent; in such circumstances, an extension was refused.

This was a Petition, for the extension of the term of Letters Patent granted to the petitioner, in the year 1835, for improvements in tanning hides and skins, by the use of blackberry brambles, as a tanning matter. It appeared from the evidence, that, in 1836, the petitioner executed an agreement with certain other persons, for working the invention, and a deed was prepared, by the other parties, for his execution; he was, however, advised, that the deed was at variance with the agreement, and he refused to execute it. Tanning works had been commenced, but, in consequence of these disputes, they were stopped, and the Letters Patent were deposited, for all parties, with the [470] Counsel who advised the petitioner; and, as the other parties would not consent to their being given up, they remained in his hands till April, 1848, when, some of the parties being dead, the Letters Patent were given up to the petitioner, who had since commenced works for the prosecution of his invention, in conjunction with another person.

Mr. Webster, and Mr. Phipson, for the Petitioner.

The Attorney-General (Sir John Jervis), for the Crown, objected to the application for an extension of the term, as no use of the patent had hitherto been made by the Patentee, and that he had not brought the invention before the public.

Mr. Webster.—The petitioner had no means himself, and as he could not get the Letters Patent out of the hands of the party in whose custody they were, no one would join him in prosecuting his invention, and he was, therefore, unable to bring the invention into notice.

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Lord Langdale.—We have considered all the circumstances of this case, and the evidence which has been adduced. The petitioner has been unfortunate; but, even admitting that it was impossible for him to come to terms with the persons who he at first joined, still it was his own act that he joined them. After giving the case our best consideration, we are of opinion, that we ought not to advise Her Majesty to prolong the term.

[Mews' Dig. tit. PATENT; F. CONFIRMATION, etc.; 2. *Renewal and Extension*; a. *Generally*. S.C. 13 Jur. 593. Cf. *In re Roper's Patent*, 1887, 4 R.P.C. 201; and see s. 25 (4) of the Patents Act 1853 (46 and 47 Vict., c. 57).]

[471] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

The QUEEN, in Her office of Admiralty, and WILLIAM TOWNSEND, Esquire, Her Majesty's Procurator-General in Her office of Admiralty,—*Appellants*; Sir EDWARD BELCHER, K.C.B., and Others,—*Respondents* * [June 25, 1849].

The Illeanon Pirates.

Bounties awarded under the Statute, 6 Geo. IV., c. 49, to the Commander, officers, and crew of Her Majesty's ship, *Samarang*, upon the capture and destruction of piratical prahns, in the Straits of Gillolo, in respect of the piratical crew on board the prahns.

Leave to appeal against an Interlocutory Decree of the Admiralty Court, awarding such bounties, granted to the Admiralty Proctor, on behalf of the Crown, notwithstanding an appeal had not been interposed within due time, the circumstances of the case entitling the Appellants to such indulgence [6 Moo. P.C. 482.].

This was an appeal from an Interlocutory Decree of the High Court of Admiralty, in a cause promoted under the Act, 6th Geo. IV., c. 49 (*a*), on the part of [472] Sir Edward Belcher, K.C.B., the Commander, and the rest of the officers and crew of Her Majesty's ship, *Samarang*, respecting the capture or destruction, on the 3rd and 4th of June, 1844, in the Straits of Gillolo, of certain prahns or vessels manned by pirates or persons engaged in acts of piracy.

The petition set forth that, on the 3rd of June, 1844, Her Majesty's ship, *Samarang*, being then engaged in surveying duties, and near the Island of Gillolo,

* Present: Lord Brougham, Lord Langdale, the Right Hon. Sir Herbert Jenner Fust, and the Right Hon. T. Pemberton Leigh.

(*a*) The Statute, 6 Geo. IV., c. 49, under which these proceedings were founded, is entitled "An Act for encouraging the capture and destruction of Piratical Ships or Vessels." Section 1, provides "that there shall be paid to the officers, seamen, and others who shall have been actually on board any of his Majesty's ships or vessels of war, or vessels at the actual taking, sinking, burning, or otherwise destroying, of any ship, vessel or boat, manned by pirates, or persons engaged in acts of piracy, the sum of £20 for each and every such piratical person, either taken and secured, or killed during the attack on such piratical vessel; and the sum of £5 for each and every other man of the crew not taken or killed, who shall have been alive on board such pirate vessel, at the beginning of the attack thereof, the number of such piratical men respectively, to be proved, by the ship's papers, taken on board such piratical ship, vessel, or boat, verified by the oaths of two or more of the persons who shall have found and taken possession of such papers, or by such other evidence as, under the circumstances of the case, shall, by the Judge of the High Court of Admiralty, or by the Judge of any other Court, authorised to take cognizance of such matter, be deemed sufficient proof thereof."

Sir Edward Belcher, her captain, with two officers and four men, quitted her in the gig, accompanied by the second barge, armed with a brass six-pounder gun and small arms, and manned with twenty officers and men, for the purpose of taking astronomical observations and fixing points of land; and the party in the gig having landed on the extreme edge of a reef extending from a small islet, were engaged in such duty, the barge in the meantime lying off; when about half-past twelve o'clock p.m., they were disturbed by an extraordinary yell proceeding from about forty men of colour, who were advancing from the [473] islet along both sides of the reef with the evident intention of surrounding Sir Edward Belcher and his party, on nearing whom they commenced hurling spears and arrows, though without effect. That the men were all naked, except their chiefs (who wore scarlet), and were soon repulsed and put to flight by musketry. That in the meantime a prahn, with about fifteen men of colour, pulled round a point from the islet, and advanced on the barge with an apparent hostile intention, but perceiving the brass gun in her bows sheered off much disconcerted, and although desired to depart, and warned by several shots fired over her, she described a wide course, and then joining the land assailants retreated to the islet. That about three o'clock p.m., his observations being finished, Sir Edward Belcher embarked in the barge, and, accompanied by the gig under the command of Mr. Hooper, proceeded in the direction taken by the prahn towards the rear of the islet, when the same, and another prahn, filled with natives, were observed escaping from two villages whence the first assailants had issued, and many natives were also seen escaping from such villages into the jungle. That the villages, and some boats, and six war prahns, lying on the beach, were thereupon burnt by Mr. Hooper and the gig's crew, whilst Sir Edward Belcher, in the barge, pursued the flying prahns, captured one of them, which ran into a creek, and was abandoned by her crew as the barge approached, and afterwards, on coming up with the other, which proved to be the first-mentioned prahn, by a discharge of round and canister shot compelled her crew to desert her, and both the prahns were then towed out to sea and burnt. That the gig having rejoined the barge, both boats [474] proceeded, during the night, twenty miles to the southward, and anchored in a lonely bay within thirty yards of the beach, where, about two o'clock a.m., of the 4th of June, they were aroused by the sound of gongs, and at the same time saw five large prahns advancing rapidly towards them, the leading prahn being highly decorated, and bearing such streamers and banners as are borne only by the Ileanon pirates, the most noted pirates in those seas. That the boats were immediately cleared for action, and the leading prahn being allowed to pass outside of them, her chief, who was on the roof with his fighting men, and wore scarlet, addressed the people in the boats, asking, "Who are you?" And Sir Edward Belcher having replied in English, as well as in the Malay language, "The captain of a British ship of war," a voice from the prahn, in broken English, asked, "Where is your ship?" to which Sir Edward Belcher replied, "Outside;" whereupon the chief and people in the prahn commenced yelling and capering, and casting their spears and arrows into the boats, and at the same time endeavoured to get the head of their prahn towards the boats. That an action immediately commenced with four of the prahns, wherein twelve rounds of well-directed round and canister shot from the six-pounder gun divided successively between them within twenty yards distance, caused the splinters to fly very profusely, and completely cleared their roofs, when the surviving pirates, panic-struck, grounded their prahns and fled to the shore, when musketry was directed against the fugitives, then so close that the spears of those on the beach passed over the boats and rendered the situation of those on board them highly dangerous; and whilst the boats were [475] engaged in conflict with the fourth prahn, the other pirates were enabled to carry off their killed and wounded into the jungle. That the three largest prahns were then captured, dragged off the reef, and towed out into deep water, and left in charge of Mr. Hooper in the gig, but in the meantime the fourth prahn was recovered and retained by the pirates, who in her rejoined the fifth prahn which had kept aloof during the action. That Sir Edward Belcher in the barge immediately went in pursuit of them: after a chase of two miles, and a sharp conflict with repeated discharges of musketry on both sides, they were abandoned by the survivors of their crews, who escaped to the shore, and the two prahns were thereupon cap-

tured by Sir Edward Belcher and his people, who found many dead and dying persons therein, and were then towed out and burnt. That at this time, six o'clock a.m., five prahns of the largest size were observed drawn up in order of battle, and so as to oppose the return of the barge towards the gig, and on the barge approaching them, the pirates on board the prahns commenced yelling and dancing, with a brisk accompaniment of small guns and musketry; such attack, however, was not returned until the barge reached within twenty yards of the prahns, when, by discharges of round and canister shot from the six-pounder gun, divided alternately amongst them, together with Congreve rockets and musketry, great slaughter and confusion was caused, and those of the pirates who were not killed or severely wounded jumped overboard and fled to the jungle for shelter; but before such event a ball from the leading prahn struck Sir Edward Belcher on the thigh and knocked him overboard, severely and dangerously wounding him. That Sir [476] Edward Belcher having been lifted out of the water and dragged into the barge, was shortly afterwards enabled to resume the command, when seeing five fresh prahns advancing, and having no ammunition left for resistance, and therefore finding it impossible to take possession of or destroy the five prahns whence their crews had just been driven, the barge at once proceeded to the *Samarang*, which it reached about ten o'clock a.m., and from which ship Sir Edward Belcher immediately dispatched the barge and two cutters, under the command of Lieutenant Heard, to go in search of the gig, and then follow the remaining prahns. That in the meantime Mr. Hooper, who had been left in command of the gig, finding the barge did not return, proceeded about seven o'clock to examine the three captured prahns under his charge, which he found to be armed with guns and to have on board flags and banners similar to those used by the Illeanon pirates; that in one of the prahns he found a dead body, and in another a woman and child, prisoners of the pirates; and Mr. Hooper having landed the woman and child, destroyed the prahns, and in the course of the forenoon, having joined the barge and two cutters from the *Samarang*, he then returned to that ship, between ten and twelve miles distant, to recruit and obtain a fresh crew. That the barge and cutters having thus parted from the gig, proceeded to the scene of the morning's action, wherein some of their party had been engaged, and there found the five prahns, from which the pirates had been driven as aforesaid, hauled up a creek, and lying there with seven others of a similar size, with many pirates on board. That on approaching those prahns, which, however, they could not do [477] within four hundred yards, on account of the shallowness of the water, a fire was opened and kept up against the *Samarang's* boats from a masked battery, notwithstanding which an incessant fire from three brass guns, viz. the six-pounder in the barge and two three-pounders in the cutters, and discharges of Congreve rockets, were kept up against the twelve prahns at the aforesaid distance, and in consequence thereof they were destroyed or rendered perfectly useless, and many men on board them killed or wounded. That the boats then proceeded to another creek, where they found and destroyed two small prahns, but with no one on board, and afterwards returned to the *Samarang*. That the crews of the two prahns, which were chased and destroyed on the 3rd of June, amounted at least to fifteen men in each prahn. That the crews of the five prahns attacked and destroyed in the action, which commenced about two o'clock a.m. of the 4th day of the same month, amounted at least to eighty men in each of three of the prahns, and to fifty-five men in each of the other two prahns. That the crews of the five prahns attacked and destroyed in the subsequent action, which commenced about six o'clock a.m., amounted at least to ninety men in each prahn, making a total of not less than eight hundred and thirty men, who were alive and on board twelve piratical prahns at the beginning of the respective attacks thereof; that none of such piratical persons were taken or secured, but that three hundred at least of the piratical persons were killed during such attacks. That there were not less than five hundred piratical persons alive on board the twelve other prahns at the beginning of the attack thereof, which prahns were attacked and destroyed in the afternoon of the 4th of June; that none of such [478] piratical persons were taken or secured, but that fifty of them at least were killed during the attack; and, in conformity with the 6th Geo. IV., c. 49, the petitioners prayed that the Court would accept the affidavits of Captain Sir Edward Belcher, of Lieutenant Thomas Heard,

of Mr. Henry Singleton Hooper, and of Mr. Arthur Adams, as evidence of the facts therein detailed; and to pronounce that there were one thousand three hundred and thirty piratical persons alive on board the several prahns at the beginning of the attacks thereof respectively, by the officers and crew of Her Majesty's ship *Samarang*, and that three hundred and fifty at least of such piratical persons were killed during such attack.

The petition having been lodged in the registry with affidavits in support thereof, notice was given, by the petitioner's Proctor, to F. H. Dyke, Esq., Her Majesty's Proctor and Procurator-General, of the petitioners' intention to move the court to pronounce in the terms and according to the prayer of the petition.

No notice of the motion, upon this petition, was given to the proctor for the Lords Commissioners of the Admiralty, by whom the orders for payment of bounties by the Accountant-General of the Navy are required to be made out and given (*a*), but the motion [479] having been postponed at the instance of Her Majesty's Proctor was afterwards brought on, Her Majesty's Advocate-General being instructed by Her Majesty's Proctor to oppose the same, and appearing in opposition thereto.

The motion was supported by affidavits of Sir Edward Belcher, the Commander, Henry Singleton Hooper, the purser, Arthur Adams, assistant-surgeon, on board the *Samarang*. These affidavits set forth in detail the four actions. Lieutenant Heard and Mr. Adams, who had been in the actions of the morning of the 4th of June, deposed that they found the five prahns which they had engaged with in the morning drawn up in the creek with seven others. That the number of men alive and on board the prahns at the beginning of the three first attacks were eight hundred and thirty, and the number killed, including those on board the five prahns not taken or destroyed in the third action, was three hundred. The number stated to have been alive and on board the twelve prahns at the beginning of the attack on them in the last engagement was five hundred, and the number killed fifty.

The Judge of the Admiralty Court (the Right Hon. Dr. Lushington) by an interlocutory decree, dated the 26th of May, 1847, pronounced that certain prahns, or vessels, names unknown, were, on or about the 3rd and 4th of June, 1844, taken and burnt, or otherwise destroyed, by the boats belonging to Her Majesty's ship, *Samarang*, the said Sir Edward Belcher, K.C.B., Commander, in the Straits of Gillolo; that at the time of being so taken and burnt or otherwise destroyed, the prahns or vessels, names unknown, were manned and navigated by pirates or persons engaged in acts of piracy, and that there were alive and on board the prahns or vessels at the commencement [480] of the engagement in which the same were taken and burnt, or otherwise destroyed, as aforesaid, one thousand three hundred and thirty pirates or persons engaged in acts of piracy, of whom three hundred and fifty were killed and nine hundred and eighty effected their escape.

In pursuance of this decree, the agent of Sir Edward Belcher and the officers and crew of the *Samarang*, in the month of June, 1847, made application to the Lords Commissioners of the Admiralty for payment of the sums of £7000, being £20 per head for three hundred and fifty pirates killed in the attack, and £1900, being £5 per head for nine hundred and eighty who made their escape. The Lords of the Admiralty, on being apprised of this decree, were dissatisfied with the sufficiency of the proofs upon which it was founded, and, after a correspondence with the Treasury, on the 8th of December, 1847, instructed the proctor for the Admiralty to appeal to the Judicial Committee of the Privy Council; but on the petition of appeal being presented, the Registrar refused to receive it, on the ground, that the appeal had not been interposed in due time.

(*a*) By the 2nd Will. IV., c. 40, entitled, "An Act to amend the laws relating to the business of the civil departments of the Navy, and to make other Regulations for more effectually carrying on the duties of the said departments," the authorities, powers, and duties, vested in the Commissioners of the Navy, (with certain exceptions,) not applying to this case, were transferred to the Commissioners for executing the office of Lord High Admiral, and all Bills theretofore made out, or drawn upon, and accepted by the Commissioners or Treasurer of the Navy, were, by the said Act, directed to be made out, or drawn upon, and accepted, by the Accountant-General of the Navy.

(Dec. 16, 1847 *) The Admiralty Proctor moved for leave to file the petition and appeal, notwithstanding an appeal had not been made within the ordinary time.

The Queen's Advocate (Sir John Dodson), and the Admiralty Advocate (Dr. J. Phillimore), in support of the motion.

The proceedings in the Court below were irregular. [481] No notice was given to the Lords of the Admiralty of the motion to the Judge of the Admiralty Court, for the bounties claimed under the Statute, 6th Geo. IV., c. 49, which ought to have been done, as the Lords of the Admiralty alone are authorized under the Act, 2nd Will. IV., c. 40, to pay the money; they were, therefore, necessary parties to such an application.—[Lord Campbell: The question is, whether the Queen, in Her office of Admiralty, was represented by the Queen's Advocate and Proctor. There was no opportunity for the Lords of the Admiralty to appeal.]—The offices of Procurator to Her Majesty, in Her office of Admiralty, and Procurator-General, are distinct. It may be a question, whether the Lords of the Admiralty, not being before the Court below, have a *persona standi* in a Court of Appeal; the Registrar refused to receive the appeal, because it was not made within fifteen days after sentence, as required by the practice of the Court, but by the Statute, 33 Geo. III., c. 38, s. 1, power is given, in prize causes, to permit appeals to be prosecuted after the ordinary time for them has elapsed; our present application is, *ex debito justitiæ*.—[Lord Brougham: Your application goes to this extent: you say first, that for want of notice, there is an irregularity; but, even if regular, you then ask for the indulgence of the Court. If you have not been heard, it is a question whether the case ought not to be sent back to the Court below.]—We ask for liberty to appeal here.

Dr. Addams, for the Respondents, opposed the motion, and submitted, that no notice was ever given, in such cases, to the Lords of the Ad-[482]-miralty, and cited, upon that point, *The Serhassin* (2 W. Rob. 354), and upon the time and manner of appealing, Statutes, 24 Hen. VIII., c. 12, s. 7, and 25 Hen. VIII., c. 19.

Lord Brougham.—There are two grounds urged before us for granting leave to appeal, in this case. First, the alleged irregularity of the proceedings in the Court below, the Lords of the Admiralty having no notice given them of the intended motion; and, secondly, supposing there had been no irregularity, yet, by mistake or accident, the appeal was not presented in time, and you apply now to the large discretion of the Court to let you in. Now, we exclude all question of irregularity, and, looking at the merits, think it right to allow the appeal: we have no doubt that due consideration will be given in the proper quarter, to the question of costs, as, were this an ordinary case, no leave would be granted, but upon the terms of the payment of costs.

The appeal now came on for hearing.

The Queen's Advocate (Sir John Dodson), the Admiralty Advocate (Dr. Phillimore), and Mr. Godson, Q.C., appeared for the Queen, in Her office of Admiralty.

The real question is, whether the prahns were engaged at all in piratical adventures. The piratical character of the vessels attacked and destroyed is not, we submit, established by the affidavits; but, even if it should be deemed that such piratical character is sufficiently established, then, we submit, that no [483] bounties were due, in respect of the five prahns deserted by their crews, but not captured or destroyed in the third engagement. There is no sufficient proof that these five prahns formed part of the twelve attacked in the fourth action, nor that any of the twelve prahns were burnt, sunk, or otherwise destroyed; but if they were, there is no proof that at the commencement of this last engagement, there was any person on board any of such vessels during the attack. The Statute, 6th Geo. IV., c. 49, enacts, that the number of such pirates is to be proved by the ship's papers taken on board such piratical ship, or, failing that proof, by "such other evidence" as shall, by the Judge of the High Court of Admiralty, be deemed sufficient proof thereof. Here there is no satisfactory proof given of the character or number of the men on board the prahns.

Dr. Addams, and Dr. Harding, for the Respondents, were not called upon to address their Lordships.

* Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. T. Pemberton Leigh.

The Right Hon. Sir Herbert Jenner Fust.—Their Lordships entertain no doubt of the fact, that the persons attacked were pirates, or engaged in acts of piracy. The manner in which they attacked the *Samurang's* boats, sufficiently showed this. The question then is, the number of the prahns destroyed. The evidence describing the four actions leaves no doubt as to the destruction of the prahns, and that the five prahns which made their escape in the third engagement, formed part of the twelve destroyed in the fourth engagement, in the afternoon of the 4th of [484] June. We are of opinion, that the facts have been ascertained, as far as they can be under the circumstances. Then, as to the number of persons engaged on board the prahns, there being no ship's papers, we must resort to other evidence to establish that fact; the affidavits, we think, are sufficient to show that the number of persons on board the prahns have been truly stated in the petition, and this number is not disputed by the Appellants. Upon the whole of the case, and considering the gallantry of the actions, their Lordships are unwilling to disturb the finding of the Court below; we shall, therefore, advise Her Majesty to affirm the decree, as to the character of the vessels, and the number of the pirates killed and destroyed, and to remit the cause with costs.

[Mews' Dig. tit. SHIPPING; A. XXVI. ADMIRALTY LAW AND PRACTICE; 21. *Slave Trade*, etc. See *The Maecander*, 1862, 1 Moo. P.C. (N.S.) 42; and, as to Admiralty jurisdiction, note to *Colby v. Watson*, 1848, 6 Moo. P.C. at p. 341.]

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

JOHN WILSON.—Appellant; ANN WILSON.—Respondent * [June 25, 1849].

Husband and wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which in itself amounted to legal cruelty; the wife afterwards sued in the Arches Court for restitution of conjugal rights, and, by virtue of a decree of that Court, the parties again cohabited, when the husband renewed his acts of cruelty towards his wife, who continued to cohabit with him notwithstanding for six months. Upon a suit brought by the wife for a divorce, by reason of cruelty, such divorce decreed, the Judicial Committee in affirming the sentence of the Arches Court, holding that the former cruelty was revived by the subsequent acts, and was not condoned by the cohabitation enjoined by the sentence for restitution of conjugal rights.

This was a cause of divorce by reason of cruelty, promoted by the Respondent, Ann Wilson, against the [485] Appellant, her husband. The libel given in by the Respondent consisted of nineteen articles. These articles severally pleaded the marriage of the parties in the year 1817, and their cohabitation until September, 1833, when, in consequence of the husband's repeated acts of violence and cruelty, the Respondent separated herself from him, and the deed of separation was executed between them, whereby he agreed to allow his wife £45 per annum, for her separate maintenance; and, that shortly after their marriage Mr. Wilson habitually conducted himself towards his wife with great harshness and cruelty, constantly swore at and abused her in the coarsest and most insulting language, and specifically set forth the commission of repeated acts of cruelty, from July, 1826, to September, 1833, when she withdrew from the society of her husband, and lived apart from him until 1847, when in consequence of Mr. Wilson (who had succeeded to property which made his income £1850 per annum) having neglected and refused to pay her allowance of £45 per annum under the deed, the Respondent brought a suit in the Arches Court of Canterbury, against the Appellant, for restitution of conjugal rights, and on the 15th of April, 1847, he was decreed to take his wife home and treat her with conjugal

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

affection; that in virtue of such decree he permitted her to return to his house, but instead of treating her with conjugal affection he renewed his violence and cruelty, by reason [486] whereof, Mrs. Wilson, in October, 1847, again left her husband, and had never since cohabited with him. The acts then complained of were specifically pleaded.

This libel was admitted without opposition. Mr. Wilson gave in no plea.

Nine witnesses were examined upon the articles, and their testimony established the facts therein alleged.

The decree in the cause was pronounced by the Judge (the Right Hon. Sir Herbert Jenner Fust) on the 24th of June, 1848, which, after reviewing the conduct of Mr. Wilson during the first cohabitation, and also his conduct during the last cohabitation, proceeded as follows:—"It is unnecessary in such a case there should be actual violence; it is sufficient in order to revive the cruelty in the former period of cohabitation that there should be enough to justify a reasonable apprehension and well-founded ground of alarm. Is there none here? I say that, as in the former period, from 1831 to 1833, he did resort to violence, so, in the latter, I have no hesitation in saying there is enough to create terror and alarm. Perhaps if the case had rested only on the evidence respecting the second cohabitation, the Court might have had some difficulty in pronouncing that there was sufficient to sustain a sentence of separation upon a substantive ground of cruelty; but when I look to the earlier period, and consider the gross personal violence proved against Mr. Wilson, I say there was a reasonable apprehension that his abuse and violent language would be followed up by the same conduct as in the former part of the cohabitation. I have no hesitation, therefore, in pronouncing for the divorce, and in signing a sentence of separation."

[487] From this sentence the present appeal was brought, and the Appellant submitted that the same was erroneous, and prayed that it might be reversed, and be dismissed from all further observance of justice for the following reasons:—

First, Because the cruelty alleged to have been committed during the first cohabitation was unconditionally condoned by the proceedings taken by Mrs. Wilson for restitution of conjugal rights, and her consequent return to cohabitation.

Secondly, Because the facts deposed to as having occurred during the second cohabitation did not amount to legal cruelty, and did not revive the cruelty alleged to have been committed prior to the suit for restitution of conjugal rights.

Sir Frederick Thesiger, Q.C., and Dr. Jenner, for the Appellant; and Dr. J. Phillimore, and Dr. Addams, for the Respondent.

The cases cited were *D'Aguilar v. D'Aguilar* (1 Hagg. Con. Rep. 134), *Oliver v. Oliver* (1 Hagg. Con. Rep. 361), *Westmeath v. Westmeath* (1 Hagg. Ecc. Rep. Sup. 1), *Durant v. Durant* (1 Hagg. Ecc. Rep. 733).

Lord Brougham.—It hardly appears from the evidence that there would be sufficient ground for saying that there had been legal cruelty upon the renewed cohabitation, if we knew nothing of Mrs. Wilson's experience of her husband's previous character, which was of the worst kind, amounting to gross personal violence and maltreatment. It appears that Mrs. Wilson having separated [488] from her husband by consent, instituted a suit, in 1847, for restitution of conjugal rights, and by the sentence of the Court he was enjoined to receive her home and to treat her with conjugal affection. Upon her return home she was subjected to treatment, which, if not amounting to personal violence, at least shows the malignancy of the husband's disposition. It is a question whether the language itself, used by him towards his wife, although not sufficient to amount to menace, does not constitute legal cruelty, because what had passed before gave a character to such language and conduct, and we have only to consider what must be the effect of the language used, accompanied by gestures, on a person acquainted with her husband's previous conduct, which was infinitely worse even than that at present complained of. Taking all circumstances into consideration, we think that the renewal of the cohabitation in 1847, was not a condonation of the former cruelty, but only carrying into effect the sentence of the Ecclesiastical Court for restitution of conjugal rights: we, therefore, see no ground for differing with the Judge of the Court below. It is said, and that is the last point urged, that Mrs. Wilson had continued to cohabit, as far at least as outward cohabitation went, for two months after the commission of

the conduct complained of, without charging her husband with any specific acts during that time. She has, however, pleaded certain specific charges which she has proved to our satisfaction, and has confined herself to those charges, which, though she leaves the blank of the two months, during which there might not have been any ill-treatment; yet that her husband's conduct was likely to have been less cruel during those two months than formerly, is not a necessary or even probable inference. [489] In these circumstances, we are of opinion, that the sentence must be affirmed, and the cause remitted to the Court below, to settle the amount of alimony to be allowed the wife.

[Mews' Dig. tit. HUSBAND AND WIFE; H. DIVORCE; 5. Bars to: c. *Condonation*. S.C. below 6 N. of C. 290.]

ON APPEAL FROM VAN DIEMAN'S LAND.

ALGERNON MONTAGU.—*Appellant*: THE LIEUTENANT-GOVERNOR, AND EXECUTIVE COUNCIL, OF VAN DIEMAN'S LAND, *Respondents* * [June 29, and July 2 and 3, 1849].

The Governor and Council of a Colony or Plantation have power, under the Statute, 22nd Geo. III., c. 75, to amove a Judge from his office, for misbehaviour or neglect of duty.

Where a Judge availed himself of his judicial office, through an incident connected with the constitution of the Supreme Court in Van Dieman's Land, to obstruct his creditor from recovering a debt due from him, and, upon an investigation by the Governor and Council, was found to be involved to a large extent in bill transactions and pecuniary embarrassment: Held by the Judicial Committee sufficient to justify the Governor and Council in removing him from office.

The amotion was made, under an order of the Governor and Council, calling upon the Judge to show cause why he should not be suspended from office; Held also, that although there was some irregularity in pronouncing an order for amotion, when the Judge had only been called upon to show cause against an order of suspension, yet, that as the facts justified the order of amotion and the Judge had sustained no prejudice by such irregularity, the order of amotion ought not to be reversed.

This was a petition and appeal brought by Algernon Montagu, Esquire, against an order of His Excellency, [490] Sir William Thomas Denison, the Lieutenant-Governor, and the Executive Council, of Van Dieman's Land, dated the 31st of December, 1847, whereby the Appellant was amoved from the office of Puisne Judge of the Supreme Court, in that Colony, made in pursuance and under the powers conferred on the Lieutenant-Governor and Council, by the Statute, 22nd Geo. III., c. 75. The appeal was referred by Her Majesty to the Judicial Committee of the Privy Council. The order of amotion was made under the following circumstances:—

By Statute, 9th Geo. IV., c. 83, for providing for the administration of justice in New South Wales and Van Dieman's Land, His Majesty was empowered to erect and establish Courts of Judicature in New South Wales and Van Dieman's Land, which were respectively to be called the Supreme Court of New South Wales and the Supreme Court of Van Dieman's Land. Under this Act, His Majesty, King William the Fourth, by Letters Patent, dated the 4th of March, in the first year of his reign, ordained and appointed that there should be within the colony of Van Dieman's Land, a Supreme Court, to consist of, and be holden by and before, two

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Judges, one of them to be Chief Justice and the other Puisne Judge. The Appellant was appointed a Puisne Judge by Letters Patent, dated the 15th of June, in the third year of the reign of Will. IV., under the Great Seal of Great Britain, to hold the same during the pleasure of His Majesty, according to the above Act of Parliament and Letters Patent, or such other Charter or Letters Patent, as might be in force respecting the Supreme Court.

On the 23rd of November, 1847, Mr. Young, the [491] attorney of a Mr. Anthony M'Meckan, presented a petition in the name of M'Meckan to His Excellency the Lieutenant-Governor, which petition set forth, that M'Meckan was the holder of certain acceptances, granted by the Appellant, then Puisne Judge of the Supreme Court, and which were renewals of other acceptances previously granted for a debt due by him, contracted several years ago. That after various fruitless attempts on the part of the petitioner to obtain payment, he instructed his solicitor to issue a summons against Mr. Justice Montagu, which was done on the 8th of November, 1847. That on the 17th of November, Mr. Justice Montagu obtained a summons from the Chief Justice, Sir John Pedder, calling upon the petitioner, on the following day at 12 o'clock, to show cause why the writ of summons so obtained by him, should not be set aside for illegality. That M'Meckan appeared by Counsel before the Chief Justice, and answered this summons on the 18th of November, and the Chief Justice, after hearing counsel on behalf of Mr. Justice Montagu, took time to consider his decision, and on the 22nd of November, the Chief Justice delivered his opinion to the effect, that he felt himself compelled to make the summons of Mr. Justice Montagu absolute, and to dismiss M'Meckan's summons for the recovery of his claim against Mr. Justice Montagu. The Chief Justice admitted, that in the Courts in England, a Judge could be sued in his own Court, and judgment recovered against him, because the constitution of the Courts in England did not require them to be composed of any particular number of Judges, and that the judgment of such Courts against one of their members would be a good judgment; but upon considering the effect of the Act of [492] Parliament and Charter creating the Supreme Court of Van Dieman's Land, he was of opinion, that each Judge formed an integral part of the Court, and that the Court could not be constituted without both Judges, and, therefore, he decided, that no judgment could be obtained against Mr. Justice Montagu so long as he remained a Judge of the Court.

On the 24th of November, 1847, a copy of this petition was sent by the Colonial Secretary of Van Dieman's Land, acting under the orders of the Lieutenant-Governor, to Mr. Justice Montagu, with a request that he would offer such explanation as he might think necessary as to the matters therein contained. Upon the same day a reply to the petition was sent by Mr. Justice Montagu to the Colonial Secretary, in which reply, Mr. Justice Montagu admitted the debt to be just, but assigned various reasons explanatory of the course which he had taken to avoid being compelled to discharge it. Upon this reply being forwarded to him by the Colonial Secretary, Mr. Young, on the 3rd of December, sent a rejoinder, containing several enclosures, on behalf of his client, in reply to Mr. Justice Montagu; and on the same day, Mr. Young transmitted another letter to the Colonial Secretary, upon his own behalf, referring to certain actions brought by him in May, 1846, and February, 1847, in his capacity of Solicitor to the Hobart Town Branch of the Bank of Australasia, upon two promissory-notes amounting to £7000, against Messrs. Addison and Fraser, in which actions he alleged, that Mr. Justice Montagu had decided in favour of the Defendants, upon a technical point, being himself, at that time, a debtor to them, who were the holders of overdue acceptances from him.

[493] On the 10th of December, 1847, the Colonial Secretary, by order of the Lieutenant-Governor, wrote a letter to Mr. Justice Montagu, informing him that the Executive Council were of opinion, that the petition of Mr. M'Meckan, dated the 3rd of November, and the statement of his Solicitor, dated the 3rd of December, 1847, seriously affected his character and standing as a Judge of the Supreme Court, and calling upon him to show cause, why he should not be suspended from office until Her Majesty's pleasure was known, and at the same time particularly directed his attention to the following points:—

1st. To Messrs. Addison's letter of the 21st of April, 1847, and the extract from

their ledger, as quoted by Mr. Young, (in his rejoinder,) which disproved Mr. Justice Montagu's statement, "that the debt, there alluded to, was of long standing, but that it had stood over by Mr. Addison's consent, and that when paid he will have received between 15 and 20 per cent. on the original debt."

2nd. To Mr. Justice Montagu, having availed himself of his office, through an incident connected with the present constitution of the Court, inasmuch as it consisted of only two Judges, to obstruct Mr. McMeekan in the recovery of the same debt.

3rd. To Mr. Young's observations upon Mr. Justice Montagu's statement, as supported by Mr. Carter, junior, that he offered him, Mr. Young, payment of the debt, and Mr. Young's denial that he ever did so.

4th. To his, Mr. Justice Montagu's, bill transactions, and pecuniary embarrassments, being apparently of such a nature as to derogate essentially from his usefulness as a Judge; and upon this part of the subject, the Council recommended, that the other letter re-[494]-ceived from Mr. Young, on the 3rd instant, might be forwarded to Mr. Montagu, for any observations he might desire to make upon it.

Upon the receipt of this letter, Mr. Justice Montagu made a communication to the Lieutenant-Governor, denying his power to suspend a Judge from his office, and declaring that the functions of the Court could not be performed by the remaining Judge, and that he would continue to act as Judge, and requesting that the form of the communication made to him in the letter of the 10th of December might be modified.

To this request, a negative answer was returned by the Lieutenant-Governor; and, on the 20th of December, Mr. Justice Montagu was officially informed, that his case would be brought forward for final decision upon the Friday, unless he showed cause why further delay should be granted to him. Mr. Justice Montagu applied for further time, which was granted to him, and, on the 28th of December, he transmitted a rejoinder, explaining and justifying his conduct.

The Lieutenant-Governor and the Executive Council having before them the accusation, and defence, as set forth in the statements on both sides, deliberated, under the advice of the Law-Officers of the Crown, upon the whole case, and eventually came to the conclusion, that the charges against Mr. Justice Montagu were proved; that being in themselves of a grave character, they were aggravated by the matter which had been alleged in the defence, and which had been brought to their knowledge during the discussion, as to render suspension from office an inadequate sentence, and, of necessity, to bring the case within the meaning and intent of the provision of the 22nd [495] Geo. III., c. 75 (a), which empowered the Lieutenant-Governor, and the Executive Council, to amove a Judge guilty of misbehaviour in his office; and on the 31st of December, 1847, they passed a sentence, whereby Mr. Justice Montagu was amoved from the office of Puisne Judge of the Supreme Court of Van Dieman's Land.

The Appellant presented a petition of appeal to Her Majesty in Council, against his amotion from the office of a Judge of the Supreme Court of Van Dieman's Land, praying a reversal of such order; and Her Majesty, by an Order in Council, referred the petition of appeal to the Judicial Committee of the Privy Council, before whom the same now came on for hearing.

Mr. Teed, Q.C., and Mr. Wood, Q.C., in support of the appeal.—Two questions

(a) Statute 22 Geo. III., c. 75, sec. 2, under which this Order of amotion was made, is as follows:—"And be it further enacted, by the authority aforesaid, that if any person or persons holding such office, shall be wilfully absent from the Colony, or Plantation, wherein the same is, or ought to be, exercised, without a reasonable cause, to be allowed by the Governor and Council for the time being, of such colony or plantation, or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to amove such person or persons from every or any such office; and in case any person or persons so amoved shall think himself aggrieved thereby it shall and may be lawful to and for the person or persons so aggrieved, to appeal therefrom, as in other cases of appeal, from such colony or plantation, whereon such amotion shall be finally judged of, and determined, by His Majesty in Council."

arise upon this case. First, we submit, that the Lieutenant-Governor and Council were not empowered to amove the Appellant, under the Statute, 22nd Geo. III., c. 75, as that Statute applies [496] only to patent offices, and does not embrace judicial offices. The Appellant was appointed to the office of Puisne Judge of the Supreme Court of Van Dieman's Land, by Letters Patent, under the Great Seal of Great Britain, to hold his office during pleasure, according to the Charter or Letters Patent, by which that Court was created; and in conformity to the Act, 9 Geo. IV., c. 83, as a Judge of the Supreme Court, he was not within the operation of the Statute, 22nd Geo. III., c. 75, and the Lieutenant-Governor and Council had, therefore, no power to remove him, and the order was consequently illegal and void.—[Mr. Pemberton Leigh: In *Willis v. Sir George Gipps* (5 Moore's P.C. Cases, 379), it was held by this Court, that the Statute, 22nd Geo. III., c. 75, which empowers the Governor and Council to amove persons holding patent offices, for neglect or misbehaviour, included judicial offices.]—If, then, the Statute does empower the Lieutenant-Governor and Executive Council to amove a Judge of the Supreme Court for neglect of duty or misbehaviour in his office, still the Appellant has not been guilty of any such in his office; none of the facts were strictly proved, as they ought to have been, and such removal from office was not justified by the circumstances of the case. *The Queen v. The Mayor, etc., of Newbury* (1 Q.B. Rep. 751). Secondly, the whole proceeding in the matter against the Appellant was irregular and illegal, and the order of amotion is, therefore, void. The order of amoval was grounded on a proceeding with a view to the suspension of the Appellant, and he was never called upon to show cause why he should not be amoved. Surely, if there had been cause of complaint against the Appellant, he ought to have had notice of the complaint, notice of the trial, and an opportunity afforded him of [497] being heard in his defence; but the Lieutenant-Governor and Council never called upon him to show cause why he should not be removed from his office, for such alleged misbehaviour, nor gave him any notice that he was in danger of being removed, nor was an opportunity of being heard in his defence against such order even given him. All judicial proceedings against a party require that notice should be first given. *Bagg's Case* (11 Co. 99, a.), *The King v. Benn and Church* (6 Term. Rep. 198). The order of amotion, in *Willis v. Sir George Gipps* [5 Moo. P.C. 379], removing a Judge, was held illegal, and reversed, because the Judge had not received notice, nor had been afforded an opportunity to answer the charges brought against him: we submit, therefore, upon this ground, that this order amoving the Appellant from office ought to be discharged, and the Appellant restored to his office of Judge, as the proceedings of the Lieutenant-Governor and Council were wholly irregular.

Sir Frederick Thesiger, Q.C., and Dr. R. Phillimore, for the Lieutenant-Governor and Council of Van Dieman's Land.

The order was fully justified by the conduct of the Appellant; the chief grounds of complaint against him are, first, obstructing the recovery of a debt, justly due by himself; and, secondly, the general state of pecuniary embarrassment in which he was found to be in. The Appellant having first put his lawful creditor in a situation which compelled him to sue for his debt in a Court of Justice, avails himself of his judicial station in that Court, being the only Court in which the action could be brought, to prevent the recovery of the debt, [498] which he admitted to be due; this is an act impeding the administration, and thereby defeating the ends of justice, and was such a gross act of misbehaviour in his office, as amply to justify his removal. Secondly, it appears, from the evidence, that the various pecuniary embarrassments of the Appellant, while sitting as a Judge, in a Court composed of only two Judges, and necessarily requiring the presence of both, for the determination of all cases brought before it, were such as to be wholly inconsistent with the due and unsuspected administration of justice in that Court, and tended to bring into distrust and disrepute the judicial office in the Colony: this was another strong reason for his removal. It is now urged by the Appellant, for the first time, that the order is irregular, in amoving him, inasmuch as he was only called upon to show cause why he should not be suspended: that is not material; he had sufficient notice of the nature of the proceeding, and ample time given to make a defence, but he had no defence which he could have alleged against suspension,

which he could have alleged against amotion. The common-law Courts will not award a mandamus to a Corporation, to restore a party to a corporate office, where his removal has been defective in form, the only effect of which would be to restore an officer who they would be bound immediately to remove in a more formal manner. *The King v. Griffiths* (5 B. and Ald. 731). *The King v. The Mayor, etc., of London* (2 Term. Rep. 177). *Ree v. Gaskin* (8 Term. Rep. 209). *The Queen v. Smith* (5 Q.B. Rep. 614). *The Queen v. The Governors of Darlington School* (6 Q.B. Rep. 682). Substantial *jus* [499] tice has been done to him. The case of *Willis v. Sir G. Gipps* is distinguishable from the present; there Mr. Justice Willis had no opportunity of making his defence, which was not so in the present case.

Mr. Teed, Q.C., in reply.

Lord Brougham.—Their Lordships have agreed upon the report they will make to the Queen: they do not state their reasons in these cases.

The report of their Lordships to Her Majesty, was as follows:—

“The Lords of the Committee have taken the said Petition and Appeal into consideration, and having heard counsel on behalf of Mr. Montagu and likewise on behalf of the Governor-General of Van Dieman's Land, their Lordships agree humbly to report to your Majesty, as their opinion, that the Governor and Executive Council had power, by law, to amove Mr. Montagu from his office of Judge of the Supreme Court of Van Dieman's Land, under the authority of the 22nd of Geo. III.; that, upon the facts appearing before the Governor and Executive Council, as established before their Lordships, in that case, there were sufficient grounds for the amotion of Mr. Montagu; that it appears to their Lordships, that there was some irregularity in pronouncing an order for amotion, when Mr. Montagu had been called upon to show cause against an order for suspension; but, inasmuch as it does not appear to their Lordships, that Mr. Montagu has sustained any prejudice [500] by such irregularity, their Lordships cannot recommend a reversal of the order of amotion.”

This report was confirmed by an Order in Council, dated the 18th of July, 1849, when it was ordered, “that the said petition and appeal be, and the same are, hereby dismissed this Board.”

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. *Judge, e. Amotion*. See note to *Willis v. Gipps*, 1846, 5 Moo. P.C. at p. 393.]

ON APPEAL FROM BRITISH GUIANA.

MICHAEL M'TURK.—*Appellant*: The Executor and Representatives of the estate of COLIN DOUGLAS, senior, deceased,—*Respondent* * [July 2, 1849].

Parties to an appeal agreed to compromise the same, and that the Appellant should have paid over to him a certain sum of money, the amount of compensation, in respect of slaves attached to an estate, the subject of the appeal. Upon petition, to dismiss the appeal, an order of dismissal made, containing also an order for the Accountant-General of the Court of Chancery, to pay to the Appellant the compensation-money in question.

This was an application, by the Appellant, upon Petition, to dismiss the appeal, and for the order of [501] dismissal, to contain an order upon the Accountant-General in Chancery, to pay over to the petitioner the sum of £2361 13s. 9d., the amount awarded, as compensation, in respect of certain slaves attached to a plantation in British Guiana. The petition set forth, that the appeal was brought from a sentence of the Supreme Court at British Guiana, and was heard by the

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Judicial Committee, on the 8th of December, 1836, when the case was referred to an accountant, to take the accounts; that various proceedings were had before the accountant, but that no report had been made. That in consequence of this suit and appeal, a claim and counter-claim, before the Commissioners of Compensation, was not proceeded with, and that the money was invested in the 3 per cent. annuities, and then standing in the name of the Accountant-General of the Court of Chancery. That the parties had agreed to compromise all matters in dispute between them, and that the Appellant should have this sum of money, but that the Supreme Court declined to make an order, in consequence of the compensation-money being the subject of appeal. The petition prayed, that the sum of £2361 13s. 9d., bank 3 per cent. annuities, standing in the name of the Accountant-General of the Court of Chancery, "British Guiana, No. 586," in the litigated West India Compensation account of the Court of Chancery, "subject to suits," might be transferred, by the Accountant-General, to the Petitioner, in full of the claim made by him, and that all further proceedings [502] in the original actions might be stayed, and the appeal dismissed.

Mr. Edmund F. Moore, in support of the Petition; and Mr. B. S. Follett, for the Respondent, consented.

The Order was made according to the prayer of the petition.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL; 6. *Practice*,
o. *Other Matters*.]

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
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F. MOORE, Barrister-at-Law. Vol. VII.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

The Most Noble SOPHIA MARCHIONESS DOWAGER of BUTE, the Honourable Lady ADELAIDE HASTINGS, ALEXANDER HUNTER, ANDREW HUNTER, Colonel JAMES McDOWAL, JAMES PATRICK, JAMES OGILVIE FAIRLIE, Lord GILBERT KENNEDY, JAMES KENNEDY BAILIE, WILLIAM ALLISON CUNNINGHAME, ARTHUR FORBES, ELIZABETH CARR, ELEANORA HUNTER and MARY CHAPMAN,—*Appellants*; HENRY WARD MASON, JAMES WATSON, JOHN HUNTER, ARCHIBALD M'LACHLAN and WILLIAM HULL,—*Respondents* * [June 26, 27, July, 5, 1849].

HEARD, *Ex parte*.

A. on behalf of himself and certain other persons, resident in Scotland, his constituents, by deed engaged B. and C. to act as agents and managers in New South Wales, empowering them to purchase sheep, cattle and land, on behalf of A. and his constituents, for which purpose certain sums were remitted to the Colony, to be invested for them and placed to their individual interest, and the proceeds of the stock, etc., were to be remitted to their respective credits. B. and C. were to receive for their trouble and expense, one third of the proceeds of the stock. With the money remitted, B. and C. bought stock and lands, and conducted the establishment in the Colony in their own name. B. and C. afterwards became embarrassed, and contracted liabilities in the management of the property, and drew bills on A. on account of the establishment, which bills were endorsed by D. and other parties in the Colony: these bills being dishonoured, and B. and C. being pressed by the indorsees, executed a Deed of assignment, and conveyed the whole of the trust property, and some property of their own, to D., for himself and the other indorsees. D. had notice of the Deed appointing B. and C. agents and managers, and that there was no authority on the part of B. and C. to draw bills on behalf of their constituents, which could personally bind them. Upon a bill filed by A., and his constituents, against B., C., and D., to set aside the Deed of assignment, as fraudulent and void, and for an account, the Supreme Court at Sydney held, that the Plaintiffs were not entitled in equity to relief, and that their remedy was to sue D. at law. Held by the Judicial Committee of the Privy Council reversing such decree:—

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

First, that the decree was erroneous, in declaring that the relief sought by the Bill was not of a proper equitable character; and

Secondly, that under the circumstances, B. and C. had, as such agents and managers, authority to dispose of the property entrusted to them, in discharge of the debts incurred by them on behalf of A., and his constituents, in the management of such property, and that the Deed of assignment was valid as against A. and his constituents, to the extent of subjecting such joint property to the payment of the debts and liabilities contracted, but null and void as to the residue, and an account directed to be taken in the Court below, of such debts and liabilities.

Parties having separate and distinct interests were joined together as complainants. Held, that as no objection, for misjoinder or multifariousness, had been raised by the answer, or at the hearing in the Court below, to the frame of the Bill, it could not be taken upon appeal [7 Moo. P.C. 18].

Some of the Plaintiffs had died in the course of the appeal, and the suit had not been revived against their representatives. In such circumstances, the appeal was allowed to be prosecuted in the name of the surviving Plaintiffs, as this Court is not disposed to give effect to technical rules in pleading, which would prevent justice being done [7 Moo. P.C. 19].

A party to a suit, having an interest in the subject-matter in his own right, and also as trustee for other parties, became insolvent, and his interest was vested in a trustee appointed to his sequestered estate. Held, that he might, as such trustee, prosecute an appeal from an order made in the suit, notwithstanding the insolvency and the vesting of his estate and interest in the trustee of the sequestered estate [7 Moo. P.C. 20].

Upon Petition, leave granted to appeal from an order of the Supreme Court at New South Wales, although no provision for appeal to the Queen in Council was made by the Charter of Justice, or Act of Parliament creating that Court [7 Moo. P.C. 13].

In the year 1838, the Appellant, Alexander Hunter, being desirous of forming an establishment in New South [2] Wales, invested certain sums of money in the purchase of sheep and other stock in the Colony, for himself, and on account of the Appellants and certain other persons, his constituents; and entered into an agreement with the Respondent, James Watson, then in Edinburgh, but about to sail for New South Wales, [3] to act for him as agent in the Colony. This agreement, which was dated the 5th of December, 1838, was in writing, in the Scotch form, and provided, amongst other things, that Alexander Hunter should send Watson sundry sums of money belonging to him, Hunter, and his co-adventurers, amounting in the aggregate to not less than £5000, to be employed in the purchase of stock, consisting of horses, cattle and sheep, and Watson engaged "to take care of, maintain, and properly to manage, to the best of his judgment, the whole of the said stock, and to receive for his trouble and expenses in so doing one-third of the produce of said stock." Watson was to transmit annually his accounts to Alexander Hunter, and to remit such portions of the yearly profits to Alexander Hunter and those of his co-adventurers, to whom the investment belonged, as they required, and to invest the remainder in stock, in the same manner as was provided in regard to the original investment. The deed of agreement also provided, that if, after Watson arrived at New South Wales, he should join in partnership with the other Respondent, John Hunter, (who had a short time previously sailed for that Colony,) he should be entitled to do so, on the footing of the contract.

Of the same date, another deed of agreement, in the Scotch form, was executed by Alexander Hunter and the Respondent, Watson, by which it was provided, that Watson might apply such part of the capital with which he was intrusted, as he thought proper, in the [4] purchase of land in New South Wales for pasturing the cattle.

When Watson arrived at Port Philip, he entered into partnership with the Respondent, Hunter, and they afterwards acted jointly as agents of the Appellants and the other persons from whom the remittances were sent, and as such took charge of the stock purchased with the monies remitted to them for that purpose.

The Respondent, Watson, took out with him large sums of money, which he received from Alexander Hunter, and on various occasions afterwards Alexander Hunter remitted to Watson and John Hunter sums of money to be invested by them on the footing of the agreement.

With these monies Watson and Hunter purchased horses, cattle and sheep, and certain parcels of land in New South Wales. The remittances made were severally and distinctly for the different Appellants and other persons, on whose behalf they were sent.

Watson and Hunter set apart for themselves, from time to time, their proportion of the produce, whether consisting of wool or of young cattle. This mode of remuneration was according to the usual custom observed in New South Wales in such cases, and was provided for by the agreement of the 5th of December, 1838.

Watson and Hunter sent home two shipments only: one in 1840, which realised £84 4s. 9d., after providing for the bills drawn against the shipment; and the other in 1841, against which, Watson and Hunter drew bills to a larger amount than its value by the sum of £235 13s. 9d.

In July, 1841, Watson and Hunter commenced [5] drawing bills of exchange on Alexander Hunter, and they continued to do so till March, 1842, by which time their drafts amounted to about £20,000.

Alexander Hunter accepted two of the earliest of these drafts, for £1000 and £600 respectively, for the honour of Watson and Hunter, but as he had no funds of theirs in his hands, he refused to accept any more of these drafts, and they were accordingly returned dishonoured to the Colony.

Watson and Hunter had discounted the dishonoured drafts with the Union Bank and the Bank of Australasia, having previously got them indorsed by different parties, and, amongst others, by the Respondent, Mason, to the amount of £8200. In applying for these discounts, Watson and Hunter disclosed to the banks their character of agents. In a letter to the manager of the Union Bank, dated the 15th January, 1842, when applying to have a draft for £1000 cashed, they stated that "they were acting as agents for the Marquis of Ailsa and other parties, who had invested large sums of money in stocks of cattle, sheep and horses, and also land."

After some of the dishonoured bills had returned to the Colony, in the month of May, 1842, the Respondents, Watson and Hunter, and Mason, and the other persons who were indorsers, had meetings and negotiations with the Banks for the purpose of making some arrangements to provide for the returned bills. The indorsers had a copy of the Deed of agreement of 5th December, 1838, in their possession, and it was read by them, including Mason, at the meetings they had on the subject of the assignment of the property.

The proposal made at the meeting of the indorsers [6] was, that the whole of the property should be assigned to some fit and proper person to be proposed by the Banks and the indorsers, and that the property assigned should, from time to time, be sold in order to provide for the dishonoured bills. The Banks having threatened sequestration, the indorsers opposed the sequestration of the estate, being in the daily expectation of the arrival of some person from Scotland, who might be empowered by those concerned at home to make the necessary arrangements.

The Banks abandoned their intention to sequester, and the parties applied to, to advance upon an assignment of the property from Watson and Hunter, declined to do so. It was then arranged, by the indorsers, that the assignment should be taken in favour of the Respondent, Mason.

The Deed of assignment was dated the 9th of August, 1842. It professed to deal with the property as if it belonged absolutely to Watson and Hunter, making no allusion whatsoever to the owners in Great Britain. By this deed, Mason acquired the means of paying off the bills for £8200, on which he stood liable as indorser, to the Banks, the holders. The deed also provided, that the assignment should be in trust, to pay all expenses of assignment and management, and also compensation and commission to Mason at the rates following:—viz., on sales under £1500, 5 per cent.; above £1500, 2½ per cent. (if by auction, one-half of the above sums); guarantee, £2 10s. per cent.; accepting £2 10s. per cent.; cash advance, £5 per cent.; withdrawal, £2 5s. per cent.; and interest account on the debtor side, £12 10s. per cent. per annum, and on the credit side £10 per cent. per annum: and the deed,

after providing that Watson and Hunter should act [7] and assist in the sale and management of the property assigned, contained the following proviso: "That the said Henry Ward Mason, his executors, administrators, or assigns, do and shall, for the space of twelve calendar months next ensuing the day of the date hereof, pay or allow unto each of them, the said James Watson and John Hunter, the clear sum of £300, by even half-yearly payments, although they or either of them shall not act or assist, or be required to act or assist, in such sale, management, care, preservation, keeping, receipt, collection, and conversion, as aforesaid." And after making provision for these expenses, commissions, and annuities, the trusts of the deed were, secondly, to pay all the local debts of Watson and Hunter (excepting the bills drawn on Alexander Hunter or other persons in Great Britain, which were or should be returned dishonoured), with interest; thirdly, to pay the Respondent, Mason, the sum of £20,000, with interest at £12 10s. per cent. per annum; and, fourthly, in case of any residue, but not otherwise, to pay all sums due in respect of the said bills of the Respondents, Watson and Hunter, on the Appellant, Hunter, or any other person in Great Britain, which had been returned or should be returned dishonoured, with interest, re-exchange, etc.; and lastly, to pay the residue to Watson and Hunter in equal shares as tenants in common and not joint tenants; and the trusts of the conveyance were, that Mason should sell the lands, and, after defraying expenses, should pay the residue or surplus to Watson and Hunter, in "equal shares and proportions as tenants in common, and not as joint tenants, and their respective executors or administrators, as or in the nature of personal estate for their respective own use and benefit."

[8] Mason afterwards obtained from Watson and Hunter conveyances of the lands, belonging to the Appellants and the other principals for whom they acted, and he entered into possession thereof, and of the stock thereon, and, from time to time, effected sales, the proceeds of which he received.

On the 4th of October, 1842, a bill was filed in the Supreme Court of New South Wales, for the District Phillip, at the instance of the Appellants, and also of the following parties, since deceased: Archibald, Marquis of Ailsa, Colonel Charles Swindell Norvell, Dr. Donaldson, Ellen Louisa Tulloh, and Sir Charles D'Oxley, against James Watson, John Hunter, and Henry Ward Mason. The bill, after stating the above circumstances, prayed, that the Deed of assignment of the 9th of August, 1842, might be decreed to be fraudulent and void, and that the Respondent, Mason, should be decreed to pay and assign to the Appellant, Alexander Hunter, in trust for himself and the other Plaintiffs in the cause, the lands conveyed to him by Watson and Hunter, and to account for the proceeds of any sales he might have made of the stock, and that a receiver might be appointed to receive the rents of the lands, the stock, and its proceeds, and to manage and take care of the same. The bill also prayed an account of all sums received by Watson and Hunter, from or on account of the Plaintiffs, and of the application thereof, and of the increase of the stock, and for payment of the balance. The bill further prayed for an injunction to restrain the Respondent, Mason, from selling or disposing of the lands or the stock, or otherwise wasting or injuring the same.

The Court granted an injunction restraining the Respondent, Mason, from selling or disposing of any of the sheep, cattle, and horses, and also from [9] selling the lands, tenements, and hereditaments, and appointed a receiver.

The Respondents, Watson, Hunter, and Mason, put in separate answers to the bill. The answers of Watson and Hunter set forth, that there had been a great depreciation in the value of stock, whereby sales could not be advantageously effected, and that the dishonoured bills were drawn upon Alexander Hunter, for the purpose of meeting the expenditure occasioned by the management of the stock.

Mason, by his answer, set up as a defence, that he was a *bona fide* purchaser for valuable consideration without notice, actual or constructive, express or implied, of the direct or exact interest of the Plaintiffs, or of any, or either of them, in the personal estate and premises. The answer then proceeded to state, that he believing that the other Defendants, Watson and Hunter, were in possession, as the owners and proprietors thereof, and fully empowered and authorized to sell and dispose of the same, on the 9th day of August agreed with the Defendants, Watson and Hunter, for the assignment to him of the stock and personal estate. And it admitted that

he had seen a copy of the agreement between Alexander Hunter and Watson. It then went on to state, that he believed it to be true that the bills of exchange drawn by the Defendants, Watson and Hunter, upon the Plaintiff, Alexander Hunter, and indorsed by him, and which have been returned dishonoured, were not drawn with the authority of the Plaintiff, Alexander Hunter, or of the other Plaintiffs. The answer then suggested and insisted, that a co-partnership existed between the Plaintiffs and Watson and Hunter; and that the joint business was carried on [10] by the Defendants, Watson and Hunter, as the ostensible partners, having full control over and power of disposing, managing, and directing all the affairs of the partnership concern.

Pending the cause, Watson and Hunter became insolvents, and the Respondent, Archibald McLachlan, was appointed trustee of their respective separate estates, and the other Respondent, William Hull, was appointed trustee of their joint estate. McLachlan and Hull were made parties to the suit by supplemental bills. The Respondent, Mason, likewise became insolvent, and his estate was sequestered; and McLachlan, as the trustee of his sequestered estate, was also made a party to the suit.

At the hearing, on the 5th of October, 1843, Mr. Jeffcott, the Resident Judge at Port Phillip, made a decree, directing certain accounts to be taken and inquiries to be made.

The Plaintiffs afterwards applied for and obtained a rehearing of the cause.

By the decree, made on the rehearing, dated the 21st of September, 1844, the same Resident Judge reversed the decree of the 5th of October, 1843, and declared the Deed of assignment of the 9th of August, 1842, to be fraudulent and void, as against the Plaintiffs, and referred the cause to the Deputy-Registrar, to inquire what portion of the property assigned by the deed belonged to the Plaintiffs, and the other persons, not parties in the cause, whose names were mentioned in the schedules annexed to Watson's answer, and whether the shares of any of these persons, not parties, had been assigned or transferred to the Plaintiffs, or any, and which of them; the Plaintiffs having undertaken to give the utmost effect to the [11] right of any persons who might be found to be interested in the subject of the suit who were not parties to the cause. An inquiry was also directed as to the amount of the remittances made to the Defendants, Watson and Hunter, how the same were invested, and whether any portion remained uninvested; and accounts were ordered to be taken of the stock purchased by Watson and Hunter, and of the increase; distinguishing what portions belonged to the Plaintiffs respectively, and what portions, if any, to the Defendants. The Registrar was also directed to inquire what portions, if any, of the stock had been sold by the Defendant, Mason, and for what sums of money; and to take an account of the lands and hereditaments purchased for the Plaintiffs by Watson and Hunter, and of the rents and profits; and also of the debts and liabilities properly incurred by Watson and Hunter, and justly chargeable to the Plaintiffs; and the Registrar was to state any special circumstances.

All the Defendants acquiesced in this decree, excepting the Respondent, Mason, who alone appealed to the Supreme Court at Sydney; in this appeal he was not joined by McLachlan, the trustee of his sequestered estate.

When the appeal came on for hearing, in April, 1845, the Plaintiffs objected, that Mason had no title to complain of the decree appealed against, inasmuch as all the interest he had in the property was vested in McLachlan, who had acquiesced in the decree; but the Court overruled this objection, and after hearing the cause on the merits, judgment was delivered by the Chief Justice, the material part of which was as follows:—"The Plaintiff's case is this: they have sent out moneys at different times to certain agents to be invested for them, and they were invested accordingly. [12] The property purchased is their own: if not belonging to them all or in entirety, it belongs to some or one of them, and is expressly so described. Putting aside the difficulty which here arises, and the question whether relief could be given at all (for to whom should it be given?) on a claim so loose and uncertain, here is a claim at all events of property, of legal right. The Defendant, Mason, has, they say, fraudulently obtained possession of this property: then he can be sued at law; that is the obvious answer. On other points in the case we offer no distinct opinion." And the Court, by an order, dated the 2nd of December, 1845,

declared, "That the said Decree of his Honor, the Resident Judge at Port Phillip, complained of by the said petition and appeal, ought to be reversed as against the said Appellant, Henry Ward Mason, and that the said Respondents, the Plaintiffs in the Court below, were not entitled to any relief prayed by their said bill as against the said Appellant, Mason, and that their said bill ought to be dismissed as against the said Appellant with costs."

The cause, having returned to the Court, at Port Phillip, was heard on further directions, and by an order, dated the 16th day of July, 1846, Mr. à Beckett, the then Resident Judge, dissolved the injunction, and ordered the receiver to deliver possession to the Respondent, Mason, of the stock and property in his hands or power as receiver, and also of all lands and hereditaments on which he had entered by virtue of his office. And it was also ordered, that the receiver should pass his final account before the deputy-registrar, and should pay what the deputy-registrar should certify to be due from him to the Respondent, Mason, and directions were given for taxing costs. And it [13] was ordered that the Plaintiff should pay the costs to the Defendant, Mason, or his solicitor.

By a subsequent order, dated the 3rd day of December, 1846, made on a petition preferred by the Respondent, M'Lachlan, his Honor ordered and directed that the supplemental bill of the Plaintiffs against M'Lachlan should stand dismissed, as against him, with costs.

The Appellants were the only surviving Plaintiffs in the cause.

The interest of the legal personal representatives of the deceased Plaintiffs was concurrent with that of the Appellants; they all had notice of the dependence of the appeal.

In consequence of there being no power given by the Charter of Justice, or the Act of Parliament, creating the Supreme Court at New South Wales, to allow an appeal to the Queen in Council, the Appellants presented a petition, praying for leave to appeal from the order of the 2nd of December, 1845, and two other orders consequential thereon.

Mr. J. Anderson, in support of the petition—Referred to *Flint v. Walker* (5 Moore's P.C. Cases, 179) and *The Bank of Australasia v. Breillat* (6 Moore's P.C. Cases, 132).

Leave to appeal from this order, and also from certain supplemental orders made consequential thereon, was granted.

No appearance having been entered by the Respondents, the appeal now came on for hearing, *ex parte*. The Appellants submitted that the decree and orders appealed from, were erroneous, for the following reasons:—

1st. Because the Respondent, Mason, had no title or [14] interest to complain of the order of the Resident Judge at Port Phillip, of the 21st of September, 1844, in respect of the sequestration of his estates, whereby all his right and interest therein became vested in the Respondent, M'Lachlan.

2nd. Because the decree of the 21st of September, 1844, having been acquiesced in by all the Respondents, who had any title or interest in the subject-matter of the suit, ought not to have been varied or altered, and because that decree was well founded in itself.

3rd. Because the Plaintiffs were entitled to relief in equity against their agents, Watson and Hunter, and the Respondent, Mason, who claimed under them; and the relief prayed by the bill was of a proper equitable character and description, and such as the facts of the case gave the Plaintiffs a right to obtain.

4th. Because the Deed of assignment of the 9th of August, 1842, was fraudulent and void as against the Plaintiffs; and the Respondent, Mason, well knew that the property assigned and covenanted to be released belonged to the Plaintiffs, and that Watson and Hunter had no power or right to assign and convey, or appropriate the same to their own use.

5th. Because the Deed of the 9th of August, 1842, was a breach of trust on the part of Watson and Hunter, and the Respondent, Mason, was cognizant of and privy to such breach of trust.

6th. Because the suit was not exposed to any objection on the head of multifariousness or misjoinder or nonjoinder of parties. And because it was not competent for the Respondent, Mason, to bring forward any such objections, in respect

that they were not only not suggested by his answer, but were not raised by him in the Court at Port Phillip.

[15] 7th. Because the interest of any absent parties was concurrent with that of the Plaintiffs, and was sufficiently protected by their undertaking contained in the decree of the 21st of September, 1844. And even although this were otherwise, because the objection would not lead to the dismissal of the suit as against any of the Respondents.

8th. Because the Plaintiffs, (Respondents in the Supreme Court at Sydney,) ought not to have been made liable to Mason, the Appellant, in the costs of that appeal.

The Solicitor-General (Sir John Romilly), and Mr. J. Anderson, for the Appellants.—The Deed of assignment made by Watson and Hunter was fraudulent and void as against the Plaintiffs. Mason was perfectly aware that Watson and Hunter were merely agents, and were dealing with property of persons resident in Scotland, and that they had no authority to assign and convey such property.—[Mr. Pemberton Leigh: That depends upon the power that they had to bind their principals. Suppose they represented to the indorsers that they were agents of persons resident in Scotland, and got the bills indorsed upon the representation that the indorsees should have the security of the property of which they had the general control and management: would an assignment of the property for the payment of the dishonoured bills be within the authority of the agency? In *The Bank of Australasia v. Breillat* (6 Moore's P.C. Cases, 152), the directors had no power under the Deed of Settlement, to wind up the concern of the Bank, or to borrow and bind the shareholders. The directors however thought it was for the benefit of the shareholders to wind up the concern, and to pledge their [16] credit, and it was held, that the power to pledge, and bind the shareholders, was a necessary incident to their authority, as directors.]—That was the case of a partnership; here the assignment is treated by us, as a breach of trust, of which Mason was cognizant. He had a knowledge of the Deed, and knew that the property belonged to persons in Scotland, and that they themselves could not contract debts in the Colony by means of their agents; neither had the agents any power by the Deed to contract debts so as to bind the persons in Scotland. It is not stated in the answers, that the parties at home authorized Watson and Hunter to draw bills. Mason was aware of the scope and extent of their agency, and that it did not extend to making parties in Scotland liable for any debt they might contract. But a question of considerable importance arises, and which is fatal; Mason was an insolvent at the time he presented his appeal in the Court below, and we submit, that he was not competent to appeal to the Supreme Court at Sydney. This very point was lately decided, in *Rochfort v. Battersby* (2 H.L. Cases, 388), where the House of Lords held, that an insolvent debtor had not such an interest in property, assigned under the Insolvent Debtors Act, as to entitle him to enter into any litigation respecting it.—[Mr. Pemberton Leigh: The difficulty about this point, is, that Mason is not a mere individual, he is a trustee, not merely for himself, but for other persons. I do not see how you can get rid of him.]

Judgment was delivered, as follows, by

The Right Hon. T. Pemberton Leigh.—We are all of opinion that it is impossible to support the decree of the Court below, on the grounds on [17] which it is based. A question then arises, whether the decree in the cause is to be reversed. The view which their Lordships take of the case, is this: it appears that Watson and Hunter had property of their own, (that is quite clear,) as well as being agents: they had received monies from a number of persons in Scotland, transmitted separately and distinctly, on account of those parties individually, and these sums they were to lay out and administer for the benefit of the individuals who sent them. They conduct the whole business and establishment, in their own names, it being known, as it appears very distinctly upon the evidence, to the persons with whom they were dealing, that they not only had property of their own, but they had property, the greater part probably, not their own, entrusted to, and to be administered by, them, which belonged to other parties. In that state of things, Watson and Hunter drew bills: these bills are drawn as between themselves and their principals, and, whether rightly or wrongly drawn by Watson and Hunter, are sworn by all the parties to have been drawn on account of the general establishment. These bills

are dishonoured, and there seems to be nothing in the case to show that there was any authority on the part of the agents to draw bills on their principals, which would personally bind them. On the other hand, if they draw bills on account of the property committed to them, although they could not bind their principals personally for the payment of such bills; yet in the situation of agents and managers of the trust property they might deal with the property itself, and, probably, might have authority either to sell or pledge such property for the payment of the bills; and then the question comes to be this: the deed which they [18] actually do execute is a deed which binds the whole of the property, including the trust property, as their own, and the whole of the debts as their own. Now, so far as it assigns their own property for payment of their own debts, of course it would be effectual. On the other hand, so far as it assigns the trust property, which certainly it does, it would be clearly bad. It also would be bad, we apprehend, with respect to those trusts for commission and management which are included in the trust deed; and, therefore, the question is, whether, the deed being in that form, in the first place, it would not be good to bind the trust property to the extent of giving those persons who had made themselves liable for the bills drawn, on what they call the joint account; whether it would not be good to the extent of making the joint property subject to the payment of those joint debts. In other words, to the payment of those bills which were drawn on account of this establishment. And if it would not have that effect, whether, at all events, it would not have been good to this extent, that those persons, Mason and whoever else advanced monies on the faith of that deed, would not be entitled to stand in the place of Watson and Hunter, who were the agents, and who, supposing a balance to be due to them from their principals, would clearly have a right themselves upon that property, and might transfer that right to Mason.

Then there is a further question as to the frame of the bill filed in the Court below; we should be extremely unwilling to dispose of the case on a mere technical point. If justice could be done as the bill is at present framed, we should be anxious to do it, though at the expense of technical rules, as understood here. This bill is filed by several Plaintiffs claiming [19] separate and distinct interests. To that it is said, that no objection to their joinder is taken upon this record, and, therefore, no objection could be taken on appeal. That would, we think, be a sufficient answer. Then comes this question; several of the persons who were parties, have died in the course of the proceedings, and the suit has not been revived against them. There may be two ways, perhaps, of looking at it; one would be, to say those persons having died leaving separate and distinct interests, you would maintain the suit in respect of the interests of those persons who are here, leaving out those who are gone. Another view which has been taken in the decree in the Court, at Port Phillip, by Mr. Justice Jeffcott, is, to treat it as a bill filed on behalf of a class, although it is not a bill filed on behalf of the Plaintiffs and other persons; and (looking at it as a matter of form) to inquire what was the property belonging to these Plaintiffs and also to other persons deceased, or persons not upon the record, who may also be interested.

These are the points which seem to arise upon this appeal.

Assuming that there is sufficient proof to lay a foundation for an inquiry, whether there is some property, at all events, belonging to these Plaintiffs, under this trust deed, which we are inclined to think there is, upon such attention as we have given to the evidence; and also, that the Plaintiffs had severally made remittances of money on that account, it will be necessary, in going into these points, to consider whether the decree as it originally stood, that is, Mr. Justice Jeffcott's, can be supported; or whether it will be necessary to modify or amend the decree in any way. The first decree may be wrong, the last decree is clearly wrong, [20] the Judge deciding that there was no relief in equity, but only at law. The remaining point is, that Mason, the Appellant below, was an insolvent at the time he presented the Appeal. We have considered this question: the difficulty is, that he is not a mere individual; he is a trustee not merely for himself, but for other persons, and being a trustee for other persons, we do not see how you can get rid of him.

Lord Brougham.—The case of *Rochfort v. Battersby* [2 H.L.C. 388] was very fully considered. It was a case of the greatest hardship, owing to defects in the

law, because it was found by a correspondence between Sir Edward Sugden and myself, that the law, to his great regret and mine, did not enable an insolvent who had paid twenty shillings in the pound to get any property which was over, because the Courts had no power to force the assignee to prove; but notwithstanding that hardship, they found that they had no power to allow him to institute a suit.

The following report was made by the Judicial Committee, upon the appeal, which was confirmed by Her Majesty:—

"The Lords of the Committee, in obedience to your Majesty's order of reference, have taken the said petition and appeal into consideration, and have heard Counsel on behalf of the Appellants, no appearance having been entered on behalf of the Respondents, and their Lordships do this day agree humbly to report to your Majesty, as their opinion, that the order of the Supreme Court of New South Wales at Sydney, of the 2nd of December, 1845, and [21] also the orders of the Resident Judge of the said Supreme Court for the district of Port Phillip, of the 25th of June, the 16th of July, the 8th of October, and the 3rd of December, 1846, excepting so much of the last-mentioned order, as ordered taxation of the costs of the Plaintiffs, of and occasioned by the petition of the Defendant, Archibald McLachlan, and payment of the taxed amount of such costs by the said Archibald McLachlan to the Plaintiffs' solicitor, ought to be reversed; and that the decree of the Resident Judge of the said Court for the said district, of the 21st of September, 1844, ought to be varied in manner following: instead of declaring that the Deed of assignment in the pleadings mentioned, bearing date the 9th of August, 1842, and made between James Watson and John Hunter (two of the Defendants in this cause), of the one part, and Henry Ward Mason, another of the said Defendants, of the other part, is fraudulent and void as against the Plaintiffs; declare that under the special circumstances of this case the said James Watson and John Hunter had authority to dispose of the property entrusted to them by the Plaintiffs and other persons in the said bill mentioned, in discharge of debts contracted and liabilities incurred by them on behalf of the Plaintiffs, and such other persons as aforesaid, in the management of such property, and that the said deed of the 9th of August, 1842, is valid against the Plaintiffs and such other persons, to the extent of subjecting such property to such debts and liabilities as aforesaid, contracted and incurred previously to the date of the said Deed, and that it ought to be declared that an account ought to be taken of such debts and liabilities as aforesaid, if any, and that provision [22] ought to be made for the payment of the same out of such property as aforesaid, and that it ought to be declared that, save as aforesaid, the said Deed is fraudulent and void against the Plaintiffs, and with this variation, that the said last-mentioned decree ought to be affirmed: and their Lordships are further of opinion, that all sums which may have been paid under the order of the 8th of October, 1846, by the said Plaintiffs to the said Defendant, Henry Ward Mason, or to Mr. John Duerdin, his solicitor, ought to be refunded by the Defendant, Henry Ward Mason, to the Appellants, or to their order, and that the Defendant, Archibald McLachlan, ought to refund and pay to the Appellants, or their order, such sum as he, or his solicitor, the said John Duerdin, may have received from the said Plaintiffs, or any of them, on account of costs, and that a receiver ought to be re-appointed of the property in question, and the injunction renewed, and that the property and monies handed over and paid to the said Henry Ward Mason on the discharge of the late receiver, together with any increase of such property and money produced by sales of any part thereof, ought to be refunded and restored to the receiver so appointed, after making all just allowances; and with these declarations their Lordships recommend that the case be remitted to the Court below, with directions to give effect to this report, and to prosecute the inquiries, and take the accounts directed by the decree of the 21st day of September, 1844, and those which it is by this report declared ought to be made or taken, and to proceed in the cause consistently with your Majesty's order upon this report, and as the justice of the case may require."

[Mews' Digest, tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an appeal lies generally*, 3. *Leave to appeal*, 6. *Practice*, b. *Abatement and Revisor*, g. *Pleadings*, h. *What points may be raised*; tit. PRINCIPAL AND AGENT, I.

AGENCY GENERALLY, E. *Rights and Liabilities of Principals and Third Parties*, 2. *Liability of Principal to Third Party*, a. *On Contracts*, i. *In what cases*. As to special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

[23]

ON PETITION FROM CANADA.

In re JUSTICE ELZÉAR BERARD * [July 2, 1849].

Where a Judge of a District Court in Canada, was removed from that Court to another District Court, and the Letters Patent appointing him Judge to the latter Court, also granted him precedence over the Judges of that Court, whose commissions were of later date than his own; Held, that such grant of precedence was valid, and that the Judge had a right to rank and take precedence accordingly.

This was a petition by Mr. Justice Elzéar Bedard, one of the Puisne Judges of the Court of Queen's Bench for the district of Montreal, in Canada, complaining of a rule, determination, or order of the other Judges of that Court, refusing him right of precedence over Mr. Justice Day and Mr. Justice Smith, the other Puisne Judges of that Court.

The petition set forth, that the petitioner was appointed, on the 22nd of February, 1836, one of the Justices of the Court of King's Bench for the district of Quebec, by Letters Patent and Commission under the Great Seal of the Province, subsequently sanctioned by warrant under the Royal Sign Manual and Seal of His late Majesty, William the Fourth, in virtue of which the petitioner assumed the duties of Judge of the Court of King's Bench for the district of Quebec, taking his rank immediately after the Honorable Mr. Justice Panet, his senior. That under the Provincial Statutes, 34 Geo. III., c. 6; 3 Geo. IV., c. 17; 10 and 11 Geo. IV., c. 7; and 7 Vict., c. 17, the Province of Lower Canada was, for the more convenient administration of justice, divided into five districts, where Courts of King's Bench, having in each [24] of these divisions the same powers and jurisdiction, were established. That the petitioner had, from time to time, acted as Judge of the Court of Queen's Bench, in four of such districts, namely, the District of Quebec, Three Rivers, St. Francis, and Gaspé; and as such Judge of the Court of Queen's Bench, in the year 1843, became, under the operation of the Provincial Statute, 7 Vict., c. 18, one of the Judges of the "Court of Appeals for Lower Canada," whose jurisdiction extends to the whole Province of Lower Canada. That whilst attending those several Courts, he took, in virtue of his Commission and Letters Patent, his rank and precedence in the Court of Appeals for Lower Canada, both at Montreal and Quebec, and in the sittings in Banco of the Court of King's Bench at Quebec, Three Rivers, and St. Francis, next immediately after Mr. Justice Panet, his senior on the Quebec Bench, and before Messieurs Justices Mondelet, Day and Smith, whose commissions as Judges of the Queen's Bench, were posterior in date to the 22nd of February, 1836. That when required to act under the 7th Vict., c. 16, s. 15, (authorising, in certain cases, the Governor, by special instrument under his hand and seal, to appoint and empower any one of the Justices of one Court to sit *ad hoc* in another district,) the Judges have invariably taken their rank and precedence according to the date of their former commissions as Judges, in their own districts, and not according to the date of the commission appointing them Judges, *ad hoc*, in the other districts in which they could claim no jurisdiction by virtue of their original appointment.

That on the 26th of April, 1848, at the city of Montreal, Letters Patent and a Commission under the [25] Great Seal of the Province were issued, appointing the petitioner one of the Justices of the Court of Queen's Bench for the district of Montreal; the Letters Patent contained, among others, the following clause: "And whereas, on the 22nd of February, 1836, our royal uncle and predecessor, the late

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

King William the Fourth, did by certain letters patent and commission under the Great Seal of our late province of Lower Canada aforesaid, appoint you, the said Elzéar Bedard, one of the Justices of the Court of King's Bench for our district of Quebec, in our said province, which office you held and enjoyed up to this day, with all its rights and privileges, it is our royal will and pleasure, and we do hereby grant and declare that you, the said Elzéar Bedard, shall have and take rank and precedence in our said Court of Queen's Bench for our district of Montreal, next after our Chief Justice thereof, and before the Honourable Charles Dewey Day, one of the Justices of the same, and in all and every our other Courts within the said part of our province of Canada, which formerly constituted our province of Lower Canada aforesaid, where, by law, you may be entitled to sit as a member thereof, next after the Honorable Philippe Panet, one of the Justices of our Court of Queen's Bench for our district of Quebec aforesaid, and before the Honorable Dominique Mondelet, Resident Judge of our district of Three Rivers, in our province of Canada aforesaid."

That on the 1st of July, the first day fixed by law for the sitting in Banco of the Court of Queen's Bench for the district of Montreal, the petitioner laid before the Judges thereof his last-mentioned commission, which had been previously enregistered in the register of the Court, and claimed to take rank and precedence [26] in the Court of Queen's Bench for the district of Montreal, next after the Chief Justice thereof, and before the Honorable Charles Dewey Day, one of the Puisne Justices of the Court;—whereupon the Honorable the Chief Justice Rolland and the Honorable Justices Charles Dewey Day and James Smith adopted, signed, and ordered to be entered of record in the register, to remain upon the files of Court, the following "determination, rule or order," namely: "Present: The Chief Justice and the three Puisne Judges. The Judges assembled for the purpose of inquiring into the question of precedence claimed by Mr. Justice Bedard, in virtue of his commission, and it was first proposed that they now decide thereon: whereupon the three Puisne Judges being of opinion, against the Chief Justice, that such is the right course—it was determined by the majority of the Judges that they now pronounce on the validity of the grant of precedence given by the Crown to Mr. Justice Bedard over and above Mr. Justice Day and Mr. Justice Smith, his seniors on this bench. And the majority of the Judges are of opinion, that the rank of a Judge, being an incident of his office, it is not in the power of the Crown to deprive him of that rank, and that Mr. Justice Day and Mr. Justice Smith, being the Senior Judges on the Bench, must rank and take precedence accordingly, notwithstanding the clause contained in Mr. Justice Bedard's commission giving him precedence, which grant, in the Letters Patent, the Judges are of opinion is void and of no effect, as being contrary to law. *Dissentiente*, Mr. Justice Bedard." And the petitioner submitted that the determination, rule, or order, was unjust and contrary to law, and Her Majesty's Royal prerogative was denied, the [27] public administration of justice impeded, the petitioner aggrieved and deprived of his just and legal rights, of his rank and precedence in the Court to which he has been removed; and, in conclusion, prayed, that the determination, rule, or order, of the 1st of July, 1848, might be rescinded and declared null and void, as being unjust and illegal, and that the entry thereof made by the prothonotary be declared of no effect whatever.

The petition was referred by Her Majesty, through the Colonial Office, to the Judicial Committee of the Privy Council, to inquire into, and advise upon the validity of the grant of precedence given by the Crown to Mr. Justice Bedard, over Mr. Justice Day and Mr. Justice Smith.

The Judges severally sent over statements, setting forth their reasons for passing the determination, rule, or order, but they did not appear by Counsel at the bar to support the same.

The Attorney-General (Sir John Jervis), and the Solicitor-General (Sir John Romilly), for the Crown.—This is a question of precedence, and involves the prerogative of the Crown. We submit, that the rule or determination made by the Judges was illegal and void, as Mr. Justice Bedard had precedence in virtue of the Letters Patent, appointing him one of the Judges of the Court of Queen's Bench for the district of Montreal, and giving him precedence over the Judges therein named. The Crown can, by Letters Patent, give precedence at pleasure, except so

far as this prerogative is controlled by the Statutes, 31 Hen. VIII., c. 10; and 1 Will. and Mary, s. 1, c. 21, which settles [28] the place and precedence of all the nobility and great officers of State. All degrees of nobility and honour are derived from the King, as their fountain, and he may institute what new title he pleases. 1 Bla. Com., p. 396. (15th Edit.) Chitty "On Prerogatives," p. 107. It is part of the prerogative at common law, *ib.* p. 113. No one can doubt, that the Queen has the right to give precedence among Queen's Counsel. Independent, however, of the precedence granted by the Letters Patent, Mr. Justice Bedard, as Senior Judge, was entitled to precedence over those Puisne Judges whose commissions were of later date than his own. It is laid down in Comyn's Dig., tit. "Justices" (D.), that if a Judge be removed from one Bench to another, he shall have precedence according to his seniority, and Comyn refers to the note in Siderfin's Reports, p. 408, as an authority in support of this proposition. Instances have occurred in England, of the removal of Judges from one Court to another. Mr. Justice Bayley was appointed a Judge of the Court of King's Bench in 1808, and on being removed to the Court of Exchequer, in 1830, he took precedence as Chief Puisne Baron over the Puisne Barons whose commissions were later than his. So where Mr. Justice Vaughan was removed, in 1834, from the Court of Exchequer to the Common Pleas, he ranked after Mr. Justice Parke and Mr. Justice Gazelee, whose commissions were anterior to his own, but took precedence over Mr. Justice Bosanquet, whose commission was later. Again, Baron Alderson was originally appointed, in 1830, a Judge in the Common Pleas, and in 1834 he was appointed a Baron of the Exchequer, and he found there, Barons Vaughan, Parke, and Bolland: he took his place, therefore, [29] as junior Puisne Judge.—[Lord Brougham.—I always considered it as a settled rule, that the Chief Justice has precedence over all the Puisne Judges, who have precedence, among themselves, according to the priority of their appointment.]

No Judgment was delivered, but their Lordships made the following report:—

"The Lords of the Committee (having had the matter of the petition referred to them), have thereupon taken the said petition into consideration, and likewise certain statements made by each of the Judges of the Court of Queen's Bench, at Montreal, in support of the said determination, rule, or order, and their Lordships have likewise heard Her Majesty's Attorney-General and Solicitor-General in the cause, as involving the prerogative of Her Majesty's Crown, (the Judges of the said Court not having appeared by Counsel at Her Majesty's bar,) and their Lordships have agreed humbly to report to your Majesty, as their opinion, that in the circumstances of the case, the grant of precedence given by the Crown to Mr. Justice Bedard, over and above Mr. Justice Day and Mr. Justice Smith, Judges of Her Majesty's Court of Queen's Bench at Montreal, is valid, and that the said determination, rule, or order, of the 1st of July, must be rescinded."

By an Order in Council, bearing date the 18th day July, 1849, it was ordered, that the grant of precedence given to Mr. Justice Bedard, by the Letters Patent of the 26th of April, 1848, be, and the same was thereby declared to be valid, and that the determination, rule, or order, of the 1st of July, be rescinded.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 1. *Judges*, f. *Other Matters*.

[30] ON APPEAL FROM THE ROYAL COURT OF JERSEY.

FREDERICK BELSON,—*Appellant*: MARIA ELIZABETH BELSON,—*Respondent* * [July 2, 1849, and Feb. 22, 1850].

Appeal allowed (without prejudice to any objection to be taken by the Royal Court of Jersey at the hearing) from a Provisional Order of that Court,

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

directing the infant children of the parties, to be left provisionally in the custody of the mother, pending a suit for a separation.

This was an application for leave to appeal from a Provisional Order made by the Royal Court of Jersey, pending a suit instituted by the wife of the petitioner, against her husband, for a separation: which Order directed the infant children of the petitioner to be left provisionally in the custody of their mother.

The Order was made by the Royal Court, under the following circumstances:—In January, 1849, the Respondent, the wife of the Appellant, presented a remonstrance to the Royal Court of Jersey, setting forth, that her husband habitually laboured under a state of great mental excitement, which often deprived him of his reason, and alleged various acts of ill-treatment towards herself, and that, in consequence of his state of mind, he was incapable of having the care of or directing the education of their children, two of whom were sons, one of eight, and the other of three years of age, and the other a daughter, aged seven years; and she prayed that her husband might be summoned [31] to appear in Court, in order that, on proof of the facts alleged, a separation from her husband, as far as regarded property, might be granted to her, and that he might be adjudged to pay her an annual pension of £250 sterling for herself and the maintenance and education of the children. The defendant put in a plea, denying the allegations contained in the reasons, and by an Act of the Court, dated the 14th of April, the case was put to proof, and witnesses were in the course of examination.

Previous to the hearing of this remonstrance, and on the 14th of March, 1849, the petitioner presented a remonstrance, complaining that his wife had taken advantage of his absence, and deserted her home, and taken with her the two youngest children, which children, he alleged, he was legally entitled to have the custody of, and no person had a right to detain them against his will; and he prayed that the Court would direct the proper Officers to enter the house, where they were concealed, and compel the person detaining them to restore them into the hands of the petitioner. This remonstrance coming on before the inferior number of the Royal Court, the prayer was granted by them provisionally, without prejudice, however, to the ultimate decision of Mrs. Belson's suit then pending.

On the 14th of April, the full number of the Royal Court having been convened for that purpose, Mrs. Belson presented a further remonstrance, complaining of the decision *ex-parte* made by the inferior number of the Royal Court on the 14th of March previous, and offering to prove the total incapacity of her husband to have the custody of the children. Mr. Belson having appeared by Counsel, the full number [32] of the Royal Court pronounced the following decree:—"Considering that Mrs. Belson, on the 20th of January, 1849, presented a remonstrance to the Court, alleging, amongst other things, the state of excitement and mental alienation of the husband, and praying a separation from her said husband, and alimony for herself and her children, that by an Act of the Court of the 14th instant, it is ordered that evidence should be heard in this action; that the remonstrance to the full Court, on the part of the said Maria Elizabeth Belson, reproduces the allegations of the mental alienation of her said husband, and an habitual state of mental excitement, which renders him incapable of their education, the Court suspends the effect of the Act or Order of the Court below of the 14th of March, 1849: and, considering that the two youngest of the said children, a girl and a boy, the former seven years, and the latter only three years, and that, under these circumstances, they were more especially in need of maternal care, the Court ordered that the said two children be left provisionally in the custody of Mrs. Belson, their mother."

From this decree the petitioner applied for leave to appeal, which the Royal Court refused, on the ground that the Order was provisional, and not a definitive sentence.

The petitioner now applied, *ex-parte*, on petition, for leave to appeal from such order.

The Solicitor-General (Sir John Romilly), and Mr. W. M. James, in support of the Petition.—The order being made provisionally only, is wrong; it ought to have been final in the first instance. In [33] this country a father cannot be deprived of the custody of his children, except for misconduct. The law of Jersey respecting

the custody of infants is the same as here, in that respect. The suit in which this Order is made, is for a separation and an alimony provision, and whichever way decided, cannot affect the father's right to the custody of his infant children. The order respecting their custody is final and definitive.

Lord Brougham.—This application is *ex parte*. We cannot make the Order you ask for, the party on the other side must have notice of the application. You may renew the motion.

Mrs. Belson having been served,

The Solicitor-General [Sir John Romilly], and Mr. W. M. James, again applied for leave to appeal.

Mr. Busk, for Mrs. Belson, and the Royal Court of Jersey, opposed the motion (Feb. 22, 1850).

It would be contrary to the law of Jersey to allow this appeal, as this Order was a Provisional, and not a Definitive Sentence. By the Jersey Code of 1771, regulating appeals, no appeal is permitted before a Definitive Sentence is pronounced. There is another objection; more than three months have elapsed since the Order was made, and the Petitioner's remedy is barred by the lapse of time. This application is, moreover, irregular, as no notice has been given to the Royal Court at Jersey, of the application for leave to appeal, that the Court may state their reasons for their refusal to allow the same. *In re Tupper's* case (note, 2 Knapp's P.C. Cases, 201). The Jersey Code of 1771, as to Doleances, requires notice to be given to the Judge. [Lord Brougham: [34] This is not a Doleance. The party Respondent have a right to notice, but what right has the Royal Court to notice? It was not done in cases before us, in which the Royal Court was concerned. *In re Whitfield* (2 Moore's P.C. Cases, 273). *In re Ames* (3 Moore's P.C. Cases, 409). *The Attorney-General of Jersey v. Capelain* (4 Moore's P.C. Cases, 37). There is no authority for the footnote by Mr. Knapp, in *Tupper's* case [2 Knapp 201. n.], respecting such practice.]—It is considered as the practice.

Lord Brougham.—This Court is not bound by the order as to the time for prosecuting an appeal. It is a directory order only. The sole question, is, whether we should admit an appeal from an Interlocutory Order. Is not this a Definitive Sentence *quoad* the custody of the children? We think it is, as the ultimate decision in the suit cannot affect that custody. We think, therefore, that leave to appeal should be granted, the Petitioner giving the usual notice to the Royal Court, who may urge any objection, as to the competency of the appeal, at the hearing, they may be advised.

The following Order was made upon this Petition:

"The Lords of the Committee have taken the said Petition into consideration, and having heard counsel on behalf of Mrs. Belson and of the Royal Court of Jersey, their Lordships do agree, humbly to report to your Majesty as their opinion, that leave ought to be given to Frederick Belson to enter and prosecute the said appeal against the said judgment or decree of the Royal Court of the Island of Jersey, of the 23rd of March, 1849, without prejudice to the right of the Royal Court to be heard by way of objection, upon the hearing of such appeal."

[See *Belson, In re*, 7 Moo. P.C. 114.]

[35] ON APPEAL FROM THE SUPREME COURT AT FORT WILLIAM IN BENGAL.

THE BANK OF BENGAL.—*Appellants*: JAMES WILLIAM MACLEOD,

Respondent * [July 5 and 6, 1849].

The payee of promissory notes of the East India Company, by a power of attorney authorized his agents at Calcutta, to "sell, endorse, and assign," the notes.

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and Sir E. Ryan, Knt.

These notes were transferable by endorsement payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering, as security, these promissory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the Bank, by way of collateral security for their personal liability, at the same time authorising the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the Bank sold the notes, and realised the amount of their loan.

Held, that the endorsement of the notes by the agents of the payee to the Bank, was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank [7 Moo. P.C. 72-76].

The rule laid down in the cases of *Gill v. Cubitt* (3 B. and C. 466), and *Down v. Halling* (4 B. and C. 330), that the negligence of a party taking a negotiable instrument, fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law [7 Moo. P.C. 72, 76].

This Court will not entertain a purely technical objection to a party's right of action, which has not been made in the Court below [7 Moo. P.C. 60].

Upon the reversal of the Judgment of the Supreme Court, at Calcutta, finding for the Plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the Defendants, instead of awarding a *venire de novo* [7 Moo. P.C. 76].

This was an action of detinue and debt brought by the Respondent against the Appellants. The declaration-[36]-tion contained three counts, the first in detinue, the others in debt. The first count alleged, that the Plaintiff was lawfully possessed of three several securities for money, that is to say, three promissory notes of the East India Company, commonly called Company's paper, all respectively of the four per cent. loan, dated 1st May, 1832, numbered, and for the following amounts respectively: No. 11,914, for S.R. 14,000, No. 13,612, for S.R. 5000, and No. 13,397, for S.R. 5000, which the Defendants unjustly detained from the Plaintiff. The second count was for money received by the Defendants to the use of the Plaintiff, and the third count was for interest. The particulars of demand stated that the action was brought to recover the three several company's papers in the first count mentioned, or the value thereof, with interest, if sold or otherwise disposed of.

To the first count the Defendants pleaded, first, *non detinent*; secondly, that the Plaintiff was not lawfully possessed of the securities therein mentioned; thirdly, that as to the Company's paper, No. 13,397, the same was transferable by endorsement, and that the Plaintiff, before the detention of the same by the Defendants, endorsed the same in blank, and delivered it to Alexander Donald Macleod, and that A. D. Macleod afterwards endorsed it to, and pledged, and deposited it with, the Defendants, as a pledge and security, for the payment of a sum of Rs. 4500 then advanced by the Defendants, to him, together with 6½ per cent. interest, and for the payment of all other and future advances made, and to be made, by them to him, with interest at 12 per cent., and with power and authority to the Defendants to sell and dispose of such Company's paper, for their reimbursement after the expiry-[37]-ration of three months from the 25th of September, 1841, by public or private sale. And that in fact the Defendants, in pursuance of such power and authority sold and disposed of such Company's paper, after the expiration of the period of three months, and before the commencement of the suit, for their reimbursement of the sum of Rs. 8000 (the amount of the monies advanced as aforesaid, and of other principal moneys advanced by the Defendants to Macleod, and interest thereon respectively, and then due), as they lawfully might, which was the detention of the last-mentioned Company's paper, in the first count complained of. Fourthly, the Defendants pleaded to the first count, that the three several Company's papers were transferable by endorsement, and that the Plaintiff endorsed them, and

deposited and pledged them to and with the Defendants, as a security for the repayment of the sum of Rs. 25,000, then advanced by them to Alexander Donald Macleod at the Plaintiff's request, with interest, and of all other advances made, and to be made, by them to Alexander Donald Macleod, with interest, and with power to sell the same by public or private sale, for their reimbursement, after three months from the 27th of September, 1841, and that in fact the papers were so sold and disposed of by the Defendants, before the commencement of the action, as they lawfully might be, for the sum then due and owing to them, to wit, Rs. 25,000, which was the detention complained of in the first count. And to the second and last counts, the Defendants pleaded *nunquam indebitatus*.

The Plaintiff in his replication joined issue on the last-mentioned plea, as well as on the first and se-[38]-cond pleas to the first count. To the third plea to the first count, the Plaintiff replied, that he did not indorse in blank, and deliver the Company's paper in the third plea mentioned, to A. D. Macleod, in manner and form, etc., and upon this issue was joined. To the fourth plea to the first count, the Plaintiff replied, that he did not indorse and deposit, lodge and pledge, with the defendants the three several Company's papers, in manner and form, etc., and upon this also issue was joined.

The cause was tried upon the 14th of December, 1846, before Sir Lawrence Peel, Chief Justice, and Sir John Peter Grant and Sir Henry Wilmot Seton, Puisne Judges of the Supreme Court.

It appeared from the evidence at the trial, that the Plaintiff, James William Macleod, and Alexander Donald Macleod, were brothers: that the Plaintiff had formerly resided in Calcutta, and had been a member of the firm of Macleod, Fagan and Co., and that he had left India previously to 1841; but that his brother, A. D. Macleod, was a partner in that firm; that the firm of Macleod, Fagan and Co. was a mercantile house established in Calcutta, and carried on a species of business known in Calcutta, as that of agents or agency business; such agents in Calcutta keeping the current accounts of individuals, and advancing monies on personal or other securities to them, and on their behalf, charging interest in account, and acting generally as such agents, in the manner and according to the rules and course of dealing of private bankers.

It appeared that in the year 1841, the Plaintiff sent from England the following power of attorney: "Know all men by these presents, that I, James William Macleod, at present of Southampton, do make, consti-[39]-tute, and appoint, Alexander Donald Macleod, and Christopher Fagan, carrying on business in Calcutta, as agents, under the firm of Macleod, Fagan and Co., to be my true and lawful attorneys and attorney, jointly, and each of them separately in their individual names, or in the name of the said firm, or of any other firm or firms which they or their associates or successors may adopt, for carrying on the said business, and on my behalf to sell, endorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the East India Company for shares in their public loans, payable from their Treasury at Fort William, in Bengal, to which I now am or may be lawfully entitled, and to receive the consideration money, and give a receipt or receipts for the same, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said attorney and attorneys shall do therein, by virtue hereof. In witness whereof, I have hereunto set my hand and seal, this 3rd day of August, in the year of our Lord 1841."

On the 25th of September, 1841, A. D. Macleod applied to the Bank of Bengal, for a loan upon his own account, and offered as a security Company's paper, No. 13,397, for Rs. 5000. This note bore the following endorsement:—"Pay to G. J. Gordon, Esq., Sec. Union Bank, or order, J. W. Macleod, by his Attorney, A. D. Macleod." "Pay to A. D. Macleod, Attorney to J. W. Macleod, order, G. J. Gordon, Sec. Union Bank. J. W. Macleod, by his Attorney, A. D. Macleod."

It further appeared, that these notes were issued by and under the authority of the Governor General and Council of the East India Company, in Bengal, for the [40] purpose of raising money to meet the exigencies of the Government of India, and that they were negotiable instruments, the property in which passed by endorsement, and in Bengal, by delivery, like other promissory or bank notes, and as the ordinary currency of the country.

The Secretary of the Bank, upon inspection of the note and the last endorsement, requested to see the power of attorney, which was shown to him, and it was thereupon registered at the Bank according to their usual course of business. The Bank at the same time took a further endorsement on the note from A. D. Macleod, in these words, "Pay to the Bank of Bengal or order, A. D. Macleod." The required loan was then made by the Bank in the ordinary course of business; and the note was taken as a security for the same, together with a memorandum of deposit signed by A. D. Macleod, and containing a power or authority from A. D. Macleod to sell the Company's paper on default by A. D. Macleod, in order to reimburse them their advances.

The memorandum of deposit signed and delivered to the Bank by A. D. Macleod, by way of collateral security, authorized the treasurer of the Bank absolutely to sell and dispose, three months after date, by public or private sale, the Company's paper, for the reimbursement to the Bank, as well of principal together with interest, paying to Macleod the surplus which might be forthcoming from such sale, he being bound to make good any deficiency after such sale.

Two days afterwards, A. D. Macleod applied to the Bank of Bengal for a further loan of Rs. 17,100 upon his own account, and the Bank advanced that sum [41] to him, upon his depositing two other of the Company's papers, numbered respectively 11,914 and 13,612, as security for the repayment thereof, upon the statement made by A. D. Macleod that the same were his own property. The Bank at the same time took an endorsement of A. D. Macleod on each of such Company's papers, and also another memorandum of deposit signed by him, and containing a power to sell the same, similar in terms to that given by him on the occasion of the first loan.

In January, 1842, on default made by A. D. Macleod, the three several Company's papers were sold, according to the usual course of business, and at the market-rate of the day, by the Bank, in pursuance of the powers contained in the memorandums of deposit, after the expiration of the prescribed time, in repayment of the respective loans.

Macleod, Fagan and Co. subsequently became insolvents.

The non-delivery of the Company's papers by the Defendants to the Plaintiff was relied upon as the detention in the first count alleged.

A verdict was found for the Plaintiff, the paper to be calculated at Rs. 10. 8 a. discount; viz. three notes, S. Rs. 5000, S. Rs. 5000, and S. Rs. 14,000.

On the 21st December, 1846, a rule was granted, on the motion of the counsel for the Defendants, to show cause, why the verdict entered for the Plaintiff in the action should not be set aside, and a nonsuit entered, or why a verdict should not be entered for the Defendants on the ground of misdirection, or why a new trial should not be granted on the ground of the verdict being contrary to evidence. This rule was argued before the full Court, and on the 2nd of February, [42] 1847, the rule was discharged with costs. Judgment was delivered by the Chief Justice, who, after stating the nature of the action, and the pleadings, proceeded as follows:—

"The third plea alleges an endorsement from the Plaintiff to A. D. Macleod, of the note for S. R. 5000, and a pledge by A. D. Macleod, of that note to the Bank. That endorsement is denied; there was no proof of any delivery, in fact, of this note by the Plaintiff, or any one, to A. D. Macleod, in the character of endorsee of that note; and unless it can be made out that the mere possession by an attorney under a power of the bill which he is authorized by that power to endorse in the name of his principal, proves as soon as he has written a form of endorsement on the bill in the name of the principal, a delivery to him of the bill as an endorsee from his principal, the allegation is not proved: the mere writing the name of the principal is the act of the principal, done by a substituted, instead of by his own proper, hand. To constitute a transfer of a bill, endorsed in blank, there must be a delivery of it. In *Adams v. Jones* (4 Per. and Dav. 474), Lord Denman says, 'Now a Bill may be endorsed to a party in two ways, either by a special endorsement, making it payable to that party, or by a blank endorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party as endorsee, in order to constitute an endorsement to him.' The continuing possession, under such circumstances, as are above supposed, of the attorney, is *prima facie* referable to the original delivery to him, and unless some change of circumstances

be shown, the character of the possession must be received as unvaried. The [43] original delivery is in such cases the delivery of an unendorsed bill which the attorney has authority to endorse in the name of his principal. But the party taking such bill from him the attorney, when endorsed in the name of the principal, must call for the power or take the consequences of his neglect, as the principal will not be bound unless the authority conferred, be pursued. The endorsement being by procuration is notice to the transferee. In *Attwood v. Munnings* (7 B. and C. 278), Mr. Justice Holroyd says, 'The word procuration gave due notice to the Plaintiffs, and they were bound to ascertain before they took the bill, that the acceptance was agreeable to the authority given.' Littledale, J., says:—'It is said that third persons are not bound to inquire into the making of a bill, but that it is not so when the acceptance appears to be by procuration; the question then turns upon the authority given.' That was the case of an acceptance by procuration, but the law is the same as to an endorsement, *Fearn v. Filica* (8 Scott's N.C. 241). In that case, Tindal, C. J., says:—'If Grame had endorsed a bill with his own hand, there can be no doubt but that would have been sufficient to pass the property to a *bona fide* holder; but where the endorsement is made by a third party, the question is, whether the third party had authority to endorse, and that lets in the inquiry as to what was the authority given to Lenegun.' The same doctrine is applied to restrictive or conditional endorsements. See *Treuttel v. Barandon* (8 Taunt. 100), *Sigourney v. Lloyd* (8 B. and C. 622), and *Robertson v. Kensington* (4 Taunt. 30). In *Sigourney v. Lloyd*, Lord Tenterden thus expresses himself:—'The use of endorsements of this kind is not small, nor are they, as [44] it seems to me, inconsistent with the interest and convenience of commerce; such an endorsement will not prevent the endorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal, all will be well, but the endorsee must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an endorsement is restrictive: on the contrary, I think that the interests of commerce will thereby be advanced. It is said that it cannot be expected that bankers or others when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree it cannot be expected they should; but still, if they take the bill so endorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.' If the payee to whom, or to whose order, a bill were to be made payable, should write an endorsement in blank on the bill, and give the bill so endorsed to one for a special purpose, as for instance to his servant, to put away, or for any other special purpose of the like kind, indicating an intention to retain the bill, and the servant should then transfer it for value, and without notice of the fraud, in fraud of his master's orders, the transferee would have a complete title to the bill, as the indorsee in law of the payee under such blank endorsement. See *Adams v. Jones* (4 Per. and Dav. 474), *Brind v. Hampshire* (1 Mee. and Wel. 365), *Marston v. Allen* (8 Mee. and Wel. 494); and though some doubt [45] was thrown out in *Hayes v. Caulfield* (5 Q.B. Rep. 81), whether the whole doctrine laid down in the case of *Marston v. Allen* could be supported, no doubt was expressed on the general law that a mere delivery for a special purpose, inconsistent with a transfer, as for safe custody for instance, does not constitute a transfer of a bill endorsed in blank, though it enables the actual possessor to transfer the bill to a *bona fide* holder for value, and without notice of the fraud, *a fortiori*, the mere continuing possession in the attorney without any delivery at all after the endorsement in blank, the endorsement in blank being unaccompanied by any change of possession, does not amount to nor evidence a transfer by delivery to such attorney, and any delivery to him in the character of attorney is a delivery to the principal. If the attorney duly executes his power, and delivers under the power to a transferee for value, his act binds the principal. It is in law the writing and delivery of the principal himself. If the writing and delivery are simultaneous no doubt can exist in any mind that this is no delivery to the attorney: to hold it otherwise would be to establish an unmeaning fiction, dividing mentally one single act into two, one a real and one a fictitious act. It is precisely the same thing if the attorney signs in anticipation of a subsequent

intended transfer; therefore whilst the bill remains in his the attorney's hands, under circumstances not proving or tending to prove a transfer to himself, the transferee cannot establish as to such possession an allegation of an endorsement by the principal to the attorney. It was however argued that the attorney, A. D. Macleod, might have sold this note to himself, that a sale to himself by an agent employed by a principal to sell, is good at law, [46] though not supported in equity; that the Bank might have supposed this, and that the Court may presume or assume it. There was no proof whatever of the fact, nor does any ground exist for the assumption, and we entirely dissent from the position that such a transfer would be valid at law. The principle of law is a clear one, that an agent shall not by his own act give himself an interest at variance with his duty to his principal. By his sale to himself, he would unite in himself the inconsistent characters of seller and buyer. It was decided by Lord Ellenborough in *Wright v. Dannah* (2 Camp. 203), that one of the contracting parties could not even be the agent of the other for the purpose of signing the contract of purchase. In *Exp. Dyster* (1 Merr. 172), Lord Eldon treats it as a clear legal principle. The case was in Bankruptcy, a petition to prove a debt. Lord Eldon in that case says:—‘There is nothing in these proceedings which imports that he was actually a principal in those very dealings in which he was ostensibly concerned as a broker. If that fact were distinctly brought before me, I should have no hesitation in saying that no action could be maintained in respect of those transactions, inasmuch as they clearly amount to a fraud.’ And Lord Wynford, in delivering the judgment of the House of Lords in the case of *Rothschild v. Brookman* (5 Bli. N.S. 165), says:—‘I take it to be a general principle of law and equity, that a man cannot be a seller for one and a buyer of that property himself.’ He adds in conclusion of his judgment, ‘I repeat, that Mr. Rothschild has only on this occasion followed the practice which I believe has been acted upon in London. It is fit your Lordships should now say such practices cannot be endured. If they are [47] common, it is fit your Lordships should say in language that cannot be misunderstood, that such practices must not continue to prevail.’ In the case of *Gillett v. Peppercorne* (3 Beav. 83), Lord Langdale expresses similar sentiments:—‘It is said that this is every day's practice in the City. I should be very sorry to have it proved to me that such a sort of dealing is usual, for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent, has himself, in the very transaction, an interest directly opposite to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand, and acts, in one sense, as arbitrator between them; but if a person employed as an agent, on account of his skill and knowledge, is to have, in the very same transaction, an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continual disappointment, if not to the continued practice of fraud.” We entertain the same opinions as those expressed by Lord Eldon, Lord Wynford, and Lord Langdale. We have chosen to fortify our opinions by higher authority than our own. The condemnation of the practice that an agent may purchase for himself, goods which he is entrusted by his principal to sell, applies strongly to the case of an agent in this country, for an absent principal in England, entrusting him with his property for sale. It is obviously the interest of the agent, if he [48] may purchase, to purchase at a time when it would not be for the interest of the principal to sell; the distance and want of power of supervision in the principal would leave him much exposed to the commission of frauds if an agent, so contracted to sell, could purchase for himself. The language of the power in question is inconsistent with the notion that any such power was intended to be conferred; no presumption can arise of a purchase which could not have been supported, and no evidence raises any presumption that such a purchase in fact ever took place. It appears to us, therefore, that there is nothing to show that any endorsement was made by the Plaintiff of this note to A. D. Macleod, and that issue was properly found for the Plaintiff, on the issue raised on the plea, of not possessed. The question is the same as to all the notes. A question was made, whether in detainue, a lien in the Defendants could be proved under this plea. It is

a matter not settled, but we are of opinion that this defence, in this action, is admissible. It is a question as between the Plaintiff and Defendants, not of lien, but of property. The suit relates to negotiable securities, and the effect of a transfer, *bona fide*, and for value of such securities, transferable by delivery, is to transfer property though the actual transferrer have none. It is true that it would be subject to redemption, if the transfer were in fact a pledge, but there would not be an absolute and also a special property in the notes created by the transfer so as to render it necessary to plead a lien. The Plaintiff proved his title, by proving that all three were made payable to him, or his order. It then lay on the Defendants to show that the property was divested as against him at least. The actual transfer [49] to the Defendants was on a pledge to them by A. D. Macleod for his own private debt, which pledge, the registered power, which applies to this note for S. R. 5000, clearly did not authorise, nor is it possible to presume that the lost power (admissions were made on the trial as to this power of attorney) contained any such authority. It was said, that a factor or agent might pledge the bills of his principal for his own debt, for that he could pledge such bills, though he could not at Common Law, pledge the goods of his principal, under a mere power of sale. The reason, however, of the distinction was not adverted to: it turns on difference in the nature of the property, not on any difference in the nature of the authority. A power of attorney is construed strictly; whether it relate to goods or bills, the intention governs, and a man who gives a power authorising a sale of his bills, or other negotiable securities, for his own purposes, certainly does not intend to confer, and does not confer, on the agent, thereby, the power to pledge the securities for the private debt of the agent; and as long as such securities require an endorsement in the name of the principal, no such power of pledging exists, or can take place, to the prejudice of the donor of the power, the owner of the unendorsed securities, nor can the attorney, by merely writing the form of an endorsement, in the name of the principal, on the securities, give himself such a power, or additional security to his transferee, for such transferee must call for the power, and will take, subject to its due execution, and no subsequent endorsee or transferee would be in a better position than the first. It would be wholly immaterial as against the payee, [50] how many names were subsequently put on the paper, either through a connected and unbroken chain of endorsements in full, or after an endorsement in blank; the legal interest in the bill would still remain in the payee, for no endorsement authorised by him would have taken place. See *Fearn v. Filica* (8 Scott's N.R. 241), and *Robertson v. Kensington* [4 Tann. 30], before quoted. It is true that in *Fearn v. Filica* [8 Scott, N.R. 241], there was no authority at all to endorse a bill of the particular description; but the principle is a general one, that when an acceptance, or the drawing, or endorsing, of a bill is not by the proper hand of the acceptor, drawer, or endorser, but made by another, in his name, the question is always, whether, that other had authority to do the act; and the judgment of the Chief Justice Tindal, before quoted, asserts the general principle. It resembles the case of a conditional endorsement. *Robertson v. Kensington*. The subsequent endorsees have their remedy against prior intermediate endorsees; but as between the payee and an endorsee, when the first endorsement is by procuration, the case turns on the due execution of the power. If the case of *Collins v. Martin* (1 Bos. and Pull. 648), be examined, the judgment of Eyre, C. J., will be found fully to support the doctrine, that the power of an agent of pledging his principal's bills in satisfaction of his own private debt, turns wholly on the nature of the property. Bills specially endorsed to the agent: bills payable to order, and endorsed in blank; bills originally made payable to bearer; all these he may transfer, as his own act, and if he pledge them for his own purposes, and the lender be not cognizant of the fraud, he is secure—the reason is, because, the nature of the property is such, that the bill, under such circumstances, is deemed [51] the property of the agent conclusively for the purposes of transfer to a *bona fide* transferee; but in unendorsed bills made payable to the principal or order, the property is in the principal, though the possession be transferred to the agent, and the power in such a case is a naked authority which must be strictly pursued. It is unnecessary to say anything as to a pledge of bills for the owner's use, under a power of sale, a pledge for the agent's use, is clearly unauthorised. But the Defendants urge there was an endorsement in blank on the notes in the name of the principal, and so the notes became payable to bearer. It

is admitted, that such endorsements were made in fact, and that an endorsement in the name of the principal was authorised for some purpose: no more is admitted, and nothing was proved, as to the transactions with the Union Bank, or any other parties, except the Bank of Bengal. No power was proved, which authorised a pledge for A. D. Macleod's own purposes, none such can be presumed. The lost power is admitted to have justified a transfer by a blank endorsement, in the name of the principal, but it is not admitted, nor proved, under what sort of a power, whether general or limited, the transfers apparent on the notes, took place, nor under what circumstances, whether they were in execution, or in abuse of the power. There was proof of a limited power subsequently given, and no proof of any necessity for one more general. We can make no intendment in this case, against the payee, of any due execution of any power by his attorney, A. D. Macleod; the Plaintiff stands on his own right as payee: if his attorney have transferred the notes, it is for the Defendants who assert that such is the case, to prove it. The Plaintiff, the principal, whose case is, that he is [52] the payee of the notes, is not bound to call the attorney or other person to prove that a fraud has been committed on the Plaintiff. It lies on those who rest on the authority, to show affirmatively, the authority and its due execution: they show that the Plaintiff gave a power to the attorney, which authorised the attorney to endorse the notes in the Plaintiff's name, for some purpose which is not disclosed, for they gave no evidence of the object for which the lost power was given, nor showed that such proof was unattainable. It does not appear that the Defendants could not have proved the nature of the power and the nature of the transactions with the first *de facto* endorsee, and we are unable to collect from any facts proved, or admitted, that any due exercise of any power ever took place. It was said, that his due execution of the power must be presumed, as an abuse of his trust would be the imputation of a criminal act, the power it is said, being an instruction in writing, to the agent. We think, however, that assuming the Statute to apply, an excess of such power is not necessarily a criminal act under the Statute. We see no limit to the application of such presumptions if this be inadmissible. It might be urged that a disputed handwriting must, *prima facie*, be treated as genuine, since signing a name to an instrument without authority is unexplained, *prima facie*, evidence of a false making, and in all cases of agency, the *onus* of proof would be shifted, and it appears from the act itself that no such consequences were intended to result. See 9th Geo. IV., c. 74, s. 105. We think, therefore, that no blank endorsement was proved in this case, divesting the property of the payee. Let it be assumed, however, that such proof was made, still there was proof of the [53] property in the notes being subsequently in the Plaintiff, and no proof that it was again divested; but notwithstanding that circumstance, a transfer by A. D. Macleod to the Bank, *bona fide*, of the notes, if endorsed in blank, would transfer the property to the Bank. It becomes, therefore, necessary, on the assumption that an effective endorsement in blank in the name of the principal, was proved, to consider whether the Bank can be viewed as *bona fide* holders. They had notice of circumstances including the state of the notes themselves, which, in our opinion, made it their duty to inquire as to the mode in which A. D. Macleod made out his asserted property in the notes. They made no inquiries whatever, whether the registered power was intended to embrace the other notes that he pledged to the Bank as well as the latter. They knew that it applied to the latter, pledged to them but two days before, and A. D. Macleod's production of it, in reference to that note on their demand for a power, admitted of no other construction. It might not be necessary to endorse the note under it, if a good execution of the former power had once taken place as to that note. But the case does not depend as to the point of *bona fides* or the necessity as to any of the notes of a transfer, under the power which was registered, but on the notice of the Plaintiff's interest in the notes, which the transmission and acceptance of that power, together with all the circumstances of the case, conveyed. They knew also of A. D. Macleod's connection with the house of Macleod, Fagan and Co., who appeared as endorsers on the notes. No inquiry whatever was made, how that firm, or A. D. Macleod, had acquired any interest in any of the notes. A sale by A. D. Macleod to his firm would be equally pro-[54]-hibited with a sale to himself. The transaction of the deposits was close upon the transmission of the power. On the deposit of the notes numbered, no power whatever was called for, though the first endorsement

was by procuration. It was not proved that the lost power was then lost, or that its contents, if it were then lost, could not be learnt. It appears on the notes themselves, that there had been transactions with the Union Bank; no inquiries were made of A. D. Macleod, or at that Bank, into their nature. That the agent had himself purchased, or that his house had purchased through him, the notes in question, from the Plaintiff, is an inadmissible assumption, and the Bank required no proof whatever, in support of the assertion made by A. D. Macleod, that he was the owner of the notes. It was urged that the words 'Atty. for A. D. Macleod,' were merely a *descriptio personæ*. It would, however, have been not merely an unmeaning, but an untrue description, injurious to the interest of A. D. Macleod himself, if he had been the owner of the notes. We think, that the conduct of the Bank, in not calling for inquiry, under circumstances, which, in our opinion, so loudly demanded it, prevents them from being viewed as *bona fide* transferees for value; and we found this opinion, not on the exploded ground of carelessness or want of prudence, whether in a greater or less degree. If we were to support this transaction, we should establish, as a consequence resulting from our decision, this position, that an attorney for an absent principal entrusted with the Government paper of his principal, payable to that principal or owner, and unendorsed by such principal, has only to write a form of endorsement by procuration in his principal's name on the [55] back of the security, and then he will be able to raise money on it for any purposes of his own, if he will but assert the property to be in himself. We should decide, in effect, that a fiction of some transfer to the attorney is to be adopted, and that a power is to be viewed as in the nature of proprietary right, such a decision would be opposed to the principles of law and to the uninterrupted current of decisions, and it would tend to encourage breaches of trust; such a decision could not tend to promote the true interests of commerce, which depend so much on the due performance of fiduciary engagements. The interests of depositors must be considered as well as the interests of those to whom depositaries may resort for aid when needing pecuniary advances. We think, that one who forbears to inquire, under such circumstances, as the present, resting on a bare statement of an agent needing an advance, that the property is his, whilst all the circumstances point to an opposite conclusion, must stand or fall by the truth or falsehood of that statement. It is his duty to inquire where the interests of third parties are apparent, and the absence of inquiry would facilitate frauds: and if he do not make that inquiry, because he thinks that the law does not demand it of him, he must take the consequences of his error.

From this judgment the present appeal was brought, which now came on for hearing.

Mr. Greenwood, Q.C., and Mr. Leith, for the Appellants.—The notes came into the possession of the Appellants in the ordinary course of their business, as bankers. [56] The endorsement by A. D. Macleod, as attorney for the Respondent, and delivery to the Bank of the notes so endorsed, for value received, constituted in law, a valid assignment and transfer. The Bank had no right or reason to suspect fraud on the part of A. D. Macleod; he brought the notes endorsed. It was proved in the cause, that he was empowered by the Respondent to endorse and negotiate the notes. What inquiries, therefore, could the Bank make? Endorsed bills in the hands of a banker are negotiable instruments. *Collins v. Martin* (1 Bos. and Pul. 648), *Bolton v. Puller* (1 Bos. and Pul. 539), *Brandao v. Barnett* (12 Clk. and Fin. 787; S.C. 6 Man. and Gr. 630). The question will turn upon the power conferred on A. D. Macleod. A person who has power to sell goods, we admit, cannot pledge them. A distinction, however, exists between goods and negotiable instruments. *Wookey v. Pole* (4 Bar. and Ald. 1). Mr. Justice Bayley, in that case, lays down the rule, as follows (4 Bar. and Ald. 15):—"A pawnee of goods or chattels, or a vendee out of market overt, has in general no better title than his pawner or vendor, and cannot resist the claim of the rightful owner; but bank notes and bills of exchange stand on a different footing in this respect from ordinary goods and chattels. The holder, *bona fide*, and for a valuable consideration, of a bank note or bill of exchange, has a good title against all the world: because, in the case of bank notes, they are considered as money, and pass as such, and it is essential for the purposes of trade, that delivery should give a perfect title, and because in the case of bills of exchange, this is the law and custom of merchants, and it makes no difference in the case of [57] bank

notes or bills of exchange, whether such holder has received them as pawnee or otherwise;" and he cites, in support of this, the case of *Collins v. Martin*. Here the Bank were *bona fide* holders, for value, of the notes, and their title ought not to be invalidated by any misapplication of the same by A. D. Macleod. The authorities referred to by Sir Lawrence Peel, as to bills wrongly endorsed, do not warrant the judgment of the Court. In *Fearn v. Fulica* (8 Scott's N.R. 241) the question was, whether the endorser had authority to endorse; and to the same effect are the cases of *Adams v. Jones* (12 Ad. and Ell. 455; 4 Per. and D. 474), *Robinson v. Little* (9 Q.B. Rep. 602), *Robertson v. Kensington* (4 Taunt. 30), *Attwood v. Munnings* (7 Bar. and Cr. 278), *Sigourney v. Lloyd* (8 Bar. and Cr. 622), and *Goodman v. Harvey* (1 Ad. and Ell. 870). The cases of *Edie v. The East India Company* (2 Burr. 1216), *Ex parte Teagood* (19 Ves. 229), *Walker v. McDonnell* (11 Law Times, 270), *Smith v. Clarke* (Peake 225, 1 Esp. 180). Smith's Mercantile Law, pp. 209-10 (4th Edit.), are strongly in our favour.

The third issue was, whether the Respondent did, in fact, endorse the notes. The Court below held, that a party could not endorse to himself, as there could not be an endorsement without delivery, any more than he could sell to himself: and, therefore, that in fact he had not endorsed the notes. This is not law, as no delivery was requisite to complete the assignment. It was formerly thought by the Court of Exchequer, in *Marston v. Allen* (8 Mee and Wel. 494) that delivery must be proved; but that case has been since over-[58]-ruled. *Hayes v. Caulfield* (5 Q.B. Rep. 81), and *Brind v. Hampshire* (1 Mee. and Wel. 365).

There is also another objection, upon which, we submit, the Plaintiff ought to have been nonsuited, as it goes to the root of his title. Detinue was not the proper form of action, and will not lie in a case like this. Buller's Nisi Prius, tit. "Detinue," p. 48-9. A. D. Macleod deposited the notes in 1841, and the Bank sold them in 1842: the action was brought in 1846, at which time the Respondent had no right of possession.

Mr. Peacock, Q.C., for the Respondent.—Upon the argument of the Appellants, and the Judgment of the Court below, two questions arise: First, whether the endorsement was a blank endorsement; and secondly, whether there had been any negligence on the part of the Bank. I do not dispute the principle laid down in *Foster v. Pearson* (1 C. M. and R. 849), that a person taking Bills of Exchange *bona fide* for value, has a good title, though he take them without care or caution, except so far as the want of such care and caution may affect the *bona fides* of the transaction. The question, is, whether, when the notes were in the hands of A. D. Macleod, they were negotiable by bearer. If the notes had been payable to bearer, I should not deny that they were negotiable; but on the face of the notes it appears they were payable to James W. Macleod's order, and certainly he never endorsed them in blank. The third point raised by the issue, is, did the Respondent put a general endorsement on the notes. That must depend entirely on the power given to A. D. [59] Macleod by his principal; which is, to "sell, endorse and assign," or to receive payment. If, therefore, A. D. Macleod had no power to do what he has done, the endorsement was necessarily void. The endorsement mentioned in the power of attorney was for the purpose of authorizing him, as agent for the purposes of a sale, and it is clear law, that a power to sell, does not give a power to pledge. *De Bouchout v. Goldsmid* (5 Ves. 211). When a bill is offered for sale, it is incumbent on the party taking it, to inquire the authority for its transfer, and that disposes of the cases cited by the Appellants. In *Collins v. Martin* (1 Bos. and Pul. 648), and *Brandao v. Barnett* (12 Clk. and Fin. 787), the bills were payable to bearer. The taker of a bill from an agent must ascertain the authority of the agent, he must look at the power as much as if it was part of the bill, and must see that the agent does not act beyond his authority, as, if the agent does so, his acts are void. *Attwood v. Munnings* (7 Bar. and Cr. 278). Here the Bank took the word of A. D. Macleod only, that the notes were his own, and made him endorse them, making him also personally liable. *Adams v. Jones* (4 Per. and D. 474). The note was then endorsed, but not delivered for the purpose of passing it. Endorsement is *prima facie* proof of delivery, but the delivery may be rebutted. *Robertson v. Kensington* (4 Taunt. 30). It is, however, said, that A. D. Macleod endorsed to himself, that he was both agent and endorsee, and that it must be presumed that he got the note

back as a *bona fide* owner; but it is evident, that he had it merely as an agent, and in that case the Bank were bound to [60] make proper inquiries, and in not doing so they were guilty of gross negligence. *Crook v. Jadis* (5 Bar. and Ad. 909), *Backhouse v. Harrison* (5 Bar. and Ad. 1098), *Foster v. Pearson* (1 C. M. and R. 849), *Haynes v. Foster* (2 Crom. and Mee. 237), *Alexander v. McKenzie* (18 Law. Journal, N.S. 94).

There is another objection, now urged for the first time, that detainee will not lie. Such objection cannot be entertained at the present stage of the appeal, it should, if tenable, have been urged in the Court below, it is now too late.—[Lord Brougham: This is a point purely technical, and if not taken in the Court below, cannot be taken here.—Mr. Greenwood: The point was taken by the second plea, that the Plaintiff had not sufficient interest to support the action.] Detinue was the proper form of action. Comyn's Dig., tit. "Detinue," 20. *Williams v. Archer* (5 Com. Ben. Rep. 318), where all the cases are collected.

Mr. Greenwood, in reply.

Their Lordships reserved Judgment until the following appeal, which arose out of similar circumstances, was argued, when they delivered a joint judgment in both appeals (see Post, p. 71).

[See note to *Bank of Bengal v. Fagan*, 7 Moo. P.C. 76.]

[61] ON APPEAL FROM THE SUPREME COURT AT FORT WILLIAM IN BENGAL.

The BANK of BENGAL.—*Appellants*: CHRISTOPHER GEORGE FAGAN,—
Respondent * [July 7, 1849].

For head note, see the case of the *Bank of Bengal v. Macleod*, *ante*, p. 35.

This case, involving a similar question to the preceding appeal, was an action of trover brought by the Respondent against the Appellants, the Bank of Bengal, upon the conversion of eight promissory notes, or securities for the payment of money, by the Governor-General of India in Council. The plaint contained one count, which charged the Defendants with the conversion of the eight promissory notes or securities of the 4 per cent. loan, commonly called Company's paper. The Defendants pleaded, first, not guilty; and, secondly, that the Plaintiff was not possessed of the notes of his own property. Upon these pleas issues were joined.

The cause came on for trial, on the 19th of November, 1847, before Sir Lawrence Peel, Chief Justice, and Sir John Peter Grant, and Sir Henry Wilnot Seton, Puisne Judges of the Supreme Court.

[62] The circumstances which distinguished this case from the last, and which appeared in evidence, on the trial, were these:—

On the 4th of November, 1841, the Respondent, an officer on the Bengal Establishment, drew upon his bankers and agents, Macleod, Fagan and Co., at Calcutta, in favour of one Tuttle Charles, for Rs. 6000, payable at ten days after sight. The draft was presented for acceptance to Macleod, Fagan and Co. on the 9th of November, 1841. In the meantime, on the 6th of November, the Respondent forwarded a hoondie [Bill of Exchange] for Rs. 2000, endorsed to Macleod, Fagan and Co., at the same time informing them of his draft for Rs. 6000. The state of the account between the Respondent, and Macleod, Fagan and Co., if made up on the 9th of November, would have shown a balance of 6 annas, 8 pie, due from the Respondent to them. Upon the presentation of the Respondent's draft for Rs. 6000, Macleod, Fagan and Co. wrote to the Respondent, and intimated to him that they had no available funds belonging to him in their hands to meet the draft. The Respondent

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir. E. Ryan.

then agreed to give them a power of attorney, upon which they accepted his draft for Rs. 6000.

The power of attorney executed by the Respondent, and sent to Macleod, Fagan and Co., was precisely in the same form, as the power of attorney executed by Macleod, and set out in the preceding case (*ante*, p. 38).

On the 24th of November, A. D. Macleod, one of the partners in the firm of Macleod, Fagan and Co., endorsed and delivered to the Appellants, a Company's note for [63] the sum of S. Rs. 8500, payable to the Respondent, his executors or administrators, or his or their order, and bearing interest at four per cent. This paper was endorsed "A. D. Macleod, attorney, for Lieut. C. G. Fagan. Pay to the Bank of Bengal, or order.—A. D. Macleod." The Appellants paid the sum of 7600 Company's rupees to Macleod who, at the same time, signed and gave to the Appellants his promissory note of that date, payable at three months, for the sum of Rs. 7600, and interest. In this note, it was expressed that the Company's note for S. Rs. 8500 was deposited with the Appellants, as a collateral security for the repayment, as well of the Rs. 7600 and interest, as of any sums which had been or might be advanced or paid to Macleod by the Appellants, and in default of payment the Bank was authorised to sell the Company's paper, and reimburse itself, paying Macleod the surplus, which might be forthcoming from such sale; and he making good the deficiency if any. On the same day, Macleod, Fagan and Co. paid the Respondent's draft for Rs. 6000.

On the 7th of December, 1841, Macleod, Fagan and Co. endorsed and delivered to the Appellants seven other Company's notes, of two of which the Respondent was the original payee, and of the others endorsee, for sums amounting altogether to Rs. 5800. These notes were endorsed as follows:—C. G. Fagan, by his attorneys, Macleod, Fagan and Co. Pay to the Bank of Bengal, or order.—Macleod, Fagan and Co." And the Appellants, upon receiving the Company's notes, paid to Macleod, Fagan and Co. Rs. 5000, taking also the promissory note of Macleod, Fagan and Co., at three months' date, for such sum and interest, which promissory note was expressed in terms similar to [64] those used in the note given on the 24th of November, by A. D. Macleod, that the seven Company's notes had been deposited as collateral security for repayment of Rs. 5000, and interest, and of all sums which had been, or might be, advanced or paid to Macleod, Fagan and Co. by the Appellants.

Default having been made in payment, the Bank of Bengal sold the several notes, so delivered to them, in February and March, 1842, and realized the amount.

Macleod, Fagan and Co. became insolvent, and on the 16th of May, 1844, an account was rendered to the Respondent by the assignee of the Insolvent Court, at Calcutta, in whom the estate of Macleod, Fagan and Co. had become vested. The Respondent corresponded with the official assignee on the subject of the estate of Macleod, Fagan and Co., and received a dividend on the balance due to him upon his account with that firm, in which the proceeds of the Company's notes in question were included.

Upon this evidence, a verdict was found for the Respondent, with Rs. 12,908. 2. 5. damages. On the 23rd of November, a rule was granted upon a motion on behalf of the Appellants, pursuant to leave reserved at the trial, calling upon the Respondent to show cause why the verdict entered for the Respondent should not be set aside, and a verdict be entered for the Respondent on the issue taken on the first plea, and for the Appellants on the issue taken on the second plea, or why a nonsuit should not be entered.

On the 13th of January, 1848, after argument, the Court discharged the rule, with costs. Sir Lawrence Peel, Chief Justice, delivered the judgment of the Court, as follows:—

[65] "This case is, in our opinion, undistinguishable in principle from that of *Macleod v. The Bank of Bengal*. Both are founded on authorities which, if they are not to be followed, must be overruled by a higher tribunal than this Court. The grounds upon which it is sought to distinguish the present case, appear to us to be untenable. We think there was no recognition. The evidence does not show a sale in fact by Macleod, Fagan, and Co., to themselves, supposing such a sale to have been legally valid. We view this sale as a mere fiction; it is ingeniously introduced to support an argument which would otherwise rest on no foundation.

The evidence shows, that the Plaintiff was subsequently informed of a sale, but it does not show that he knew the real circumstances; and there is no evidence of any sale except that by the Bank of Bengal, which is not the sale which the argument treats as recognised: but an imaginary sale by Macleod, Fagan, and Co., for the Plaintiff, to themselves, is the subject of the supposed recognition. It is said that Macleod, Fagan and Co., had a lien, and that they transferred that lien to the Bank of Bengal. Macleod, Fagan, and Co., undoubtedly had a lien; but if the nature of it be considered, the consequence to the Plaintiff's success in this action, which it is sought to deduce, will not follow. The Bank of Bengal sold these securities. This act could be supported under the power of attorney alone. For the paper was specially endorsed to the Plaintiff, and has been by him unendorsed, unless the power has been executed. If Bills of Exchange are drawn, payable to the order of A., and A. pays them into his Banker's hands without endorsing them, it is obvious, that though A. may become subsequently indebted to his Banker, [66] and his Banker may have a lien on those bills, that this lien does not operate to transfer a property in such bills, and is only an equitable interest. The debts which they secure and evidence, are transferrable by the custom of Merchants, but transferrable by the custom in such a case by endorsement only, not by delivery without endorsement: the bills not being in a state that the property in them can pass by delivery. *Collins v. Martin*, (1 Bos. and Pul. 648,) will, if it be attentively examined, show that it is the nature of the property in bills, which enlarges the power of alienation over that which exists as to mere chattels. Without a valid endorsement, no property in these specially endorsed securities could be transferred to the Bank, so as to prevent their sale from operating as a conversion; and by a conversion their lien would for any defensive purposes in this action be destroyed. The question is, therefore, simply this: was the power exercised or abused? We think upon the evidence, that it was grossly abused. If such an exercise of a power could be supported, then a lien might be enlarged to the prejudice of the owner by the fraud of the agent. It is, therefore, in our opinion, clear, that the Bank of Bengal could not be in a better position than Macleod, Fagan, and Co., against the Plaintiff. They, Macleod, Fagan, and Co., could sell the Plaintiff's paper and confer property in it, if they followed the authority conferred: that authority, if the correspondence and the power be looked at, was not to pledge the paper, still less to pledge it to another for their own advantage. The sale by the Bank was unauthorised, since the pledge to the Bank was an unauthorised pledge. The real contract between the Bank of Bengal, and Macleod, Fagan, and Co., was not [67] a contract that the latter should transfer their lien, but it was a totally different contract: and it cannot be viewed now otherwise, because it is found to be unsupportable as it really was. What ground there is for assuming a sale by Macleod, Fagan, and Co. to themselves is best tested by this: whether on this evidence if they had retained the paper and it had risen in value, and the Plaintiff tendering to them the amount of their advances had claimed to have his paper back, they could have said: 'Look at these endorsements made by us as your attorneys: the property is ours: we have sold to ourselves, and we will take advantage of the rise in the value.' The Plaintiff is, in our opinion, entitled to retain his verdict. It is not, in discussion, under this rule, whether the verdict should stand for the full amount of the damages, or for that sum reduced by the amount of Macleod, Fagan, and Co.'s lien against the Plaintiff. The Defendant has not availed himself of the leave offered him at the trial, to move to reduce the damages, as we understand, because that reduction might prejudice his right of appeal. Upon that point, therefore, we express no opinion. If this case be appealed, and our decision be sustained on the main question, then if the Defendant is entitled at law to a reduction of the damages to the extent of the lien of Macleod, Fagan, and Co., against the Plaintiff, the evidence furnishes the means of making that reduction, if the verdict not questioned now on this point can be appealed against on that ground. The Plaintiff, if he be legally entitled to retain his full damages, is certainly a trustee for the surplus: whether for the Bank of Bengal or for the creditors of Macleod, Fagan, and Co., it is not necessary for us to decide. A mere equitable lien could not, we [68] apprehend, furnish ground for a reduction of damages in an action of law; and whether the lien of Macleod, Fagan, and Co., be treated as merely a common law lien on a chattel, or

as a lien on a negotiable instrument, needing endorsement, and unendorsed, still the lien of their transferee, the Bank, would be but equitable, if the power of attorney was not duly exercised. A lien on a mere chattel, is not at common law transferrable, *Legg v. Evans*, (6 Mee. and Wel. 42,) and the case is not within the Factor Act. That the transfer for a valuable consideration of an unendorsed bill or note, payable to order, confers only an equitable right. *Watkins v. Maule* (2 Jac. and Wal. 243)."

Judgment was afterwards signed for the amount of such damages and costs.

From this judgment, the Bank of Bengal appealed to Her Majesty in Council, and the case came on for hearing at the same time as the appeal of *The Bank of Bengal v. Macleod* (*ante*, p. 35).

Sir Frederick Thesiger, Q.C., Mr. Greenwood, Q.C., and Mr. Hare, for the Appellants.—The notes in question were negotiable instruments, and came into the hands of the Appellants, in the course of their business as Bankers. Macleod, Fagan, and Co., were the agents at Calcutta of the Respondent, to whom they had advanced money, on the securities of those very notes, and he in return empowered them to endorse the notes; which they did, for value received, to the Appellants. The Appellants have nothing to do with the alleged fraud of Macleod, Fagan, and Co., in pledging the notes, they could have no reasonable grounds for suspecting that they were improperly dealing [69] with the notes. The question really turns upon this, whether the power was properly exercised by them. The form of the power of attorney granted by the Respondent to Macleod, Fagan, and Co., is to "sell, endorse and assign," and may, therefore, be read distributively or conjunctively, as you please. *Baldwin's Case* (Leon. 74). The Bank were authorised by law in selling. In *Stierneld v. Holden* (4 Bar. and Cr. 5) the pledge sold, and it was held that he could not be sued in trover for bills of lading. Every deed is to be taken most strongly against the grantor. He cannot defeat his own grant. Comyn's Dig., tit. "Grant" (E 14). But it is said that the power to endorse is auxiliary only: that is not so; it is the real object of the power. In *Murray v. The East India Company* (5 Bar. and Ald. 204), and *Fenn v. Harrison* (3 Term. Rep. 757, 4 Term. 177), there was no authority given by the power to endorse; those cases, therefore, are distinguishable from the present. *Ex parte Twogood* (19 Ves. 229), *Ex parte Pease* (19 Ves. 25), and *De Bouchout v. Goldsmid* (5 Ves. 211), are to the same effect.

Mr. Serjeant Byles, Mr. Peacock, Q.C., and Mr. Maude, for the Respondents.—The power of attorney given to Macleod, Fagan, and Co., was for the purpose of enabling them to deal with the notes, as agents for the benefit of the Respondent, it did not give them any authority to pledge the notes; their pledging or assigning them to the Appellants was, therefore, a fraud upon the Respondent. An unauthorised endorsement conveys no more title than a forgery, and [70] the question, is, whether this endorsement entirely converted the note, into a bill payable to bearer, and if so, was it authorised. Powers of attorney are to be construed and limited to their expressed particular object. Chitty, "On Bills of Exchange," p. 29. (9th Edit.) In this case there is no power given to pledge. The authority is "to sell, endorse and assign." It is admitted that the notes were pledged for the personal use of Macleod, Fagan, and Co., at less than their value, and that the agent also gave his promissory note to the Bank. An agent cannot deal for himself at law or in equity. *Farebrother v. Simmons* (5 Bar. and Ald. 333), *Brookman v. Rothschild* (3 Sim. 153, S.C.; 5 Bli. N.S. 165), *Marshall v. Kinner* (1 Stark. 499). If the word "endorse" had been the only word, he could have sold; but we submit that the word "endorse" is controlled by the context, and these words must be taken collectively, and that the Appellants wholly failed in making out any defence to the action. There was quite sufficient grounds to induce the Bank to suspect that Macleod, Fagan, and Co., were dealing improperly with the notes. They also referred to *Watkins v. Maule* (2 Jac. and Wal. 237), *Queiroz v. Trueman* (3 Bar. and Cr. 342), *Stierneld v. Holden* (4 Bar. and Cr. 5), *Shipley v. Kymer* (1 Mau. and Sel. 484), *Kuckein v. Wilson* (4 Bar. and Ald. 443).

Mr. Greenwood, in reply.—The power "to sell, endorse and assign" is general. The Bank of Bengal had no reason to suspect fraud on the part of Macleod, Fagan, and Co., if, indeed, there was any. It was perfectly reasonable to suppose, that as the balance was against Fagan, and he wanted money, [71] he wished to raise money

by pledging the notes. It might be imprudent at that time to sell them, when the money could be raised by pledging.

On the 19th of July, 1849, judgment was delivered in this appeal, and also in the preceding case of *The Bank of Bengal v. Macleod* (see *ante*, p. 35), by

Lord Brougham.—Both these cases involve the same question, and depend mainly on the decision of that question. If it be determined in the Appellants' favour, in the first appeal, they are both decided for them; if that be given against them, special circumstances, peculiar to the second appeal, require to be considered.

That question relates to the authority which the house of Macleod and Co., agents of James William Macleod, in the one case, and of Captain Fagan, in the other, had to indorse the paper belonging to these principals, and deposited with them as agents, and the authority is the same in both cases; for although a correspondence, peculiar to the second, is relied upon, as qualifying or limiting the authority, it does not appear to us to possess that virtue: even supposing it could be imported into the consideration of the case, and allowed to influence the construction of the power of attorney, on which the authority of the agents rests.

It is admitted, on all hands, that if Macleod and Co., having the Bills in their possession, had no power to endorse them, their act of endorsement would convey no title to the party taking and discounting them, any [72] more than a forgery would do. It is equally admitted, on the other hand, that if they had the authority to endorse, their endorsement passed the property. It may be taken as also established, that whatever may have been the law laid down in *Gill v. Cubitt* (3 B. and C. 466), and *Down v. Halling* (1 B. and C. 330), and one or two other cases, and not abandoned, at least, as far as the language went, which the Court used in some subsequent cases, is now law no longer: and that the negligence of the party taking a negotiable instrument, does not fix him with the defective title of the party passing it to him. Thus, the main and fundamental question is, had Macleod and Co. authority to endorse under the power of attorney? which is in the same words in both cases.

It is to "sell, endorse and assign, or to receive payment of the principal according to the course of the Treasury—and to receive the consideration-money, and give a receipt for the same." It is contended for the Respondent, that the words, "sell, endorse and assign," used conjunctively, cannot be used in the disjunctive, but that the only power given to endorse is one ancillary to sale, and that we are to read it, as if it were, power to sell, and for the purposes of selling, to endorse. This construction is endeavoured to be supported by referring to the variation of "or" for "and" immediately following—"or to receive the money at the Treasury." We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. The matter first dealt with, is the use of the paper as a continuing and subsisting instrument; as securities not paid off, the matter afterwards dealt with, is the receiving of the money due on these securities, when paid off, and [73] when they ceased to exist—it is called "payment of the principal," and then follows a like power to receive the consideration-money, and give receipts; that is, to receive the money, and give receipts for the money arising from the sale, endorsement, and assignment, because to that alone could this clause apply—the giving up the paper to the Treasury, authorized by the second clause, requiring no receipt whatever.

The change of "and" for "or" in the second clause does not, therefore, appear at all to alter or affect the construction of the first clause or member of the sentence. Shall we, then, say, that a power to "sell, endorse, and assign," does not mean a power to sell, a power to endorse, and a power to assign? And would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction, we must hold, that these words not only give no powers to endorse, without selling, but also, that they give no power to sell without endorsing, and we must suppose the agent acting under such a power to be entirely crippled. Now, as there can be no doubt that this is a general form for powers of attorney to deal with negotiable instruments, and that in the general case, whatever may have been the understanding in the case at the Bar, the power to endorse is intended to be conveyed. Were we to adopt the Respondent's construction, we should sanction this position, not only that all powers now existing and acted on, and which have

been acted on, if conceived in this form, are most defective, indeed, almost inoperative, and that what has been done under them, and is now done under them, is insufficient to convey a title to the taker of the negotiable instrument, but that in future, to make such powers complete, indeed, [74] to render them useful, a new and very tautologous phraseology must be adopted, as this "power to sell, and also to endorse, and also assign, or to endorse without selling, or to assign without selling or endorsing, or to sell without endorsing," and so forth. It appears to us, that the rational and the natural construction is the one which represents a power "to sell, endorse, and assign," as a power to sell, a power to endorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally. The elliptical mode of expression, by not repeating the words "a power," or "full power," we consider to be thus properly supplied, and the expression thus justly expounded in the ordinary mode of parlance.

But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only saying, that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said, that even if the expression be read as only amounting to this, the endorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the endorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the endorsee's title must depend upon the authority of the endorser, it cannot be made to depend upon the purposes for which the endorser performs his act under the power.

We find great reason to commend the ability and learning and diligence shown in the Judgment delivered below. But it would have been more satisfactory to have found that the argument, as urged before us in support of the Judgment, had been considered by that Court. On the contrary, we cannot find any reference to the terms of the power, either in the Judgment or in the reasons given in the petition of appeal. The Court seems to have assumed, that there was no authority to endorse. Indeed, the printed cases do not themselves seem to take the point, or to raise the question; and yet the Respondent here distinctly admits that the Judgment cannot stand, if there was the power to endorse generally.

I have seen, since the argument, the printed forms used at the India House, of powers of attorney. They are all in the words here used, "endorse, sell and assign," and their title, which is placed in red ink at the top of the page, shows the meaning affixed in practice, to those words. It is, power "to sell or endorse."

Much reliance was placed by Respondents on the case of *De Bouchout v. Goldsmid* (5 Ves. 211). But the question there was, whether shares could be pledged by an agent acting under power "to sell, assign and transfer," and the undisputed law, as to his being unable under an authority for selling, to pledge goods of his principal, was held applicable to shares as well as goods. The question here arises on a negotiable instrument, and it was by no means decided in the case referred to, that a power to "sell, endorse and assign," is confined to selling, without extending to endorsing. The frame of the two powers upon the construction of which the whole question here turns, is entirely different in the two cases. In the case of *De Bouchout v. Goldsmid*, there are only the words "sell, assign and transfer;" and no word of pledging, [76] or referring to deposit, at all. In 1834, I examined fully all the cases within the principle of *De Bouchout v. Goldsmid*, in the case of *Wilson v. Moore* (1 Myl. and K. 337),—approximating to the former case, and I am informed that this decision of *Wilson v. Moore* has since been constantly cited, as ruling the question; but I must remark, that in the judgment there given, I cited the cases of *Gill v. Cubitt* [3 B. and C. 466], and *Down v. Halling* [4 B. and C. 330], as having gone far to overrule *Lawson v. Weston* (4 Esp. 56). These cases are no longer law, and Lord Kenyon's opinion is set up and supported by all the lawyers.

As we are with the Appellants on this fundamental point, in both cases, it becomes unnecessary to say anything of the peculiar circumstances, which distinguish the second from the first appeal. There must be a reversal in both appeals.

In answer to the question of Counsel respecting the form of the Order to be made,

Lord Brougham said, that the judgment in both appeals being reversed, the De-

fendants ought to be placed in the same situation, as if there had been a verdict for them in the first instance: and there being no jury at Calcutta, the Court being both Judge and jury; it would, therefore, be out of all question to grant a new trial. The verdict must, therefore, be entered for the Defendants, in both cases.

By Orders in Council, bearing date the 30th day of July, 1849, it was ordered, that the Judgments of the Supreme Court of Fort William in Bengal, be and the same were thereby reversed, and that verdicts be entered for the Defendants in the said causes or actions.

[Mews' Dig. tit. BILLS OF EXCHANGE, C. CAPACITY AND AUTHORITY OF PARTIES, 1. *Agents*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principles on which Privy Council Acts*, 6. *Practice*, h. *What points may be raised*: tit. PRINCIPAL AND AGENT, II. POWER OF ATTORNEY, C. *Extent of Authority Conferred*. S.C. 5 Moo. Ind. Ap. 1.; 13 Jur. 945. On point as to construction of Power of Attorney, Dist. *Joumenjoy Coondoo v. Watson*, 1884, 9 App. Cas. 561, held not to lay down principle of construction, *Lewis v. Ramsdale*, 1886, 55 L.T. 180.]

[77] ON APPEAL FROM THE SUPREME COURT AT AUCKLAND.
NEW ZEALAND.

The QUEEN (by Her Attorney-General for New Zealand).—*Appellant*: GEORGE CLARKE,—*Respondent** [July 6, 1849, and May 15, 1851].

Heard *Ex parte*.

Quære.—Whether the Governor of the Colony of New Zealand, has, under his general authority, as such Governor, vested in him, so much of the prerogative of the Crown, as relates to the making of grants of waste lands within the Colony? [7 Moo. P.C. 83, 84].

A grant of lands made by the Governor to a land claimant, founded upon the recommendation contained in the report of a Commissioner, such grant embracing a quantity of land exceeding the amount prescribed by Ordinance, Sess. 1, No. 2, of 1841. Held, in *scire facias*, void, and judgment given for the Crown [7 Moo. P.C. 83, 84].

This was a proceeding in *scire facias*, to annul a grant of land, made by the Governor of the Islands of New Zealand, in the name of the Crown, in favour of the Respondent, George Clarke, his heirs and assigns, by Her Majesty's Attorney-General for the Colony of New Zealand, by virtue of a warrant under the hand of the Governor and Commander-in-Chief of the Islands of New Zealand, and issued under the public seal of the Islands. The writ recited, that by certain deeds of grant, dated the 16th of May, 1841, and signed by Robert Fitz Roy, Esquire, then Governor, and signed with the public seal of the Colony, certain por-[78]-tions or parcels of land in the deeds more particularly described, amounting in the whole to 5500 acres, were granted unto the Respondent, his heirs and assigns: and reciting, that Her Majesty was given to understand that the grants were issued unlawfully, and contrary to the provisions of a certain Ordinance, Sess. 1, No. 2 (passed 9th June, 1841), and that the same ought to be declared void and annulled, and the Sheriff was commanded to make known to the Respondent, that he was to appear before the Court to show why the deeds of grant so made to him, ought not to be declared void, and annulled.

The Respondent having appeared to the writ, the Attorney-General declared in *scire facias* against him. The declaration alleged, that the grant of the 16th of May, purported to convey to the Respondent, his heirs and assigns, all that allot-

* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, Sir John Jervis, Knt., and Sir Edward Ryan, Knt.

ment or parcel of land, said to contain 4000 acres, more or less, situated between Wainmate and Hobianger; that the 4000 acres, comprised in and purported to be granted by the grant were claimed by the Respondent, as having been purchased by him from certain of the natives of that country, before the proclamation of the Queen's sovereignty over the Islands; that the claim of the Respondent was duly referred for investigation, pursuant to the provisions of the Land Claims Ordinance, Sess. 1, No. 2, to two Commissioners, Godfrey and Richmond, who duly heard and examined the same, and on the 13th of May, 1843, reported upon the same, for the information and guidance of the officer for the time being administering the government of the Colony: that the said Commissioners were not [79] authorised by the Governor in Council to recommend a grant of land to the Respondent, exceeding 2560 acres; that the Commissioners, by their report dated 13th day of May, 1843, recommended that a portion only of the land claimed, namely, 2560 acres, should be granted to the Respondent; that the report was confirmed by the Officer administering the Government, for whose information and guidance the same report was made, and that the confirmation of the report was published in the "New Zealand Government Gazette," of the 21st of June, 1843; that subsequently, on the 16th of May, 1844, the grant thereinbefore mentioned was made by Robert Fitz Roy, Esquire, the then Governor of the Colony of New Zealand, to the Respondent; and the Attorney-General thereby further said, that the Grant of the 16th of May, 1844, ought to be declared void, annulled, and set aside for the following reasons:—1st. Because the grant was contrary to the Commissioners' report so made and confirmed as aforesaid; 2ndly. Because no greater quantity than 2560 acres of land could be granted to any claimant under the provisions of the Land Claims Ordinance, except upon the recommendation of the Commissioners who heard and examined the claim, in manner prescribed by the said Ordinance, being specially authorised thereto by the Governor, with the advice of the Executive Council.

To this declaration, the Respondent pleaded, that subsequently to the reference to, and the report of, the Commissioners, and on the 1st of May, 1844, Robert Fitz Roy, Esquire, the then Governor, referred the claim of the Respondent to Fitzgerald, a Commissioner duly appointed under an Ordinance, Sess. 3, [80] No. 3, intituled "Land Claims Amendment Ordinance," who, on the 2nd of May, 1844, sent in to Robert Fitz Roy, Esquire, a report, whereby Fitzgerald recommended that the Respondent should be allowed Crown grants for 5500 acres, less exceptions. And the Respondent further said, that the 4000 acres comprised in the deed of grant, were part of the 5500 acres in the Report mentioned, and that the deed of grant was made in pursuance of the report of the last-mentioned Commissioner.

The Attorney-General filed a demurrer to this plea, by reason, that the plea was insufficient in law, for the following reasons: 1st. That the Commissioner, Fitzgerald, was not, nor was any single Commissioner, authorised by the provisions of the Land Claims Amendment Ordinance, Sess. 3, No. 3, to re-hear claims, or to reverse reports already duly heard, investigated and reported upon by two Commissioners, pursuant to the provisions of the Land Claims Ordinance, Sess. 1, No. 2, which he had not heard and examined in manner prescribed by that Ordinance. 2ndly. That the single Commissioner, Fitzgerald, was not, nor was any single Commissioner, authorised to report upon claims to land under the Land Claims Ordinance, Sess. 1, No. 2, which he had not heard and examined in manner prescribed by the Ordinance. 3rdly. That it was not alleged, in the plea, that the Commissioner, Fitzgerald, was specially authorised by the Governor in Council to recommend a greater quantity than 2500 acres of land to be granted to the Respondent.

It was admitted by the parties that the report and recommendation of the Commissioner, Fitzgerald, were not preceded by, or made in pursuance of, any [81] special authority given for that purpose by the Governor, with the advice of the Executive Council, as required by the Land Claims Ordinance, and it was agreed that this admission should have the same effect in all respects as if it had been made in the body of the pleadings.

The Supreme Court upon the hearing of the demurrer, gave judgment for the Respondent, upon the following grounds:—First: that the New Zealand Charter

of 1840 (a) placed in the hands of the Governor (among other things), so much of the Royal prerogative as related to the making of grants of waste lands. Second. That such prerogative could only be taken away or restrained within the Colony, by the express words of an Ordinance or Statute. Thirdly. That the Land Claims Ordinance, not only contained no such express words restraining the exercise of the prerogative, so vested in the Governor, but contained a clause expressly saving the prerogative: and, Fourthly, that although the Governor, Fitz Roy, had departed from the spirit of the Ordinance, in making a grant of more than 2500 acres, upon a report which was inconsistent with the Ordinance, yet he could, [82] in the absence of any false suggestion by the grantee himself, legally make such a grant, and for these reasons the Supreme Court held, that no sufficient legal ground had been disclosed for avoiding the deed of grant.

The Attorney-General, upon Petition, applied (6th July, 1849) for leave to appeal direct to Her Majesty in Council, from this judgment, which was granted.

The Respondent did not appear, and the appeal now came on for hearing, *ex parte*.

The Attorney-General (Sir Alexander Cockburn), and Mr. W. N. Welsby, in support of the appeal.—The deed of the 16th of May, 1844, granting to the Respondent 4000 acres of land, is altogether void. It purports to grant a greater quantity of land than could be granted by law. Section 3 of the Land Claims Amendment Ordinance, Sess. 1, No. 2, expressly provides, that no grant of land shall be recommended by the Commissioners, which shall exceed, in extent, 2560 acres, unless specially authorized by the Governor with the advice of the Executive Council. In this case it is admitted by the pleadings, that there was no such authority: but the Respondent relies upon a subsequent Ordinance, Sess. 2, No. 14. By this Ordinance, so much of Ordinance, Sess. 1, No. 2, as restricts grants of land to 2560 acres, was repealed. This Ordinance, however, cannot be relied upon by the Respondent, as authorizing the grant, as it never had the effect of law in the Colony, not having been allowed by the Queen in Council in England, as was necessary to give it the force of law. Colonial Acts are not valid till allowed by the Queen in Council. [83] The consequence of the disallowance of this Ordinance, was the revival of the Ordinance, Sess. 1, No. 2. A grant, to be valid, must be made upon the report of two Commissioners. Here, it was made upon the report of a single Commissioner, in pursuance of the provisions of Ordinance, Sess. 3, No. 3. That Ordinance however does not authorize a single Commissioner to rehear claims, or to reverse reports already heard and reported by two Commissioners, pursuant to Ordinance, Sess. 1, No. 2, which had not been heard and determined in the manner prescribed by this latter Ordinance. A deed of grant upon such a report was an exercise of a power which the law did not allow. The recommendation being illegal, it follows, that the grant founded upon it, was also illegal and void. It is not pretended that the Commissioner was specially authorized by the Governor, with the advice of the Executive Council, to recommend a greater quantity of land than 2560 acres, to be granted to the Respondent: the Respondent rests his title upon the Ordinance, Sess. 3, No. 3. It is clear, that upon these grounds this judgment cannot stand.—[Dr. Lushington: The judgment of the Court below, proceeds upon the ground, that the Governor representing the Crown, had authority to make this grant, independently of the Ordinances.]—He has no such power. A Governor of a Colony is not invested with all the prerogative of the Crown. The power of granting land is part of the prerogative of the Crown. The

(a) The Charter of 1840, so far as it relates to the powers conferred on the Governor of New Zealand, is as follows:—"And we do hereby give and grant to the Governor of our said Colony of New Zealand for the time being, full power and authority in our name and on our behalf, but subject, nevertheless, to such provisions as may be in that respect contained in any instructions which may from time to time be addressed to him by us for that purpose, to make and execute in our name and on our behalf, under the public Seal of the said Colony, grants of waste land to us belonging within the same to private persons, for their own use and benefit, or to any persons or bodies politic or corporate in trust for the public uses of our subjects there resident, or any of them."

Governor's power is limited by his Commission, and the Royal instructions. In this case, moreover, the Ordinance expressly limits the Governor's power, for it says, that all titles to land, acquired by purchase from the natives, shall be wholly void, except such as are [84] allowed in virtue of proceedings instituted under the Ordinances, and in conformity to them. The Respondent in his answer to the declaration does not rely upon the grant, as emanating from the Governor by virtue of any authority inherent in him in his capacity as Governor, he expressly justifies under Ordinance Sess. 3, No. 3.

Judgment was delivered, as follows, by

The Right Hon. T. Pemberton Leigh (May 15, 1851).—Their Lordships have looked carefully through the papers in this case, and they are of opinion, that the judgment cannot be supported.

This is a case, in which a grant has been made by the Governor of New Zealand, under an Ordinance passed to give effect to the report of a Commission issued in pursuance of a previous Ordinance. That report was admitted by the Judges to be inconsistent with the Ordinance under which it was made, and that so far, therefore, as the grant professed to be in confirmation of that report, it would necessarily fall to the ground. They were of opinion, that inasmuch as there is a provision in the Statute, 3 and 4 Vict., c. 62, under which the Charter of 1840 was granted, that it shall not affect the prerogative of the Crown, the grant might take effect under the general authority on the part of the Governor to make grants; but we are clearly of opinion that, whatever the authority of the Governor might be, this is not a grant professing or intended to be made, as a matter of bounty or grace, from the Crown, but it is only intended as a confirmation of that report, which was made under the authority of the Ordinance. The grant is founded upon the report, and the report is [85] founded upon the Ordinance. It is clearly contrary to the terms of the Ordinance, and, therefore, the grant must fall, and the judgment upon the *scire facias* must be for the Crown.

[Mews' Dig. tit. CROWN; D. CROWN GRANT. As to propriety of proceeding by *scire facias* to annul grants of Crown Lands, see *R. v. Hughes*, 1865, L.R. 1 P.C. 81; 3 Moo. P.C. N.S. 439.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

The EAST INDIA COMPANY,—*Appellants*; ODITCHURN PAUL,—*Respondent*.
[Dec. 5, 6, 1849].

The Statute of Limitations, 21 Jac. 1., c. 16, extends to India [7 Moo. P.C. 100]. The Statute 9 Geo. IV., c. 14, (extended to India by the Indian Act., No. XIV. of 1840,) held to apply to an action pending in the Supreme Court at the time of its introduction into India [7 Moo. P.C. 113].

In assumpsit, the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the breach, and not from the time of the refusal to perform the contract [7 Moo. P.C. 111].

In 1822, A. purchased at a Government sale, at Calcutta, a quantity of salt, part of a larger portion then lying in the warehouse of the vendors (the Government) where the salt was to be delivered. By the conditions of sale, it was declared, that on payment of the purchase-money the purchaser should be furnished with permits to enable him to take possession of the salt; there was also a stipulation that the salt purchased, should be cleared from the place of delivery within twelve months from the day of sale, other-

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh. Assessor—Sir Edward Ryan, Knt.

wise the purchaser was to pay warehouse rent for the quantity then afterwards to be delivered. The purchaser paid the purchase-money, and received permits for the delivery of the salt, which was delivered to him in various quantities, down to the year 1831; in which year, an inundation took place, which destroyed the salt in the warehouse, and there remained no salt to satisfy the contract. The purchaser petitioned the vendors for a return of the purchase-money, which was refused, on the ground, that the loss happened through his negligence in not sooner clearing the salt from the warehouse. An inquiry, however, took place at the instance of the Government, who referred the matter to the Salt Collector for a report. This inquiry was made by the Government without the purchaser being a party to it. The Collector did not make his report till the year 1838, and upon that report, the Government refused to return the purchase-money, claimed in respect of the deficient salt. The purchaser then brought an action of assumpsit for recovery of the purchase-money of such part of the salt as had not been delivered, alleging, as a breach, the non-delivery thereof. To this the Defendants pleaded the Statute of Limitations, that the cause of action had accrued within six years before the commencement of the suit. The Supreme Court at Calcutta found a verdict for the Plaintiff. Held, upon appeal, reversing such verdict, that when the purchaser applied for the residue of the salt, and was told that there was none to deliver, the contract was broken, and the cause of action accrued from the time of such breach; and that the subsequent inquiries by the Government did not suspend the operation of the Statute of Limitations, till the year 1838, the time of the final refusal, and that the remedy was barred by the Statute [7 Moo. P.C. 104, 111].

Semble.—There may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the Statute of Limitations, in respect of the time employed in the inquiry, and an action might be brought for a breach of such agreement [7 Moo. P.C. 112].

At the trial, certain documents contained in the Schedule to the answer of the Defendants to a Bill of Discovery filed in Equity were read as evidence for the Plaintiff, but the Court refused to allow the Defendants to read the answer to which the Schedule was annexed. Held, that as the Supreme Court at Calcutta, being jurymen as well as judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue, which could influence their verdict, a new trial on the ground of such refusal, would not be granted [7 Moo. P.C. 102, 103, 107].

This was an appeal against an order made by the Supreme Court at Calcutta, refusing a new trial in an [86] action of assumpsit, brought by the Respondent to recover damages from the Appellants for part of the purchase-money of a quantity of salt. The action was grounded on the non-performance by the Appellants, of the contract to deliver the whole quantity of salt sold.

The facts of the case, as they appeared in evidence at the trial, were as follows:—

In the month of March, 1822, a public sale of salt belonging to the Appellants took place at Calcutta in pursuance of an advertisement. Amongst the salt advertised for sale were 230,000 maunds in the zillah of Hidgellée, and 160,000 maunds in the division or zillah of Tumlook, the former of which places lies on the sea-coast, to the south-west of Calcutta. By the [87] conditions of sale, contained in the advertisement, the salt was to be transported from the places of delivery, which were fully detailed in an advertisement published at the Government office, at the risk of the purchasers. On a payment in ready money being made, an order was to be immediately issued by the Secretary to the Board of Customs, Salt, and Opium, for the delivery of a quantity of salt equivalent to it, and the merchant was to be furnished with the order for delivery, and such rowannahs (permits) as he might require for the salt, on his paying the rowannah fees as usual. It was further declared and stipulated, that all lots be cleared out from their respective places of delivery within the period of twelve months from the day of sale, and that in failure of such clearance, the purchaser should be subjected to the payment of golah (warehouse) rent.

at the rate of Rs. 5 per 1000 maunds, per mensem, and a deduction for wastage at the rate of half a maund per 100 maunds per mensem, to commence from the expiration of the allotted period of clearance. That such lots as were not cleared out within the above period of twelve months, should be retained by the Salt Agent, or Superintendent of the golahs, until the claim for golah-rent should have been adjusted; or such portion thereof should be sold by public sale, as the Board of Customs, Salt, and Opium, might deem requisite, for realizing the amount due.

The sale took place on the 15th of March, when the Respondent became the purchaser of 34,000 maunds, of the years 1227 and 1228, B.E., then lying in golahs of the Appellants, in zillah Hidgellee, and [88] 1000 maunds in other golahs in zillah Tumlook, at which golahs the salt was to be delivered.

The purchase-money for the salt having been paid, the Respondent was furnished with chauris, or delivery-orders, from the Secretary of the Board of Customs, dated 2nd of July, 1822, for the salt, and of one of which the following is a copy:—

“ Hidgellee Division.

“ Kalleenagur District, 995 maunds of 82 sicca weight. Oditchurn Paul having paid for the clearance of 995 maunds of salt of 1228, being in full of his purchase of lot No. 34, on the 15th of March, 1822, you will please to weigh off and deliver the same to him on receipt hereof, but not suffer to be removed from the ghaut till the rowannahs for the salt shall be produced to you, after which you are to let it pass without further delay.”

At the same time the Respondent was furnished with rowannahs for the removal of the salt, current for one year from their date.

The Respondent omitted to remove the salt, and in the month of May, 1823, more than twelve months after the purchase of the salt, while it still remained in the golahs of the Appellants, an extensive inundation of the sea occurred in the district of Hidgellee, where the golahs containing the salt were situated, and the consequence was, that a quantity of the salt purchased by the Respondent was destroyed, and a portion of the residue was deteriorated in value. A portion of the salt that remained was removed, but down to 1831, a quantity of it still remained in the golahs.

From the time of the sale, with the exception of certain renewals of the rowannahs made on the application of the Respondent, no communication was [89] received by the Board from the purchaser of the salt until 1827. On the 27th of February, in that year, a petition was presented by the Respondent, to the Board, in which, after stating that he had sold the salt to sub-purchasers, who had afterwards failed in business, he prayed, that in consideration of the heavy loss which he must suffer, the Board would order a remission of golah-rent and deduction for wastage, to which he had become liable. The Board authorised the remission solicited by him, of wastage and golah-rent mentioned in his petition.

On the 21st of May, 1827, the Respondent presented another petition to the Board, in which he stated, that the 34,000 maunds of salt purchased by him, which were lying in the golahs in Hidgellee, remained still uncleared, and that the salt was unsaleable in consequence of the injury which it had sustained from the inundation, and also stated that the rowannahs for the delivery of the salt were then pledged with Mehajuns or bankers, and he prayed an order that the purchase-money, with interest, might be returned to him.

The Board referred this Petition to their salt agents at Hidgellee, who reported thereon, denying the allegation contained therein; whereupon the Respondent presented other Petitions to the Board, which were similarly referred, and the Board ultimately determined they could make no order.

In November, 1830, renewed rowannahs, for the period of six months, were obtained by the Respondent, and in January, 1831, application was made in the name of the Respondent, for part of the salt; and the salt agent, not being satisfied whether the golah-rent and wastage, as stipulated by the original conditions of sale, ought or ought not to be charged, he, on the [90] 11th of January, 1831, wrote to the Board for directions on the subject. In the same month, viz. on the 25th of January, 1831, Juggomohun Seal and Anundmohun Seal, who represented themselves as the pledgees of the rowannahs granted to the Respondent, presented a

petition, stating the doubt raised by the salt agent, and praying that the salt might be ordered to be delivered without deduction.

In consequence of these communications, the Board sent the following directions to the salt agent:—"The golah-rent and wastage adverted to by you were remitted by the Board on the 21st of March, 1827, under a promise on the part of the holder that the salt should be cleared from the public golahs immediately. Nearly four years having elapsed since that period, and so long a delay after the assurances given, would fully justify the Board's non-observance of a conditional promise altogether. They are not desirous, however, to press too hardly on the holders of the chauras and rowannahs, as they are believed to have suffered considerably by these transactions with Ramrutton Mullick (the original purchaser); they will therefore forego any claim on the part of the Government to golah rent or wastage, due prior to the 21st of March, 1827, but as, after that period, it was entirely the fault of the holders that the salt was not cleared out on the most favourable terms for themselves, they see no reason why any abatement should be made in the demands of the department; they therefore request that you will levy golah-rent and wastage on the salt from the 21st of March, 1827."

On the 29th of January, 1831, Juggomohun Seal presented a fresh petition, in which he submitted that the circumstance of the salt not having been exported [91] immediately was not imputable to the negligence of the merchant; that by reason of part of the salt having been found foul, discussions had arisen; and that, in consequence of the salt agent having maintained that the salt in store was the very salt sold, it was found there was no alternative, and that, accordingly, in November, 1830, a renewal of the rowannahs had been obtained; and he urged that the golah-rent and wastage should be wholly remitted.

Whereupon it was determined by the Board not to exact the golah-rent and wastage. And on the 4th of May, 1831, Juggomohun Seal entered into an agreement, that, in fairly weighing out the salt from the Sircarry golah, if, in the dryage from the 21st of March, 1827, there be found a trifling diminution, he would make no claim on that score.

A part only of the salt was removed, and on the 30th of October, 1831, a second inundation took place, whereby a great part of the salt purchased by the Respondent, and still lying in the golahs, was destroyed.

On the 10th of February, 1832, Juggomohun Seal presented a petition, whereby, without noticing the inundation, he alleged that he had removed all the salt that could be had, and that there turned out to be a deficiency of more than 10,000 maunds, and he prayed that he might be compensated, with interest.

On the 9th of March, 1832, this petition was referred by the Board to their salt agent, Mr. Donnithorne, for investigation.

On the 13th of July, 1832, Juggomohun Seal presented another petition, representing that no report had yet been made by the salt agent.

In consequence, on the 17th of July, 1832, another [92] letter was addressed by the Board to Mr. Donnithorne, calling his attention to the subject.

On the 14th of August, 1832, Mr. Donnithorne made a report to the Board, by which he showed the actual quantities which had been delivered to the petitioner, and deduced the result to be as follows: "The actual deficiency occasioned by two serious inundations, as also by wastage, during the great length of time the article was allowed to remain in the golahs, 7639 maunds;" adding, "had the Beoparee cleared the salt out of the golahs, according to his engagement, instead of perpetually offering objections, no defalcation would have arisen; but fully aware, as I conceive from the information of his gomastahs [steward], that a dreadful loss must have taken place by the late hurricane, he has been induced to offer this false representation, in order that the total loss of the article should be ultimately sustained by the Government."

In consequence of this report, the Board did not accede to the claim made for compensation, and for more than two years nothing further was heard on the subject. On the 17th of September, 1834, Juggomohun Seal presented another petition, in which, after referring to his petition of the 10th of February, 1832, and the report made thereon, he stated that prior to the storm of the 31st of October, 1831 he had delivered in his chaur and rowannahs, and that then a large quantity

of the salt was not forthcoming, and prayed that the money, with interest and expenses, should be returned. On the 30th of November, 1835, he again presented a petition for the same purpose, stating that no order had yet been made by the Board on his petition of the 10th of February, 1832, and praying that the Board would make the order desired.

[93] In the meantime, Mr. Donnithorne had retired from the office of salt agent at Hidgellee, and Mr. John Henry Barlow was appointed to succeed him, and the Board having determined to make renewed inquiry into the subject, on the 12th of December, 1835, forwarded to Mr. Barlow the former petition of the 10th of February, 1832, Mr. Donnithorne's report thereon, and the subsequent petitions.

Mr. Barlow instituted the inquiry, and on the 16th of May, 1838, communicated the result to the Board in a letter.

Though Mr. Barlow's report was in some respects rather more favourable to the Respondent than that of Mr. Donnithorne, still it appeared to the Board that there was no ground to doubt but that the deficiency in the salt was owing entirely to the inactivity and negligence of the Respondent in leaving the salt unremoved for so many years; and, under these circumstances, the Board declined to accede to the prayer of the petitions, and refused to make an order in his favour.

On the 18th of July, 1839, the present action was commenced by the Respondent against the Appellants, on the plea side of the Supreme Court of Calcutta. The declaration contained three special counts: the first count stated, that on the 2nd of July, 1822, the Respondent bought of the Appellants large quantities of salt, of the manufacture of certain years, deliverable to him at certain golahs or storehouses of the Appellants, situate at Kalleenagur, in the zillah of Hidgellee, in the province of Bengal, at any time within twelve months from the 15th of March, 1822, and thereafter to be subject to golah-rent at a certain rate per annum, and subject to certain deductions for waste as therein spe-[94]-cified: whereupon the Appellants promised to deliver the salt to the Respondent, from the golahs at Kalleenagur, on production of the chauras and rowannahs, when the Appellants should be requested so to do. And that, although he, the Respondent, had frequently, since the 2nd of July, 1822, requested the Appellants to make delivery of the same salt to him, at Kalleenagur aforesaid, upon production of the said chauras and rowannahs, and offered to pay golah-rent, and allow the deduction for wastage at the rates respectively agreed: and although the Appellants, in part performance of their promise, had, at different times, since the 2nd of July, 1822, delivered to the Respondent, divers, to wit 36,000 maunds of the salt, in part of the salt so bought; yet the Appellants had wholly neglected and refused to deliver the residue of the salt to the Appellants. The second and third counts were similar to the first, varying only as to the quantities of salt, and the places where it was deposited, and the time when it was deliverable. The declaration also contained the usual money counts for money had and received on an account stated, and for interest, and the damages were laid at Rs. 200,000.

The Appellants pleaded the following pleas to the declaration:—First, *Non assumpsit*. Secondly, That the alleged cause of action did not accrue within six years, as required by the English Statute of Limitations. Thirdly, As to the first count, that the 4000 maunds of salt therein mentioned were suffered by the Respondent to remain in the golahs of the Appellants at Kalleenagur, in the zillah of Hidgellee, from the 15th of March, 1822, to the 27th of May, 1823, the time of the tempest and inundation hereinbefore mentioned; that during that period they had never refused [95] to deliver the 4000 maunds of salt, and were never applied to for the delivery of the same, but were, till the time of such tempest and inundation, ready and willing to deliver the same; that the Respondent, during all that time, neglected to remove the salt from the golahs, and while it was so remaining, by such neglect of the Respondent, on the 27th of May, 1823, a violent storm, attended with an inundation of the sea, swept over the place where the salt was warehoused, and wholly destroyed the same, whereby the Appellants were then and had ever since been unable to deliver the salt in pursuance of the contract in the first count mentioned. Fourth, As to the second count, a plea similar to the third. Fifth, As to the third count, a plea similar to the third and fourth.

The Respondent, by his replication, joined issue upon the first plea, traversed the second, and replied generally, *de injuria*, to the other pleas.

In March, 1841, before the action at law was tried, the Respondent, Ram Rutton Mullick and Jaggomohun Seal, filed a bill of discovery, on the equity side of the Supreme Court at Calcutta, against the Appellants and Mr. Henry Parker, then the first member of the Board of Customs, Salt, and Opium. The bill sought to establish some admission to take the case out of the Statute of Limitations, and required a full discovery of every thing connected with the transactions, and a full discovery of all books and papers relating to the matters in question, which were in the possession or power of the Defendants.

The Appellants and Parker put in their joint and several answer to the bill, stating the circumstances respecting the two inundations of 1823 and 1831, and the loss occasioned to the salt thereby, and [96] alleged that in substance and in fact, the original agreement for sale of the salt had been performed on the part of the Appellants, and denied the allegation of any admission to take the case out of the Statute, and in the schedules set forth at length, petitions and other documents, before stated, and in another schedule set forth a list of all papers and documents in their possession relating to the matters in question.

On the 8th July 1842, an order in the suit in Equity was made by consent, that the Defendants should deposit with the Equity Registrar of the Court, for the inspection of the Plaintiffs, all the documents scheduled to the answer, and this was accordingly done.

The action at law was tried on the 25th and 26th of July, 1842, on the Plea side of the Supreme Court, before Mr. Justice Grant and Mr. Justice Seton.

In the course of the trial, the counsel for the Respondent tendered as evidence, amongst others, the originals of the following documents, viz. Juggomohun's petition on the 10th of February, 1832, and the 30th of November, 1835. The letter of the Board of the 12th of December, 1835, Mr. Barlow's letter of the 31st of December, 1835, and the answer thereto, and Mr. Barlow's report of the 16th of May, 1838, the production of which from the Equity side of the Court, he had obtained by means of an *ex parte* order which had been made on the Plea side of the Court, bearing date the 20th of July, 1842, but of which no notice whatever had been given to the Appellants. The Respondent, at the same time, put in the order on the Equity side of the Court, of the 8th of July, 1842, and the order of the 20th of July, 1842, and called a witness to prove the official character of the documents [97] above mentioned. The Counsel for the Appellants objected to the reception of these documents in evidence, unless the answer, of which they formed part, were likewise put in, both on the ground, that the *ex parte* order on the Plea side of the Court was irregular, and was a surprise on the Appellants, and also on the ground, that it appeared by the Orders produced, that the documents in question were parts of the answer to the Bill in Equity. The Counsel for the Respondent refused to put in the answer as evidence, and the Court, overruling the objection taken on behalf of the Appellants, admitted the documents and papers as evidence, without the answer.

At the conclusion of the case, the Court gave interlocutory judgment, in the nature of a verdict, in favour of the Respondent, for the sum of S. Rs. 39,740. 8a. 9p., which sum was calculated on the ground of no allowance being made for *golah-rent*, or *wastage*.

On the 27th of October, 1842, a rule *nisi*, to show cause why the verdict should not be set aside, and a new trial granted, was obtained by the Appellants, on the grounds—First, that evidence was improperly received at the trial; and secondly, that there was no evidence to take the case out of the Statute of Limitations.

This rule was, after argument before the full Court, in Bank, composed of the Chief Justice, Sir Lawrence Peel, and Mr. Justice Grant and Mr. Justice Seton, by an order, bearing date the 17th of November, 1842, discharged, with costs. The grounds on which the Court discharged the order were thus stated by the Chief Justice:—"It was not necessary to decide whether the evidence objected to had been properly [98] received. Had it been necessary to decide the question, he should have concurred in the decision which the learned Judges who had tried the cause had made, for he thought that the regularity of the order, under which the documents had been produced, could not be entered into at the trial, the documents being, in fact, produced and proved in the usual mode, and being evidence *per se*, and, without the aid of the answer, were, in his opinion, rightly admitted in

evidence; but it was unnecessary to decide this question. It was also unnecessary to decide whether, the Indian Act (No. XIV. of 1818) included an action commenced before the passing of that Act; or whether, that which was relied on as acknowledgment, to defeat the operation of the Statute of Limitations, amounted to any such acknowledgment, or the effect of such an acknowledgment, in an action of this description; or, lastly, whether it was binding on the East India Company, since the Court thought that the cause of action arose within six years from the commencement of the suit. It appeared, by the Defendants' own evidence, that the salt was detained for golah-rent, for which they had, by the contract, a right to detain it. This was waived up to the 4th of May, 1831, by the Defendants, upon the petition of the party entitled to the delivery of the salt, and of the petition of the 10th of February, 1832, which the documents produced by the Defendants in evidence referred to, requested an inquiry into the circumstances connected with the undelivered salt. The Court thought that the East India Company having, upon the petition of the 10th of February, 1832, consented to that inquiry, no refusal to deliver the salt could be said to have taken place before the conclusion of that inquiry, which did not terminate until [99] within six years of the time when the action was brought."

From this decision the Appellants appealed to Her Majesty in Council.

The Attorney-General (Sir John Jervis), Mr. Wigram, Q.C., and Mr. Forsyth, for the Appellants.—Two principal questions arise: First, as to the improper reception of evidence at the trial; and secondly, whether, as the cause of action accrued more than six years before the commencement of the action, the Plaintiff is not barred by the Statute of Limitations, there being no evidence before the Court below, of any recognition of the contract by the Defendants, to take the case out of the operation of the Statute of Limitations.

I. With respect to the question concerning the reception of evidence, we submit there was a miscarriage. The Respondent was allowed to use in evidence, documents which it appeared at the trial had been produced by the Appellants only as part of their answer to the Respondent's Bill in Equity, which was for discovery only, and not for relief; such evidence ought not to have been received without the answer being also read, and the Court was bound to decide the question of the admissibility of the documents without eluding the point then pressed upon them. The answer contained statements which would have materially affected the decision of the case, both as respected the operation of the Statute of Limitations and the right of the Respondent to recover damages. It is clear law that the schedule to an answer is part of an answer, and that the documents produced and re-[100]ferred in an answer, cannot be read by either party without reading the Bill and answer. *Heutt v. Pigott* (5 Car. and P. 75). *Brown v. Thornton* (1 Myl. and Cr. 246-8). *Long v. Champion* (2 Bar. and Ad. 284).—[Lord Campbell: This is not a Bill of Exceptions; it is an application for a new trial; and you must show that you are prejudiced by the answer not being read. Sir Edward Ryan says, it is not the practice of the Supreme Court at Calcutta, to grant a new trial upon a technical objection when they clearly see, that the admission or rejection of the evidence, did not have any effect upon the verdict.]—It is a familiar rule here, that, whatever the quantity of the evidence rejected may be, nobody can say what effect may have been produced if it had been admitted.—[Lord Campbell: We are in the same situation as the Court below, being both Judge and jury, and if we think the evidence that was rejected ought to be admitted, we can give it its weight.]—The order for production of the documents was irregularly obtained, and a surprise upon the Appellants.

II. But the important question really is, when did the Statute of Limitations, 21 Jac. I., c. 16, begin to run.—[Lord Campbell: Does the Statute extend to India?]—Yes, it admitted that it was introduced into India previous to the Charter. The law is clear, that the Statute runs from the time of the breach, for that constitutes the cause of action. *Battley v. Faulkner* (3 Bar. and Ald. 288). *Howell v. Young* (5 Bar. and Cr. 259). *Short v. McCarthy* (3 Bar. and Ald. 626; and see 2 Saunders' Rep. p. 63). *Colvin v. Buckle* (8 Mee. and Wel. 680). *Pott v. Clegg* (16 Mee. and Wel. 321). *Kennet and Avon [101] Canal Company v. The Great Western Railway Company* (7 Q.B. Rep. 824). These cases clearly establish the rule, that when once the cause of action accrues, the limitation dates, not from the time when it came to the

knowledge of the party, but from the time when the breach of the contract, or duty, took place. It was erroneous to suppose that the question turned upon a refusal to deliver. The question is confined to this point, when did the Statute begin to run? The inundation put it out of our power to deliver the salt; the breach was complete, and then the Statute commenced running. *Short v. Stone* (8 Q.B. Rep. 358), *Love-lock v. Franklyn* (8 Q.B. Rep. 371), establishes this proposition, that, when a request is unnecessary, by reason of an act done by the party, which puts it out of his power to comply with such request, no request is necessary. We submit, therefore, upon this point, that there has been a miscarriage, as the learned Judge was wrong in the view which he took, the action being clearly barred. The cause of action accrued, at least, in February, 1832, more than six years from the commencement of the action, and was barred by the Statute of Limitations. Nothing was shown in the evidence in the Court below, either to prove that the Appellants recognised the continuing liability to deliver the salt or to take the case out of the operation of the Statute. This involves another point, not decided by the Court below, namely, whether the Statute, 9 Geo. IV., c. 14, applied to this particular case. That Statute was extended to India by the Indian Act, No. XIV., of 1840, pending this action, but before plea. *Towler v. Chatterton* (6 Bing. 258) is an [102] authority upon this question, and must be held to apply. Now this case can only be taken out of the general operation of the Statute of Limitations by something that would satisfy the provisions of the 9th Geo. IV., c. 14, which must be an acknowledgment in writing, clear and specific, signed by a party who has power to bind us. It is manifest that the ground on which the Court below held the operation of the Statute of Limitations to be excluded, namely, that no refusal to deliver the salt could be said to have taken place pending the inquiry by Mr. Barlow, is not sustainable. The inquiry was a private one by the Board, by one of their own servants, for their own satisfaction, to which the Respondent was no party, and with which he had no concern. The right of the Respondent accrued certainly in 1832, if not earlier. There is another defence to this action. It is a well-known rule at law with respect to injuries of this description, by inundation, or fire, that the warehouseman would not be liable for any loss except he has been guilty of negligence. Story's Com. on the Law of Bailments, p. 452. The negligence was on the part of the Respondent in not removing the salt within a reasonable time, as required by Ben. Reg. X. of 1817, section 36.

Mr. Greenwood, Q.C., and Mr. Leith, for the Respondent.—First, we submit, that the evidence objected to was, under the special circumstances of the case, properly received by the Court below, in conformity with the practice of that Court; and secondly, that the Plaintiff's remedy, by action, was not destroyed by any statutory or other bar.—[Lord Campbell: You need [103] not address their Lordships upon the question of the admissibility of evidence, as our minds are made up upon that point.]—The real question then is narrowed to the operation of the Statute of Limitations. The cause of action is founded on the non-performance of the contract, occasioned by the Appellants' neglect, and refusal to deliver. There are three grounds of defence pleaded; first, *non assumpsit*; secondly, the English Statute of Limitation, *non accrevit infra sex annos*; and thirdly, that the undelivered portions of the salt were destroyed by an inundation, by reason of which the Appellants were unable to deliver to the Respondent.—[Lord Campbell: We must take it that the contract was broken.]—*Simmons v. Swift* (5 Bar. and Cr. 857) is a strong case in our favour, and very much resembles the present case; there, the owner of a stock of bark entered into a contract to sell it at a certain price, per ton, and the purchaser agreed to take and pay for it on the day specified; and a part was afterwards weighed and delivered, and taken away by him; the rest was carried away by a flood. The vendor brought an action of *assumpsit*, for bark sold and delivered; but the Court held that the action was not maintainable, as the property in the residue did not vest in the purchaser until it had been weighed.—[Mr. Pemberton Leigh: *Logan v. Le Mesurier* (6 Moore's P.C. Cases, 116), decided here, was to the same effect. It was held, that the risk remained with the sellers.]—The case put by the Appellants, that they were warehousemen, is wrong. The stipulation in the conditions of sale, that the purchaser was to pay warehouse rent, amounted to nothing more than making a payment in respect of the convenience afforded [104]

to the purchaser for letting it remain on the premises; it was a running contract for rent. The property in the salt never passed to the purchaser until it was separated and weighed off. The cases cited on the other side upon this branch of the case have no application to the present; here, the salt has always remained the property of the sellers, and there has been an actual loss of that proportion of the salt which was contracted to be delivered. Our proposition is, that the right of action only accrued in 1838, when the Appellants refused us compensation. It was a running inquiry up to the time of Mr. Barlow's report. [Lord Campbell: The contract was clearly broken in 1832, when there was no salt to deliver, and the Respondent knew of that inability. The Statute was running on while the inquiry was being made, as your right of action arose when the Appellants were not in a condition to deliver the salt.]—Here is a contract, in a particular form, and, so long as a party regards the contract, and makes his demand at the time stipulated, that is all that is required. The inability of one party to fulfil the contract can make no difference. It is not necessary for a merchant to express, in technical terms, his desire to have the article he contracted for, with a view to make a conversion by a demand and refusal. The Respondent was constantly pressing for the completion of the contract. The demand was not made by a person acquainted with English law, and ought, therefore, to be looked at with indulgence. A harsh construction would be productive of injustice; the more so, as the Respondent is a Hindoo: and if the position of the parties to the action had been reversed, and he been Defendant instead of Plaintiff, he would have been entitled, under Statute 21 Geo. III., c. 70, to [105] have had the case tried by the Hindoo Law; the limitation of suits, under the Hindoo Law, would have been twelve years, when this six years' bar could not have been set up. If the Appellants make out, that the moment we knew of the inability of the vendors to fulfil the contract, we had a right of action, from which time the Statute of Limitations runs, then we say, that we have a right to recover, on the count, for money had and received, for there has been an entire failure of the delivery of the salt, and the money has been paid. Where a party enters into a contract for the delivery of an article, which is improperly disposed of by the vendor, you may either bring an action of trover for the conversion, or acquiesce in his agency, and bring an action for money had and received.—[Lord Campbell: The difficulty is, that there was no acknowledgment of the debt within the six years, as required by Statute, 9 Geo. IV., c. 14.]—That Statute was imported into India, by the Indian Act, No. XIV. of 1840, and was not in force in India at the time the action was brought. *Towler v. Chatterton* (6 Bing. 258) shows the time when this Act of Parliament operates upon a suit, in which the Statute is pleaded. Independently, however, of the Statute, enough appears to constitute an acknowledgment in bar of the Statute. It is a mixed case of written admissions and acts of the parties. The report of Mr. Barlow, the servant of the Appellants, is an admission. *Colledge v. Horn* (3 Bing. 119). *East India Company v. Prince* (Ry. and Moo. 407). *Pierce v. Brewster* (12 Moore's Rep. 515). The Bengal Regulation X., of 1819, sec. 36, has no bearing upon the case, it is merely a fiscal Regulation to prevent smuggling.

[106] Mr. Wigram, in reply, referred to *Greenfell v. Girdlestone* (2 Y. and C. 663) and *Cripps v. Davis* (12 Mee. and Wel. 159).

Judgment was reserved, and now delivered by

Lord Campbell.—This is an appeal from a rule of the Supreme Court of Judicature at Calcutta, by which a rule *nisi*, for a new trial, was discharged with costs.

The action, which was commenced on the 18th of July, 1839, by the Respondent against the Appellants, was in assumpsit. The declaration contained special counts, on a contract for the sale and delivery of salt, alleging for breach, the non-delivery of a considerable part of the salt, with the usual money counts.

There were several pleas in bar; but the only one now material, is, "That the cause of action did not accrue within six years next before the commencement of the suit," the Statute law of England upon this subject being in force at Calcutta. The Plaintiff replied, "That the cause of action did accrue within six years before the commencement of the suit," and thereupon issue was joined.

The trial took place before Mr. Justice Grant and Mr. Justice Seton, on the 25th and 26th days of July, 1812. It then appeared in evidence, that on the 15th of March, 1822, and at a public sale of salt, (a commodity of which the East India Company have the monopoly,) the Plaintiff became the purchaser of 34,000 maunds, then lying in golahs (or warehouses,) of the Defendants, in Hidgelee. By the conditions of sale it was declared, that "on a payment in ready money being [107] made, an order would be given for the delivery of an equivalent quantity of salt, and the purchaser would be furnished with perwannahs (or permits,) which were necessary to enable him to be lawfully in possession of it." There was a further stipulation, "That all the lots of salt purchased should be cleared out from the several places of delivery within twelve months from the day of sale, otherwise the purchaser was to be subject to golah-rent, and a deduction of half a maund on one hundred maunds *per mensem* was to be made from the quantity to be afterwards delivered." The Plaintiff immediately paid the whole of the purchase-money, and received rowannahs, which were to be in force for a twelvemonth. These rowannahs were renewed till November, 1831, and no longer.

In May, 1823, before any of the salt had been cleared, there was an inundation at Hidgelee, which destroyed part of the salt lying in the golahs, and damaged other part of it. Between that time and October, 1831, there were deliveries to the Plaintiff, amounting to nearly 20,000 maunds; and no more was ever delivered. On the 31st day of October, 1831, there was another inundation in the district of Hidgelee, which swept away almost the whole of the residue of the salt in the golahs. The Plaintiff soon after presented the delivery orders and rowannahs at the golahs, and demanded the 10,000 maunds remaining to be delivered; but was told by the golah-keepers that no more salt remained to satisfy the contract. He then petitioned for a return of the purchase-money, which was refused, on the ground that the loss had happened through his negligence in not sooner clearing the salt from the golahs. However, the proper authorities consented that the matter should be inquired into by [108] Mr. Donnithorne, the salt agent at Hidgelee; and in August, 1832, he made a report, in which he stated, that "if the purchaser had cleared the salt out of the golahs, according to his engagement, instead of perpetually offering objections, no defalcation would have arisen;" and he represented that the salt had been lost by wastage before the late inundation. The Plaintiff presented another Petition, denying these facts, and praying that the purchase-money for the 10,000 maunds deficient should be returned to him; and on the 12th of December, 1835, a fresh inquiry was ordered by the proper authorities, representing the Company, to Mr. Barlow, another gentleman who had succeeded Mr. Donnithorne. Mr. Barlow did not make his report till the 16th of May, 1838; and upon the report which he then made, the Company finally refused to return the purchase-money, claimed in respect of the deficient salt.

There was a verdict for the Plaintiff, with damages equal to the price of the whole of the deficient salt, and interest, from November, 1831.

At the trial, various documents were read in evidence, which had been produced by virtue of a Bill of Discovery filed by the Plaintiff against the Company, although the Company's answer, by their officer, which detailed the transactions, was not read.

The rule for a new trial was obtained on two grounds: First, that these documents were improperly admitted in evidence, without reading the answer to the Bill of Discovery; and secondly, that upon the evidence, the Statute of Limitations was a bar.

Cause being shown before Chief Justice Peel and his brethren, he said, it was unnecessary to decide, whether the answer ought to have been read or not, as they [109] were all of opinion that it did not contain anything material to influence the verdict, and that "the East India Company having, upon the Petition of the 10th of February, 1832, consented to that inquiry, no refusal to deliver the salt could be said to have taken place before the conclusion of that inquiry, which did not terminate until within six years of the time when the action was brought." They, therefore, discharged the rule with costs.

We entirely agree with the Court below, in thinking, that the first ground on which the verdict was impeached cannot be supported. From the notes of the

trial, there is a doubt whether the Counsel for the Company did more than object to the regularity of the Order under which the documents were produced, and this certainly could not be inquired into at the trial. Supposing, however, that the answer ought to have been read, still, before a new trial is granted for withholding it, the Defendants were bound to show that it might have materially influenced the verdict. The common Law Courts in England have considered themselves compelled to grant a new trial, if any evidence had been improperly admitted or rejected at *Visi prius*, however little it may weigh, because the objecting party might have tendered a Bill of Exceptions, upon which the Court of Error would be bound to grant a *venire de novo*; and, to save the delay and expense of such a proceeding, it has been thought more convenient that a new trial should be granted by the Court in which the action was originally brought. But it has been certified to us, by Sir Edward Ryan, the very learned late Chief Justice of Calcutta, that a different rule prevails in the Supreme Court there; and considering the constitution of that Court, and the [110] line of distinguished men who have presided in it, strange would it have been if the rule had not been different. The same individuals being Judges and jurymen, the proceeding would be preposterous, if, in their capacity of Judges, they were to grant a new trial before themselves, as jurymen, by reason of the admission or rejection of evidence, which they feel could not alter the verdict. They very properly follow the practice of equity Judges in England; where an issue has been granted, and an application is made for a new trial, on the ground of the improper rejection or admission of evidence; there no Bill of Exceptions lies; and although the objection is in strictness well founded, a new trial is granted or refused, according to the importance of the evidence which has been admitted or rejected. The learned Judges, in the present case, thought that the answer could not have influenced their verdict. We have carefully read the answer, and have come to the same conclusion. We, therefore, think, that on the first ground, the verdict ought not to be disturbed.

It would have been very satisfactory to us, if, consistently with the rules of law, we could have found evidence to show that any cause of action, stated in the declaration, arose to the Plaintiff, within six years before the commencement of his suit. There seems no doubt that the Defendants have broken their faith with him, and that if he had commenced his action against them, in February, 1832, instead of agreeing to the inquiry which was conducted so tediously, he would have been entitled to damages equivalent to the salt which remained undelivered. But this inquiry, through the fault of the Company's servants, was not terminated till the 16th of May, 1838. Almost as [111] soon as the final refusal of the Company to return any part of the purchase-money was communicated to the Plaintiff, he commenced the present action. It will, therefore, be an extreme hardship upon him, if, by reason of this delay, which they occasioned, they may successfully defend themselves, by pleading the Statute of Limitations. But it is the duty of all Courts of Justice to take care for the general good of the community, that hard cases do not make bad law.

Upon the special counts of the declaration, the cause of action disclosed, is the refusal to deliver the residue of the salt purchased and paid for. When did this accrue? From that point of time the Statute of Limitations began to run; and when it once began to run, nothing could stop it; so that in six years thereafter the right of suit was barred. The rule is firmly established, that in assumpsit, the breach of contract is the cause of action, and that the Statute runs from the time of the breach, even where there is fraud on the part of the Defendant. *Battley v. Faulkner* (3 Bar. and Ald. 288). *Short v. McCarthy* (ib. 626). *Brown v. Howard* (2 Brod. and Bing. 73). When the Plaintiff tried to obtain the 10,000 maunds of salt, and he was told by the agents of the Company, that there was no salt in the golahs to deliver to him, the contract was undoubtedly broken, and the cause of action has accrued. It has been contended, that the subsequent negotiations and inquiries suspended the operation of the Statute, till 1838, when there was a final refusal to make any compensation, or that a new right of action then accrued. But no authority has been, or can be, cited to support either of these propositions, and we are reluctantly obliged to overrule [112] them both. There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time

employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined—proof being given that the action did clearly accrue more than six years before the commencement of the suit—the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict.

Chief Justice Peel rests the judgment of the Court, upon the supposition, that there had been no refusal to deliver the salt until the conclusion of the inquiry. Till then there certainly had been no absolute refusal to make compensation, by returning a part of the purchase money, but in 1831 and 1832, there had been a refusal to deliver the salt. The controversy then was, whether the salt was in the golahs at the time of the second inundation; but whether it was, or was not, the contract was equally broken, and neither party contemplated a performance of the contract by any further delivery of salt. The inquiry was only to decide whether a pecuniary compensation was to be made, and what should be the amount of it.

Although the judgment of the Court rested entirely upon the special counts of the declaration, it has been very ingeniously argued at our bar, that the Plaintiff may recover the price of the 10,000 deficient maunds, on the count for money had and received, as the contract may be considered as subsisting, till Mr. Barlow's report, and that it was subsequently rescinded. But there appear to us to be insuperable [113] difficulties to be encountered in attempting so to shape the Plaintiff's case. There is no stipulation in the original contract for allowing it to be rescinded by either party, either entirely or partially, and the Defendants have never agreed to its being in any way rescinded. Then there clearly has not been an entire failure of consideration, for the Plaintiff has received and disposed of nearly 21,000 maunds of salt delivered to him by the Defendants. The contract could not afterwards be rescinded by the Plaintiff, and his only remedy was an action for the breach of it, in not delivering the residue of the salt to which he was entitled. Even if he could proceed as upon a rescinding of the contract, the Statute of Limitations would equally be a bar to the counts for money had and received, for he might have brought his action on this count as well in 1832 as in 1839. We have been told in answer to this objection, that the transactions in the interval, amounts to an acknowledgment, which will take the case out of the Statute of 21 Jac. I., c. 16, and that the Statute of 9 Geo. IV., c. 14, does not apply, because this action has been commenced before that Statute was made law in India. But there are repeated decisions in Westminster Hall, that it applied to actions pending when it passed; and in India, it must have a like operation. Besides, independently of 9 Geo. IV., c. 14, no sufficient evidence was offered to take the case out of the Statute of 21 Jac. I., c. 16, for in none of the correspondence or negotiations, did the Company ever acknowledge that they were indebted to the Plaintiff, or that they were liable to him in any shape.

We are, therefore, of opinion, that the rule for setting aside the verdict, and granting a new trial, should be made absolute.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 5. *Principles on which Privy Council acts*; tit. LIMITATIONS (STATUTES OF); A. ACTIONS ON SIMPLE CONTRACT, ETC.; II. 1. 1. *In other cases*; III. *Places where Statute applicable—India*; VII. *Matter in avoidance of the Statutes*; 4. *Agreements to waive the Statute*. S.C. 5 Moo. Ind. Ap. 43; 14 Jur. 253. As to extension of 21 Jac. I., c. 16, to India, see *Ruckmaboye v. Tulloobhoy Mottichand*, 1851-52, 8 Moo. P.C. 17; 5 Moo. Ind. App. 247. See now Indian Limitation Act, 1877, and amending Acts. As to effect of Judicature Act, 1873 (36 and 37 Vict., c. 66), sect. 24, on agreement not to plead the Statute, see *Trill v. Lade*, 1842, 11 L.J. Ch. 102; 6 Jur. 272, and Darby and Bosanquet on *Statute of Limitations*, Second Edit. pp. 94, 95, 554.]

[114] ON PETITION FROM THE ISLAND OF JERSEY.

IN RE FREDERICK BELSON * [JAN. 21, 1850].

The Court of Chancery, in England, has, by its Common Law jurisdiction, authority as general as the Common Law Courts have, to issue a writ of *Habeas Corpus*, and can issue such a writ in the vacation [7 Moo. P.C. 130, 131].

Such writ (since the passing of the Statute, 5th and 6th Vict., c. 103, and the 4th Order in Chancery of 1842, made in pursuance thereof,) is properly sealed in the Office of the Clerks of Records and Writs. An objection to a writ so sealed, that it ought to be sealed with the Great Seal of England, overruled [7 Moo. P.C. 132].

A writ of *Habeas Corpus ad subjeiendum*, issued under the fiat of the Lord Chancellor, pursuant to an order of the Vice-Chancellor of England, made in a cause in Chancery in England, to bring up the bodies of infant wards of Court, is a common law prerogative writ, which runs into the Island of Jersey, and the Royal Court of that Island is bound to register a warrant of attachment for a contempt of such writ, and to aid its execution, within the Island [7 Moo. P.C. 130, 132].

This was a Petition to Her Majesty in Council, presented by Frederick Belson, complaining that the Royal Court of the Island of Jersey had refused to register a writ of *Habeas Corpus*, made by the Vice-Chancellor of England on the 6th of November, 1849, and two warrants, issued by the Lord Chancellor, of the 13th of November in the same year.

The petition arose out of the proceedings taken in the case of *Belson v. Belson* (*ante*, p. 30), upon the application for leave to appeal from the provisional order of the Royal Court of Jersey, directing and providing for the custody of the infants, the children of the petitioner, in which case the facts are fully detailed. Shortly after that application, a Bill was filed in the Court of Chancery in England, for the purpose of making the children of Mr. and Mrs. Belson, wards of Court.

[115] On the 23rd of August, 1849, the petitioner, Frederick Belson, presented a petition to the Vice-Chancellor of England, which petition was supported by an affidavit, stating, that the infant children, Mary Juliana Belson and Frederick John Belson, were at St. Heliers, in the Island of Jersey, under the custody and control of their mother, and of William Henry Hartman, their step-grandfather, and praying an order that a writ of *Habeas Corpus* might issue, directed to Maria Elizabeth Belson, the mother of the infants, and to William Henry Hartman, to bring the infants before the High Court of Chancery, at Belle Vue, Southsea, near Portsmouth, in the County of Hants, on the 12th of September, then next ensuing. An order was made accordingly, and in pursuance thereof, a writ of *habeas corpus* was, on the 5th of September, 1849, at the instance of Frederick Belson, the father, issued out of, and under the seal of the High Court of Chancery, from the office of the Clerks of the Records and Writs. This writ was in the following form:—"Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to Maria Elizabeth Belson, and William Henry Hartman, greeting. We command you, and each of you, that you do, on Wednesday, the 12th of September, at ten o'clock in the morning, bring before us, in our Court of Chancery at Belle Vue, etc., the bodies of Mary Juliana Belson and Frederick John Belson, by whatsoever name, or addition of name, they are known or called, who are detained in your custody, to perform and abide such order as our said Court shall make in this behalf; and hereof fail not, and bring this writ with you." This writ of *Habeas Corpus* was, on the 7th of September, 1849, served on Mrs. Belson and Hartman.

[116] On the 12th of September, the day named in the writ, Mrs. Belson and Hartman attended before the Vice-Chancellor, when it was ordered, that the matter

* Present: The Lord President (the Marquis of Lansdowne), Lord Langdale, Lord Campbell, Sir George Grey, and the Right Hon. Dr. Lushington.

should stand over until the first day of Michaelmas term, they undertaking not to remove the children from Jersey, except by bringing them to England. Mrs. Belson and Hartman did not appear on the first day of Michaelmas Term, and not having made any return to the writ, a declaration was made, on the petition of the Petitioner, by the Vice-Chancellor of England, that their conduct was a contempt of the Court, and it was ordered, that they should stand committed to the custody of the keeper of the Queen's Prison until they should clear their contempt, or further order. Accordingly, a warrant was signed and issued by the Lord Chancellor of Great Britain, bearing date the 13th of November, 1849, addressed to Allen, the tipstaff of the High Court of Chancery, or his deputy, directing him to make diligent search after Mrs. Belson, and, wheresoever he should find her, to arrest and apprehend her, and her safely to convey to the Queen's Prison, there to remain until further order; and a similar warrant was at the same time issued against Hartman.

By an Order in Council of the 21st of March, 1769, the laws and privileges of the Island of Jersey were confirmed "as of ancient times;" and it was provided, that no orders, warrants, or letters missive of any sort, should be put into execution within the Island until after having been presented to the Royal Court, in order that they might be registered and made public; and in case any such orders, warrants, or letters missive should be found contrary to the Charters and privileges, or burthensome to the Island, the registry, publication, and execution might be suspended by the [117] Royal Court until the case had been represented to His Majesty, and his will and pleasure on the same signified.

On the 15th of November, the tipstaff arrived in Jersey. Application was made to the Royal Court, to register the order of the Vice-Chancellor of England and the warrants of the Lord Chancellor, and for assistance in executing such warrants. On the 17th of November, the application for registration being reiterated before the full Court, by Allan, Mrs. Belson and Hartman demanded to intervene, and claimed the protection of the Court, to oppose the registry and execution of the order, on the ground, that such registry and execution would have the effect of withdrawing from the jurisdiction of the Court, a cause that was pending therein, and which, according to the Charters and privileges of the Island, could not be taken before another tribunal, except by appeal.

On the 21st of November, the Royal Court delivered the following judgment:—"With regard to the demand in intervention, considering that Hartman and Mrs. Belson have interest in the cause, the Court have admitted their intervention; and regarding the demand of Allen, considering that the Royal Court of this Island is independent of all other authority, save Her most excellent Majesty in Council, and as it is specified in the Charters granted from time to time to the inhabitants of this country by their Sovereigns, that no orders or warrants proceeding from the English Courts can be put in execution in this country, unless they are sent in virtue of an Order from Her Majesty in Council, the Court have unanimously judged that the demand of Allen is not allowable."

The Petitioner then presented this petition to Her [118] Majesty in Council, praying Her Majesty to declare and order, that the writ of *Habeas Corpus*, issued under the seal of Her Majesty's High Court of Chancery of Great Britain, did of right run into, and ought to be obeyed within, the Island; also to order and direct the Royal Court of Jersey to register and publish the warrants of the Lord High Chancellor of Great Britain, and to direct the Governor, or Lieutenant-governor, Viscount, Denunciators, Officers of Justice, Constables, and Centeniers, and all other Her Majesty's subjects within the Island, to be aiding and assisting in the due execution of the same warrants, and to order and direct them to be aiding and assisting Allen in taking as well Mrs. Belson and Hartman, as the infants, into his custody, and bringing them before the High Court of Chancery, there to abide such order as the said Court should make.

By an order of the Lords of the Committee of Council, for the affairs of Jersey and Guernsey, bearing date the 4th of December, 1849, a copy of the petition was referred to the Royal Court of the Island of Jersey, for such observations as they might think fit to make thereupon.

In obedience to this order, the bailiff and jurats of the Royal Court of Jersey, submitted to Her Majesty in Council, the following explanation of the motives

which led them to the adoption of their act of the 21st of November, 1849: That the Petitioner had recognised the jurisdiction of the Royal Court by presenting a remonstrance: that, at the time the order of the Vice-Chancellor of England issued, the Royal Court was duly seised of the matters at issue between the Petitioner and his wife, and the Court had made an order in reference to the custody of the two children, [119] who were then within the jurisdiction of the Court: that the Royal Court was the only tribunal competent to deal with the matter; and, in support of this, they gave extracts from the Charter granted by Queen Elizabeth, which was subsequently confirmed by Charles I., Charles II., and James II.; and that the decision of the Royal Court could only be called in question by an appeal to Her Majesty in Council: that the Vice-Chancellor had not any authority in this case to issue a writ of *Habeas Corpus*: that the writs which were granted by the Vice-Chancellor were not writs of "*Habeas Corpus ad subjiciendum*" at common law, not being issued out of the Crown-office: that, assuming the writs were writs at common law, they did not run into the Island of Jersey, which was not subject to the common law of England: that the office of Vice-Chancellor was created by an Act not extending to Jersey, and, therefore, the Royal Court had no legal knowledge of it, and his order had no force or validity: that although, by an Order in Council of His late Majesty King William IV., of the 11th of July, 1832, printed copies of the Acts of the 31 Car. II. and 56 Geo. III. (the *Habeas Corpus* Acts) were directed to be transmitted to the Royal Court, yet in consequence of a representation made at the time to His Majesty's Government, that the registration would be an infringement of the privileges of the Island, it was then determined by the Secretary of State not to press the registration of the said order and Act of Parliament, and the same had not accordingly been registered.

The petition now came on for hearing, when the Lord President [The Marquis of Lansdowne] directed the Counsel for the Royal Court to address them, in the first instance, in sup-[120]-port of the objection of the Royal Court to obey and register the writ and warrants.

Sir Frederick Thesiger, Q.C., Mr. Peacock, Q.C., and Mr. Busk, for the Royal Court of Jersey.—This is a serious invasion of the rights and privileges of the Royal Court, and in opposition to the Order in Council, of the 21st of March, 1769, which confirmed those rights and privileges "as of ancient times." The question is not merely, whether a warrant of commitment can be executed in Jersey until it is registered by the Royal Court, but whether it can be executed, even if registered. The *Habeas Corpus* Acts, 31 Car. II., c. 2, and 56 Geo. III., c. 100, have never been registered in the Island, as required by the law of Jersey; so that these Statutes cannot be considered to prevail there: but even if these Statutes, without registration, have the force of law in the Island, still the writ of *Habeas Corpus*, issued in this matter, is not such a one as runs into the Island. Assuming, however, that it would run, yet we submit it cannot be executed, for it would improperly interfere with the proceedings of the Royal Court, who has by law cognizance of the subject matter, and is fully competent to decide it. Upon this point we refer to the Constitutions of King John. *Precepte d'assize* of the Itinerant Judges in the reign of Edw. III. A.D. 1331, and the Letters Patent of Queen Elizabeth, *Falle's Jersey*, p. 343. —[Lord Langdale.—The Court of Chancery in England would not have interfered, if a return had been made, and it appeared, that the children were in the custody of the mother, under the order of a Court of competent jurisdiction.]—No return has been made, for that could not be done without producing the chil-[121]-dren. If the children were once taken out of the jurisdiction of the Royal Court, and placed under the jurisdiction of the Court of Chancery, it would be an effectual bar to the proceedings in Jersey.—[Lord Campbell.—If the prerogative writ issued out of a Common Law Court, would not the Royal Court have been compelled to make a return?—Yes. The Court of Queen's Bench have power under the Statute, 56 Geo. III., c. 100, to issue an attachment for disobedience to the writ. In *Carus Wilson's case* (7 Q.B. Rep. 984), the Royal Court made a return; but in the present case, the writ is not directed to the Royal Court, nor is it such a one as calls for a return; Mrs. Belson has refused to obey it, and the Royal Court cannot compel her; it is merely a writ directing the Royal Court to register a warrant of attachment, which they consider an infringement of their privileges, and, therefore, refuse to

register. It is moreover a grave question, whether an attachment from the Court of Chancery for a contempt could be rendered available in Jersey.—[Lord Campbell: I remember a writ to have been issued by the Court of Queen's Bench, where there had been a commitment by the House of Commons; the writ was obeyed and a return made. As the House of Commons trusted their privileges, in that case, to the judgment of the Court of Queen's Bench, it would have been no degradation to the Royal Court at Jersey to have followed their example.] The form of the writ, in this case, is not that of the high prerogative writ of "*habeas corpus ad subjiciendum*," set forth in Coke's 2nd Inst., p. 53, which writ, we admit, runs into Jersey. Anon (1 Vent. 357); Carus Wilson's case; Hale's Hist. of the Com. Law, 268. It is merely the writ "*ad faciendum et recipiendum*." [122] The difference between the writ "*ad faciendum et recipiendum*," and the high prerogative writ of "*ad subjiciendum*," is shown in Blackstone (3 Comms., pp. 129, 131, Edit. 1809), and Bac. Abr., tit. "*Habeas Corpus*," D. s. 6. There is also the writ of "*habeas corpus ad respondendum*," 1 Smith's Ch. Prac., p. 110, which is issued, when a party is in custody in the prison of an inferior Court; and also the writ of "*habeas corpus ad testificandum*," and there are other writs of a similar description, all of which are judicial and not prerogative writs, and have no more power or extent, than the ordinary proceedings of our Courts of Justice, and consequently, would have no force whatever out of the realm. There are three sources only, from which the high prerogative writ can issue, namely, at Common Law; by Statute, 31 Car. II., c. 2; or by Statute, 56 Geo. III., c. 100. We do not rely upon the non-registration in the Island, of these Acts. But the writ did not issue under either of the two first: the first Statute related to criminal matters only, and, under the second Statute, Equity Judges had no jurisdiction whatever, being particularly excluded from its operation. It is clear, then, that the writ, issued in consequence of the Vice-Chancellor of England's order, is not a writ issuing in any of these three ways. Crowley's case (2 Swanst. 46, 49) shows, that the Chancellor has the power of issuing the high prerogative writ of *Habeas Corpus*, but the only mode in which it can be issued, is, from the Latin, or Common Law side of Chancery, through the Petty Bag-office, being, as Blackstone expresses it, the "*officina justitiæ*."—[The Solicitor-General [Sir John Romilly].—No such writ ever issued from that office. Search was made in Cobbett's [123] case (30th April 1849), a prisoner in the Queen's Bench, but no instance was found of such a writ issuing from the Petty Bag-office; but as he insisted upon having the writ, the Lord Chancellor ordered one to issue.]—The writs relating to the business of the subject were kept *in hanaperio*, whilst those relating to matters in which the Crown was interested were kept *in parva bagga*; whence arose the distinction between the Hanaper-office and the Petty Bag-office. In *Hutchins v. Player* (O. Bridgman, 289), the distinction between the judicial and prerogative writ issuing out of Chancery, is clearly taken. In all cases where the high prerogative writ issues, the Court has no jurisdiction except over the cause of commitment: if the cause is legal, the party is remanded to custody; if illegal, he is discharged: whereas in this case the order is to bring the infants within the jurisdiction of the Court of Chancery, the object being, that, when they are within the jurisdiction, they may be subject to any order that Court may think proper to make. It is plain that this will be the effect, for the Court of Chancery has jurisdiction specially over children, as representing the Sovereign, who is *parens patriæ*: although Common Law Courts have somewhat trenched on the jurisdiction of a Court of Equity, by allowing the children, if of sufficient age, to decide for themselves with which of the parents they will live. The proceedings before the Court of Chancery are generally taken on petition, and not by issuing a writ. There were very few instances in which such writs have been issued; and Lord Eldon, in the case of *Lyons v. Blenkin* (Jac. 254), was clearly of opinion, that the proper course was to file a petition. Proceedings are [124] different in the case of infants and adults. *Leg v. Turnbull* (2 P. Will. 409). The writ in this case is a writ of "*habeas corpus cum causa*." Veal's "Forms of Writs," 50.—[Lord Campbell.—I do not see, in substance, how that writ differs from the writ of "*habeas corpus ad subjiciendum*."]—The difference consists in the one being a writ of process, from which, in case of error in the proceedings, there would have been a rehearing before the Lord Chancellor, and an appeal to the House of Lords; but can any one say there would have

been an appeal, if the Lord Chancellor had issued his fiat at once for the great prerogative writ of "*habeas corpus ad subjiciendum*?" The word "*subjiciendum*" would be omitted in the writ of "*habeas corpus cum causa*." Again, if a man wished to obtain a writ of "*habeas corpus ad subjiciendum*," he can only obtain it through the fiat of the Court, or of a judge; whereas the writ of "*habeas corpus cum causa*," would issue as of course. The writ omits the words "*ad subjiciendum*," and must, therefore, be considered as a common writ, which the Court of Chancery is in the habit of issuing by virtue of the authority given to it over infants, and an exercise of that authority, as a process writ. This was the form of the writ used in *Lyons v. Blenkin* (Seton "On Decrees," 282). The issuing of the prerogative writ is not, as in the present case, on matter depending in the High Court of Chancery, which could be heard and determined by the Vice Chancellor, and upon which an appeal will lie, but is issued by the fiat of the Lord Chancellor alone, and from it there is no appeal.

The second ground of objection, is, to the seal attached to the present writ. The writ is issued from the office of the Clerks of Records and Writs, and is sealed with the seal of the Clerks of Records and Writs. [125] We submit, that the Great Seal of England is the only one which can properly be attached to the high prerogative writ. The Clerks of Records and Writs only derive their power under the Statute, 5 and 6 Vict., c. 103, and the Orders of the Court of the 26th of October, 1842, made in pursuance of that Statute. Now this Statute does not mention Jersey, and the inhabitants of Jersey are, therefore, not bound by it. Under these Orders, the power of attaching the seals is only given to the Clerks of Records and Writs, as officers of the Court, in relation to suits, as a process writ. Their seal can never be tantamount to the Great Seal for all purposes. This writ was not so issued, and cannot, therefore, run into the Island of Jersey, and there was no contempt in disregarding it. It is clear, that if the writ be not a valid writ, the warrants of commitment cannot be executed, and the present application must be dismissed.

The Lord President [The Marquis of Lansdowne].—The Committee are of opinion that it is only necessary for the Petitioner's Counsel to address them upon the question of the validity of the writ.

The Solicitor-General (Sir John Romilly), and Mr. W. M. James, in support of the Petition.—This writ is the high prerogative writ. It is the proper writ of "*habeas corpus ad subjiciendum*." Two points are raised; first, as to the form of the writ; and secondly, the seal to it. These questions must be considered under separate heads. First, we submit, that the argument on the other side, that this was a writ merely "*ad faciendum et recipiendum*," or a writ of "*habeas corpus cum causa*," fails. There is no direction contained in this writ, to bring up any [126] cause, nor is there any pretence that there was a cause to bring up; it was merely to deliver up the custody of the infants. The form of the writ of "*habeas corpus cum causa*," was "*ad faciendum et recipiendum*," to do and receive, whatever the Court might think fit; but the form of the prerogative writ, "*ad subjiciendum*," had those words in it, and ran in the form, "*ad faciendum et subjiciendum*," to do and submit, or abide, by the order of the Court. The present writ is an exact translation of the form set out in Coke's 2nd Institute, with the omission of a few words relating to the caption. The Latin "*ad subjiciendum et recipiendum*" is translated in the present writ "to perform and abide." In Blackstone (3 Comms. p. 131, Edit. 1809), the words "*ad faciendum*," are given in addition to the others, "*subjiciendum et recipiendum*." The words "*una cum causa detentionis*," which are omitted, are only used when there was an illegal imprisonment and detention, but not when, as in this case, the children were merely to be brought up before the Court; there was, therefore, no occasion for the introduction of those words, and the omission cannot in any manner affect the validity of the writ. The form of the writ in Seton, "On Decrees," p. 282, used in the case of *Lyons v. Blenkin*, was not a writ of "*habeas corpus cum causa*," as supposed by the other side; it was the high prerogative writ, "*ad subjiciendum*," the form always used by the High Court of Chancery in matters of this description. The question then, upon this branch of the case, is narrowed to this, does the omission of the words "*una cum causa detentionis sue*" render the writ invalid? This is an important point, and involves grave considerations; for if writs, having that omission, were bad [127]

from that cause, they would be equally bad in any English county, as they would be in Jersey, and the consequence would be, that all commitments under writs in such a form would be bad. That, however, is not so, for the only writ known to the officers of the Court, is in the form of that which is now in dispute.

Secondly. The remaining question, is, whether this writ is defective by reason of having the seal of the Clerks of Records and Writs, instead of having the Great Seal, attached to it. Before the passing of the Statute, 5th and 6th Vict., c. 103, whenever a writ was issued from Chancery, it went with the Great Seal attached to it; there was no seal of the Petty Bag-office. It did not, therefore, show from which side of the Court it issued; indeed, it made no difference whether it issued from the equity or common law side. The argument of the other side, that this was a common law writ, and must have proceeded from the common law side of the Court of Chancery to give it validity, is a mere assumption, and no authority is cited in support of such proposition. They entirely overlook the fact that the Court of Chancery possesses its jurisdiction by the Common law. It is not a Court which has acquired jurisdiction in modern times by Statute, but was created by the authority of, and is dependent upon, the Common law of England. Undoubtedly before the Statute, 5th and 6th Vict., c. 103, the writ of *Habeas Corpus* was always prepared in the Six Clerks Office, and then brought up to the Lord Chancellor for signature, and whether he signed it, or whether he affixed the Great Seal, in his character of a Judge, sitting in equity, or common law, or under any of the various jurisdictions which he exercises, it was [128] immediately effectual and valid. Jenkes's case (6 Howell's State Trials, 1189). Crowley's case (2 Swanst. 1). Here the writ was issued in the vacation, when the writ cannot issue out of the Petty Bag-office. Crowley's case, Exp. Armitage (1 Amb. 296), as that office was not open in vacation for issuing writs returnable in Chancery. The 4th Order of the Court of Chancery, of October, 1842, which has the force and effect of an Act of Parliament, directs that a writ, when sealed by the Clerk of the Records and Writs, shall have the same force and validity as if sealed with the Great Seal. If the writ was defective and void, the proper course would have been to have applied to the Court of Chancery to quash it; the parties objecting to it, ought to have applied to discharge the writ, or to have discharged the warrant of commitment, and that application should have been made to the Court of Chancery, and not to this Committee. We, therefore, submit, that these technical grounds, urged by the other side, cannot prevail, and that the only real question, is, whether the writ of *Habeas Corpus* runs into the Island of Jersey. Exp. Tomkinson (10 Ves. 106). *In re Parke* (2 Q.B. Rep. 619). *In re Spence* (2 Phill. 247).

Sir Frederick Thesiger in reply.—It is doubtful whether the Vice-Chancellor of England has any jurisdiction at all to issue a writ of "*Habeas Corpus ad subjiciendum*." The Statute, 53 Geo. III., c. 24, creating the office, gives the Vice-Chancellor authority to act in those cases only, in which the Lord Chancellor has authority by Act of Parliament. The *Habeas Corpus* Act, 31st of Car. II., c. 2, does not extend to [129] Jersey, and the Royal Court, therefore, had no cognizance of that Statute. Another objection, also fatal to the writ, exists. It is sealed by the Clerks of Records and Writs, and not with the Great Seal, as was necessary. The Statute, 5 and 6 Vict., c. 103, relied upon by the other side, does not cure this defect, as that Statute does not apply to Jersey.—[Lord Campbell: If an Act of Parliament says a certain substitute shall be made to the Great Seal, surely it is binding all over the world.]—No, unless it mentions Jersey it would not be in force there.—[The Solicitor-General [Sir John Romilly]: The Great Seal itself was altered at the time of the Union, and yet the Statute by which that alteration was directed to be done does not mention the Island of Jersey: therefore, this objection, if good, would equally apply to the Great Seal itself.]

No judgment was delivered, but the following report to Her Majesty, dated the 4th of February, 1850, containing the reasons of their Lordships' opinion, was prepared by Lord Langdale, and approved of by the other members of the Committee present at the hearing of the Petition:—

"In January, 1849, Mrs. Belson brought an action against her husband, in the Royal Court of Jersey, for a separation, and for the custody of the infant children of the marriage. On the 23rd of April, it was ordered by the Royal Court, that the two youngest children should be left provisionally in the custody of Mrs. Belson.

For anything which appears to the contrary, this Order (which is now subsisting) is a valid Order of a Court of competent jurisdiction. Four months after the date of this Order, a Bill (*Belson v. Belson*) was filed in the Court of Chancery in England, of [130] which Court it is alleged that the children thereby became wards. On the 23rd of August, the Vice-Chancellor of England ordered a writ of *Habeas Corpus* to issue, to bring the children to England, to perform and abide such Order as might be made. On the 5th of September, the writ issued, returnable on the 12th; no return was made, but on the 12th, the parties (who had been served on the 7th) appeared before the Vice-Chancellor of England, and, by arrangement, the case stood over till the first day of term. On the 6th day of November (no return being made), the Vice-Chancellor of England declared the two persons on whom the writ was served to be in contempt, and ordered them to stand committed, and on the 13th November, the Lord Chancellor issued his warrants to take them into custody accordingly. We think, that if the facts were truly stated to the Vice-Chancellor of England, the writ ought not to have been ordered, but the writ having issued, it ought to have been obeyed.

The Royal Court of Jersey, having refused to register the warrants, and to assist in the execution, Mr. Belson presented his petition to Her Majesty in Council, and, as we understand, the only questions reserved for consideration, were—

"First. Whether the writ of *Habeas Corpus*, issued under the fiat of the Lord Chancellor, pursuant to the Order of the Vice-Chancellor, is a common law prerogative writ?

"Second. Whether the writ is properly sealed in the office of the Clerk of Records and Writs?

"The Lord Chancellor, or the Court of Chancery, has, by the common law jurisdiction, authority to issue writs of *Habeas Corpus*, and the authority appears to have been exercised in a manner as general, as the like authority by the Court of Common Law, and more-[131]-over is exercised in vacation, when it is supposed, at least, that such writs cannot be issued by the other Courts. Coke, 2 Inst. 53, 55, 4 Inst. 81, 182.

"There does not appear to have been any restriction as to the purposes for which the writ might issue. It was due to any person complaining of unlawful detention, and it was employed for the purpose of removing prisoners, of bringing them up to be bailed, of bringing up infants improperly detained, etc.

"Before the writs were in English, when the object was to remove a prisoner, the writ was expressed to be '*ad faciendum et recipiendum*, etc.,' 'to do and receive, etc.,' as is now expressed in the writs issued by the Courts of Common Law for the like purpose. Tidd's Forms, 120.

"I have not found any Latin form for the writs issued for other purposes. But since the writs were issued in English, the expression 'to do and receive' has not been employed; but all the writs of *Habeas Corpus*, for whatever purpose, issued out of Chancery, have had the expression 'to perform and abide, etc.'

"Where the object was to remove or bring up a prisoner in custody of the sheriff, gaoler, etc., the writ commanded that the prisoner should be brought before the Court wheresoever it then was, 'with the cause of his detention,' etc., whereas, where the object was the bringing up infants, or others detained in private custody, the party detained was to be brought before the Court or Judge on a particular day, and at an hour and a particular place named in the writ, and the clause '*cum causis*' was omitted.

"Of late years there are abundant precedents of this in the case of Bankrupts committed by Commissioners, infants withheld from parents or guardians, etc., and [132] the common and only form for all such writs, when the person to be brought up is not a prisoner, in the custody of a sheriff, gaoler, etc., is precisely the same as the form of the writ issued in the present case. There is an instance set forth in Seton '*On Decrees*,' p. 282. In that case the writ was issued in a cause, but the form is not different from that issued when no cause is pending.

"Moreover these writs, whether with or without the clause '*cum causis*,' were always prepared in the Six Clerks Office, and are now always sealed in the Record and Writs Clerks Office. In 1736, a prisoner committed by a certain Justice of the Peace, petitioned to be brought up to be bailed. The Lord Chancellor ordered that

the petitioners' Clerk in Court should sue out a writ of *Habeas Corpus* under the seal of the Court, etc., and such has always been the course for whatever purpose the writs are required.

"The object of the writ which issued in the present case, being to bring up infants detained in private custody, has not the clause '*cum causis*,' but it is the same sort of writ as that which in *Ex parte Crowley* [2 Swanst. 48], is described by Lord Eldon, as a very high prerogative writ, and there can be no doubt, and it was admitted, that it might be held to run into the Island of Jersey.

"And, therefore, if the other members of the Committee of Council concur, I think that Her Majesty ought to be advised to order and direct the Royal Court of Jersey to register and publish the warrants of the Lord Chancellor, and to direct the Governor, etc., and all Her Majesty's subjects, to be aiding and assisting in the due execution of the same warrants."

[133] Her Majesty having approved of this report, by an order in Council, dated the 5th of February, 1850, ordered.—"That the Royal Court of Jersey do forthwith register and publish the warrants signed and issued by the Right Hon. the Lord High Chancellor of Great Britain, bearing date the 13th of November, 1849, addressed to William Allen, tipstaff, etc., directing him to arrest and apprehend Maria Elizabeth Belson and William Henry Hartman; and Her Majesty was further pleased to order and direct the Lieutenant-Governor of the Island of Jersey, the Viscount denunciators, officers of justice, constables, and centeniers, and all other Her Majesty's subjects within the said Island, to be aiding and assisting in the due execution of the said warrants."

[Mews' Dig. tit. APPEAL, II. To HOUSE OF LORDS, 6. *Practice*, l. *costs*, xi. *Security for*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an Appeal lies generally*; tit. CROWN OFFICE, C. HABEAS CORPUS, 1. *Jurisdiction generally*, 2. *To Colonies and other Dominions of the Crown*. S.C. 14 Jur. 631.]

In re PETTIT SMITH'S PATENT * [Feb. 11, 1850].

In cases for extension of the term of Letters Patent, the Attorney-General represents the Government and the public generally [7 Moo. P.C. 136].

An application by the Lords of the Admiralty to enter a caveat and be heard against a petition for an extension, such caveat not having been filed within the time required by the rules of the Privy Council Office, refused, as the Attorney-General was present to watch the interests of the Government [7 Moo. P.C. 136].

Extension of Letters Patent granted for five years; the invention being of great merit and public utility, but the patentee and his grantees had received no remuneration, in consequence of the originality of the patent being disputed at law [7 Moo. P.C. 138].

In granting such prolongation, the Judicial Committee imposed a condition, that the Commissioners for executing the office of High Admiral should have the right of manufacturing such invention, for the service of Her Majesty, without any licence from the patentee [7 Moo. P.C. 138].

This was an application for an extension of the term of three letters patent granted to Francis Pettit [134] Smith for England and Ireland and Scotland respectively, for an invention described under the title of "An improved propeller for steam and other vessels." The petition was presented by the patentee, and Sir John Dean Paul, Bart., and John Maltby Sunley, the trustees of the Ship Propeller Company, and Thomas William Dukes, the secretary of the Company.

The petition stated the novelty and utility of the invention, and its adaptation for propelling ships and vessels on and through water, by means of screws or worms

* Present: Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

applied to such ships, made to revolve below the water-line of the same, thereby providing vessels of war with the means of motion by propellers applied under water, out of the reach of the enemy's shot, and capable of being used in all weathers, and thus dispensing with the old cumbersome paddle-boxes and wheels, and other apparatus connected therewith, so as to contain in vessels so fitted adequate space for a complete broadside or tier of guns fore and aft, which they otherwise could not have, by reason of the collocation of the paddle-boxes, engines, and boilers, thus affording both to the royal and mercantile navies a means of propulsion which, by superseding the old paddle-wheels and boxes, got rid of the impediments to sailing from the swell and surge created by the paddle-wheel and the effect of the wind and sea upon such paddle-wheels and boxes, so that the power of steam was conveniently adapted to sailing vessels, and capable of being applied as an auxiliary power with great economy and advantage to the public. That the invention consisted in the screw, or worm, being placed in a recess or open space formed in that part of the vessel commonly called the "dead rising or dead wood of the run," and made to revolve rapidly under water. [135] That in consequence of the inventor's circumstances being insufficient to enable him to furnish the necessary capital for carrying into effect the object of his discovery and invention, he had assigned his rights to the Ship Propeller Company, who had afterwards been incorporated by an Act of Parliament passed in the 2nd and 3rd years of Her present Majesty. That the invention was of great national benefit, as an auxiliary power in the saving of time, in the certainty with which long voyages were made, and the consequent saving of capital. That the patentee was wholly unremunerated for his invention, and the Company had expended a large capital upon which they had got no return. That the losses they had sustained were owing to circumstances over which they had no control.

Upon the opening of the petition, Mr. Crowder, Q.C., for the Lords of the Admiralty, applied for leave to enter a caveat against the extension, on the ground, that the fact of the application had not come to the knowledge of the Lords of the Admiralty, until it was too late, consistently with the rules of the Privy Council Office, to enter a caveat, as they wished a condition to be inserted in the grant, which was of importance to the public, and asked for the hearing of the petition to be postponed.

Sir Frederick Thesiger, Q.C., for the Petitioners, objected to a caveat being then filed; or to any postponement, as great expense had been incurred in bringing their witnesses.

[136] The Attorney-General (Sir John Jervis) offered no objection to the application.

Lord Campbell.—I cannot understand why the Attorney-General may not do all that the public interests require without the Admiralty. It must be a very strong measure to induce us, when the case is called on, and there is a competent person before us to take care of the public interest, to postpone the hearing upon a suggestion that might have been acted on long ago. The Petition must go on.

It appeared from the evidence, that the invention was of great merit and public utility, although the novelty of the Patentee's invention had been questioned. The Patentee's merit being, not so much in the invention of the screw, as the place where he placed the screw, in the rising or dead wood of the run. There was no profit. There had been a contract with the Admiralty, who had used it very extensively, and owed £25,000 for its use, but who refused to pay it, in consequence of the litigation and claims of other parties respecting the originality of the invention. There had been large infringements, and an action had been brought by the Patentee against a party for an infringement, but the defendants got a verdict, to the loss of the Patentee of £2000. No actions had been brought against the other parties who had infringed the Patentee's rights.

Sir Frederick Thesiger, Q.C., Mr. Montagu Smith, and Mr. Webster, for the Petitioners.

The Attorney-General (Sir John Jervis), for the Crown, [137] objected to any extension being granted unless a condition was inserted in the new Letters Patent, to enable the public service to use and manufacture the invention, without any licence for that purpose, from the Patentee or his assignees.

Lord Brougham.—Their Lordships have paid attention to this case, from the great importance of the subject, and also because there are peculiarities in it which require investigation. It differs, in one or two respects, from the cases which have generally come before us. It requires that we should also attend to the peculiar circumstances of each case narrowly, because it is anything rather than to be taken as a matter of course, that when a party applies for an extension of a patent, merely on the ground, that it is a valuable invention, he is to have an extension of it beyond the fourteen years which the Statute gives him.

The parties will, therefore, perceive that it was necessary for us to examine minutely into the peculiarities of this case. Their Lordships are of opinion, that, though there are certainly some peculiarities which are not very satisfactorily explained, especially the length of time during which no steps were taken to sue parties who were clearly infringing the Patent, and the extension of time is not by way of compensation for such infringement, to those who have the Patent right; yet we have also to look to the circumstances, in which the party was placed in respect to the Admiralty, on the one hand, and to the great misadventure he had in steering through the Courts of law, where he unfortunately went against the wrong parties, and, at the expense of £2000, failed in his suit. We have to consider these matters altogether; and, also, that we [138] have no clear proof, that there was any very great amount of infringement, because, though it is alleged, on the one hand, that there were 100 merchant vessels, that is a mere statement, and, on the other hand, it is asserted there were 3000 horse power, which also is a mere statement: probably the truth may be between those two extremes.

Now, while their Lordships did not think that, regard being had to the other circumstances of this case, to the great merits of the Patentee, which are undeniable, and to the great advantage likely to accrue to the public from this invention, enough had been made out for them to refuse this application; at the same time, in granting the extension, we are quite clear, that it ought to be with a view to the condition exacted by the Attorney-General, and to which Sir Frederick Thesiger, on the part of his client, intimated that he had no objection. Such a condition must be a part of our recommendation to the Crown for the grant in question; but we cannot tell, it being very important that it should be accurately framed, how to word it, and, therefore, how to word our judgment. Accordingly, we shall just state the amount of time for which we mean to extend the monopoly, adding that, before the close of the sittings, we wish that the parties would each give in that to which they have agreed, and then we will add and annex to it, our recommendation of the extension which, we are of opinion, ought to be for the term of five years.

The condition to be inserted in the new Letters Patent having been agreed upon, by an Order in Council, it was ordered, that new Letters Patent for England, and Ireland, and Scotland, respectively, were to be granted to the Petitioners, John Dean Paul, Bart., and [139] John Maltby Sunley, in whom the legal interest in the said original Letters Patent were then vested, for the further term of five years, from and after the expiration of the term in the said Letters Patent; and Her Majesty was further pleased to Order, that “there be inserted a condition, or reservation, in the said new Letters Patent, that it shall be lawful for the Lord High Admiral of the United Kingdom of Great Britain and Ireland, and for the Commissioners for executing the office of High Admiral for the time being, to contract with any person or persons, whomsoever, for the manufacture and fitting, and cause to be manufactured and fitted by any person or persons, whomsoever, at any time or times, and at any place or places, whatsoever, the said Invention, for the service of Her Majesty and Her Majesty's heirs and successors: such person or persons shall be at liberty to manufacture and fit the same accordingly, for the service of Her Majesty, her heirs, and successors, without any licence, let, or hindrance from the Patentee, his executors, administrators, or assigns, and without the Patentee, his executors, administrators, or assigns, being entitled to any compensation or damages, whatsoever, for the same; and that there should also be a condition, that, if the Patentee, his executors, administrators, or assigns, shall not supply, or cause to be supplied, and fit, or cause to be fitted, for Her Majesty's service, the said invention as he or they shall be required to supply or fit the same, in such manner, at such times, and at, and upon, such reasonable prices and terms as shall be settled for

that purpose by the Lord High Admiral of the United Kingdom of Great Britain and Ireland, or by the Commissioners for executing the said office for the time being, then that the said Letters Patent shall be void."

[Mews' Dig. tit. PATENT; F. CONFIRMATION, RENEWAL, AND EXTENSION OF LETTERS PATENT; 2. *Renewal and Extension*; a. *Generally. Position of Attorney-General—Inadequate Remuneration*. As to extension generally, see 46 and 47 Vict., c. 57, s. 25. As to imposition of conditions, see *Smith's Patent, In re*, 1885, 2 R.P.C. 14.]

[140] ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT AT BENGAL.
RAJA SUTTI CHURN GHOSAL, *Appellant*; SRI MUDDEN KISHORE INDOO,
—*Respondent* * [Feb. 12, 1850].

Petition to dismiss an appeal from the Sudder Court, in India, and for an order directing that Court to carry into execution the terms of a deed of compromise, upon which the withdrawal of the appeal was founded; refused.

All this Court will do, in such circumstances, is to make an order of dismissal, reserving to the parties, leave to apply to the Court in India, to take further proceedings, in pursuance of such agreement.

This was a petition to dismiss an appeal. The parties executed, in India, a *razinamah*, or deed of compromise, for the settlement of their respective claims, the subject of the cause, and for the withdrawal of the appeal, upon certain conditions specified therein, respecting the taking of the accounts of the *wasilat*, or mesne profits. The petition, besides praying for the withdrawal of the appeal, also prayed, that directions might be given to the Sudder Dewanny Court, to carry into effect the terms of the deed of *razinamah*.

Mr. Turner, Q.C., in support of the Petition.

Mr. Wigram, Q.C., for the Respondent.—Their Lordships granted leave to withdraw the appeal, but refused to make an Order directing the Sudder Dewanny Court to carry into execution the terms of the deed of *razinamah*; leave being reserved [141] to the parties to apply to the Court below, to take further proceedings under such agreement.

The following Order in Council was made upon the Petition:—

"Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said appeal be, and the same is hereby, dismissed, with leave to the parties to apply to the said Court of Sudder Dewanny Adawlut, to take further proceedings in pursuance of the said agreements, whereof the Judges of the Court of Sudder Dewanny Adawlut, at Fort William, in Bengal, for the time being, and all other persons whom it may concern, are to take notice, and to govern themselves accordingly."

[S.C. 5 Moo. Ind. App. 107.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT
FORT WILLIAM, IN BENGAL.

In re WILLIAM PATRICK GRANT † [Feb. 15 and 19, 1850].

Appeal from an Order of the Supreme Court at Calcutta, suspending from office

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and Sir E. Ryan, Knt.

† Present: Lord Brougham, Lord Langdale, Lord Campbell, and the Right Hon. Dr. Lushington. Privy Councillor—Assessor—Sir E. Ryan, Knt.

the Master and Accountant-General and Examiner in Equity of that Court, upon special application, allowed [7 Moo. P.C. 142, 143].

The Supreme Court at Calcutta has power by the Charter of Justice of 1774 (14 Geo. III.), to remove, or suspend, Officers of that Court, on account of misconduct, and this power of removal is not limited to acts done by such Officer in his judicial character, but includes transactions distinct from those of his office [7 Moo. P.C. 146].

An Officer of the Court, being a Shareholder and Director of the Union Bank at Calcutta, was a party to deceptive statements, contained in the half-yearly reports of the concern, as to the state of the affairs of the Bank, and also availed himself, in his character of Director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of co-partnership of the Bank, amounted to a breach of trust. No charge or imputation, with respect to his judicial functions, was brought against him.

Held (affirming an Order of the Supreme Court suspending such Officer from office), that there were sufficient grounds for calling upon the Court to protect the administration of justice, by suspending such Officer for so misconducting himself [7 Moo. P.C. 159, 160].

This appeal was presented by William Patrick Grant, Esquire, against an Order of the Supreme Court of [142] Judicature at Fort William, in Bengal, dated the 6th of June, 1818, suspending him from the offices of Master, Accountant-General, and Examiner in Equity, in that Court, until the further order of the Court.

The facts of the case and the correspondence between the Judges of the Supreme Court and Mr. Grant, which led to his suspension, are so fully stated in the judgment, that it is unnecessary to state them here. The Judges of the Supreme Court, upon the facts and evidence brought under their consideration, thought that the conduct of Mr. Grant, as one of the Directors of the Union Bank of Calcutta, was such, that they could not, consistently with their duty to the public, retain him in his Offices, but, as there was an absence of authority as to the power of removal from office by the Court, and the nature of the tenure of his office, and the Court was acting in the exercise of a discretionary power, the Court suspended him from office until further order, instead of an absolute removal.

The Supreme Court granted leave to appeal from this order of suspension, but, as doubts existed as to the power of the Court, under the Charter of Justice to grant such an appeal, Mr. Grant applied specially to Her Majesty in Council for leave to appeal.

[143] (13th Feb. 1849. *) Mr. Peacock, in support of the application, referred to *Morgan v. Leech* (3 Moore's P.C. Cases, 368). *In re Minchin* (6 Moore's P.C. Cases, 43).

Leave to appeal was granted.

The appeal having been admitted, the Appellant submitted that the order of the Supreme Court suspending him from his Offices ought to be reversed, for the following reasons:—

First. Because the Appellant must be deemed to have held the Offices from which he has been suspended by the order, for life, or during good behaviour, and no sufficient case was suggested, or produced, to justify his removal, and no power is given by the Charter of Justice, or any Statute, or Act of the Local Legislature, to the Judges of the Supreme Court, to remove or suspend the Officers of the Court, at pleasure.

Second. Because it appeared from the opinion expressed by the Chief Justice [Sir Lawrence Peel], that the Judges proceeded upon supposed matters of fact originally brought to their notice, either extrajudicially, or by their incidental introduction into proceedings to which the Appellant was not a party, and in which they were not in issue, and no judicial proceeding had ever been had for the due investigation of these matters of fact, nor was there any notice to the Appellant, until the letter of the 24th of May 1818, that the Judges professed to be acting judicially in the matter.

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

or that he, the Appellant, was expected to defend himself against formal charges involving forfeiture of Office.

Third. Because, even assuming the charges against the Appellant, and the evidence in support of them, as stated in the Chief Justice's note, enclosed in the [144] Registrar's letter of the 26th of May, the conclusions of fact drawn by the Chief Justice were not warranted by the evidence; and, if such conclusions of fact were warranted by the evidence, they were not such as would support any penal proceeding, and were wholly insufficient to justify the infliction upon the Appellant of so severe a penalty as forfeiture of, or suspension from, Office.

Fourth. That the order did not, on the face thereof, state or refer to any grounds upon which the same had been made, and whereby its propriety might be tried by the Court of Appeal, in which it was admitted to be examinable.

The Chief Justice [Sir Lawrence Peel] of the Supreme Court did not state any case, but instructed Counsel to attend the Committee with a view to render such assistance as justice might require, and submitted, that the Petition of appeal ought to be dismissed,—

Because the Supreme Court possessed the jurisdiction which the Chief Justice had assumed to exercise in the case.

Because, having regard to the circumstances of the case, the order made by the Chief Justice was a fit and proper exercise of that jurisdiction; and

Because, having regard to all the circumstances of the case, Mr. Grant was not a fit and proper person to hold the office of Master Accountant-General and Examiner on the Equity side of Her Majesty's Supreme Court.

Sir Frederick Thesiger, Q.C., Mr. Turner, Q.C., and Mr. Peacock, for the Appellant; and the Solicitor-General (Sir John Romilly), and Mr. S. Henderson, for the Chief Justice.

[145] Upon the question of the tenure of the offices of Master and Accountant-General and Examiner in Equity, and the power of the Supreme Court at Calcutta to suspend or remove officers of that Court, on account of misconduct, Statute, 13th Geo. III., c. 63, sec. 13; *Calcutta Charter of Justice* (March 26th, 1774, 14 Geo. III.), *In re Minchin* (6 Moore's P.C. Cases, 43); and *Goodwin v. Gosnell* (2 Coll. 457).

Judgment was delivered by

The Right Hon. Dr. Lushington (14th May, 1850).—The Appellant, William Patrick Grant, held the offices of Master and Accountant-General of the Supreme Court at Calcutta, from the 30th of April, 1838, and of Examiner in Equity, from the 14th of January, 1839, and continued to discharge the duties thereof till the 6th day of June, 1848. On this last-mentioned day he was suspended from these offices, until further order, by Sir Lawrence Peel, the Chief Justice of the Supreme Court, who at that time, in consequence of the absence of his colleagues, alone constituted the Court.

From this Order the Appellant presented his petition to the Supreme Court for liberty to appeal, and such petition was received and allowed, and on the 13th of February, 1849, leave was granted by the Judicial Committee to appeal to Her Majesty in Council.

The Appellant now submits, that the Order of the Supreme Court of June, 1848, suspending him from his Offices, ought to be reversed.

The Chief Justice instructed Counsel to attend, with a view, as he states, to render such assistance as justice may require, and he submits, that the Supreme [146] Court had jurisdiction to make the Order, and that it was a fit and proper Order to be made.

Counsel on both sides have been fully heard, and it is now the duty of their Lordships to consider what are the questions arising upon this appeal, and how they ought to advise Her Majesty to adjudicate thereon.

A question was raised in the Court below as to the tenure by which the Appellant held those offices, and there was some discussion at the Bar upon that point, but we do not think it necessary to enter into this discussion, for whatever be the tenure of those offices, there must exist in the Supreme Court the power of suspending officers on account of misconduct, and the only question can be, whether the misconduct imputed is sufficiently proved, and if proved, it be a sufficient ground for

calling upon the Court to protect the administration of justice by the suspension of the officer so misconducting himself.

Sir Lawrence Peel states his reasons for suspending, instead of removing, Mr. Grant, in the following terms:—"As there is an absence of authority as to the powers of removal, and the tenure of the office, and I am acting in the exercise of a discretionary power in some degree: and as it is just to save Mr. Grant all avoidable injury by my decision, if erroneous, I shall suspend him from office until further order, instead of an absolute removal; so that if the Privy Council, upon appeal, should reverse my decision, he will not be prejudiced by the form of my Order in any claim he may prefer for the intermediate profits of his Office."

Though the form in the Order is suspension, we cannot disguise from ourselves, that the true question, [147] under all the circumstances of this case, is, not merely whether the suspension of Mr. Grant from office is justified, but in substance and effect, whether he might be justly removed therefrom.

The offices held by Mr. Grant were the highest offices in the Supreme Court, after the Judges of that tribunal. On the due performance of the duties attached to those offices the administration of justice in no unimportant degree depends. All those offices are offices of trust and confidence, and on many occasions the Master must be called upon to exercise functions which are in their nature judicial.

These duties Mr. Grant discharged for a period of ten years, and it is admitted, on all hands, that not the slightest imputation rests upon him with respect to the fulfilment of the duties he had undertaken. Mr. Grant, most unfortunately for himself, had been a shareholder in the Union Bank, established at Calcutta in the year 1829, and had been a Director from 1842 till the close of the year 1847, when the Bank failed. This failure was most disastrous, for not only was the whole of the capital, amounting to one million sterling, lost, but the shareholders were called upon to contribute to a large amount for the purpose of discharging the obligations of the Bank. No doubt such a catastrophe occasioned great consternation and dismay at Calcutta, and hostile feelings were excited against the Directors, to whom, whether justly or unjustly, the calamity was attributed.

At that period, and for some time after, the Supreme Court consisted of Sir Lawrence Peel and Mr. Justice Seton; Sir Lawrence Peel states the circumstances which gave rise to the interposition of that Court, in the following terms:—"Soon after the stoppage of the [148] Union Bank, it became known to me, though not judicially, that great misconduct of its affairs was imputed to the Directors of the Bank, and to Mr. Grant as one of them. The matter occasioned the greatest anxiety both to Mr. Justice Seton and to myself. We were both of opinion, considering the nature of the matters imputed, that Mr. Grant was a principal officer of this Court, and the peculiar character of his office, that some inquiry would be necessary; but we ultimately thought that it would be improper to call on that gentleman for an explanation of his conduct as a Director, until after the decision of the causes pending in the Supreme Court against the Union Bank."

Accordingly, on the 11th of April, 1848, a letter was addressed to Mr. Grant by both the Judges, and it is in the following terms:—"Sir, the Judges have great pain in communicating to you, that the disclosures that have lately taken place in relation to yourself and the Union Bank are such as necessarily to destroy that confidence which, for the sake of the public and the Court, ought to subsist between the Court and an officer entrusted with the duties of the Master, and they think it right to state their views to you, in order to give you an opportunity of avoiding the necessity of more painful proceedings. We have the honour to be, your obedient servants, Lawrence Peel, H. W. Seton." To this letter Mr. Grant immediately returned an answer, requesting to be acquainted with the specific circumstances to which the letter of the Judges alluded, in order that he might know with what he was charged, and have an opportunity of answering.

On the 12th of April, 1848, the Judges replied, [149] stating that the gross mismanagement of the Union Bank, involving, in addition to the deceptive nature of the reports, breaches of trust of the most serious description, justified the withdrawal of their confidence; and they referred to the lending of the funds on unauthorized securities, and to Mr. Grant being a debtor to a large amount on mere personal

security. On the same day Mr. Grant wrote to the Judges, denying the charges, and informing them he would prepare and send in a statement.

On the 5th of May, 1848, Mr. Grant sent in his statement, and to it annexed two reports and accounts.

By order of the Court, the Registrar procured from the Executive Committee of the Bank, a statement of the amount due by Mr. Grant to the Bank, and the particulars of Mr. Grant's debt relating to Bills discounted. These two documents were laid before Mr. Grant for any explanation he might think fit to give, and on the 20th of May, 1848, Mr. Grant addressed an explanatory letter to the Judges. On the 24th of May, Mr. Grant received notice that the Chief Justice would sit at his Chambers, on the 31st, to hear anything Mr. Grant might desire to urge. In answer to this notice, Mr. Grant wrote on May the 25th, to the effect, that if it was intended that the matter should assume the shape of a judicial investigation, on he knew not what charge, he should decline to appear, and should protest against the legality or justice of such proceeding.

About this period, Mr. Justice Seton was, in consequence of illness, compelled to leave Calcutta.

The Chief Justice, on May the 28th, caused a paper, containing his observations on Mr. Grant's letter of May, 1825 [25th, 1848], and setting forth the charges and describing the evidence in support of them, to be delivered to Mr. Grant.

On May 30th, 1848, Mr. Grant addressed a long letter to the Judges, commenting upon the preceding communication, renewing the protest, and declining to appear; which declaration was repeated in another letter, dated June the 5th, 1848, after Mr. Grant had received notice that the hearing was postponed until the 6th of June.

On that day the Chief Justice (Mr. Grant not appearing) suspended Mr. Grant from his offices till further order, and assigned his reasons for so doing at a considerable length.

The whole of the documents to which the preceding statement refers, are printed in the Appendix to this case, and also some further documents or extracts therefrom, which are of a public and formal character. It is upon this evidence that we have to determine, whether the order of the 6th of June, suspending Mr. Grant, was rightly issued. We will first re-state the charges upon which the proceedings of the Supreme Court were founded, then consider how far they are established by the evidence adduced; and if we should be of opinion, that the evidence affords sufficient proofs of the facts, lastly, whether the facts proved justify the Order of suspension. The Charges are contained in the following letter:—

“ Court-House, 12th April, 1848.

“ Sir—The gross mismanagement of the affairs of the Union Bank, which has ended in the destruction of the interests confided in you, involving, as it does, in addition to the deceptive nature of reports, breaches [151] of trust of the most serious description, justifies the withdrawal of our confidence from you. We need only refer to two of the more prominent instances; viz., the lending the funds of the partnership on unauthorized securities, and becoming yourself a debtor to the Bank to a large amount, and on mere personal security, contrary to the most obvious principles of your duty, of which we beg to observe on your part great apparent unconsciousness.—Your obedient Servants, Lawrence Peel, H. W. Seton.

“ W. P. Grant, Esq.”

The charges having been stated, Mr. Grant was afforded ample opportunity of controverting them, or of offering any explanation he might deem advisable: he availed himself of the facility so afforded to him, to send in very elaborate statements in writing; but, as already observed, declined to appear before the Court. The materials from which our conclusion must be drawn, consist of the correspondence, which includes the statements and several documents to be found in the Appendix to this case. No evidence was adduced to contradict any avowment of fact made by Mr. Grant. The question was, what inferences were to be drawn from the facts?

The evidence before us relates to the transactions of the Union Bank, and the conduct of the Directors, and we must bear in mind that the principal question is,

not what was done by the Directors simply, but how far Mr. Grant had knowledge of those transactions, and can fairly be considered as responsible for them, either as being cognizant of them, or in having neglected an imperative duty in not availing himself of the means [152] of knowledge, within his power, to fulfil the duty he had undertaken.

The duties of the Directors are set forth in the following clauses of the Deed of Co-partnership:—" 39. That two of the Directors shall transact the daily business of the Bank, and that a meeting of the whole of the Bank Directors, for the time being, shall be held at the Bank once in every week; and that any two or more of the Directors, for the time being, may, at any time, call a meeting of the whole of the said Directors, by notice in writing, to be sent to each of the Directors for the time being, such meeting to be holden on such day as shall be mentioned in such notice; but that no business shall be transacted at any general meeting of the Directors, unless four Directors, at the least, shall be present; when such business shall be submitted for consideration; and that the chair shall be taken, at every general meeting of the Directors, by the President, or, in his absence, by the Vice-President; or, in case of the absence of both, by one of the Directors chosen from the number of Directors present, by a majority of votes, who shall act as President for the time being."

One of the principal charges against Mr. Grant is, that of having been a party to deceptive reports of the state of the Bank reports calculated to mislead the Proprietors and the public as to the real state of the affairs of that concern, and that, too, with a knowledge that the reports were not founded upon a full, fair, and true representation of the facts. We have had submitted to us, two of the reports: the half-yearly report of January, 1847, and that of July of the same year. Having perused these reports, we are necessarily led, after considering their [153] import, to see whether the representations therein contained are consonant with the evidence which we have before us; and this brings us, though unwillingly, to look into the affairs of the Bank as disclosed by these papers.

We derive our information principally from the statement of Mr. Grant himself; he gives us a history of the Bank, from its commencement in 1829, and, in more detail from 1839, when its capital amounted to one million sterling. It appears that, in June, 1841, the credits granted on the security of Indigo factors amounted in round numbers to nearly £1,400,000, and that in December, 1841, above half a million sterling was due on these accounts. In August, 1842, Mr. Grant became a Director; he states that, at the close of 1842, £600,000 had been advanced on Indigo factories; that two firms had failed, owing the Bank £300,000, for which the Bank had no security but the Indigo factories.

Mr. Grant takes credit to himself for having, both as shareholder and as Director, opposed this system of lending the funds of the Bank on the security of Indigo factories, and to that praise he may justly be entitled; but the question here is, not whether the system was prudent or not, but what was its actual operation and effect on the property of the Bank in 1847, when the reports were made.

It is perfectly obvious, from Mr. Grant's statement, that a large proportion of the capital of the Bank depended on the realization of these securities; that they were not convertible securities. Following the history further, we find that they could only be maintained, as of some future speculative value, by advancing large sums annually for their cultivation. Large [154] sums were so advanced, and the result is thus stated. The Bank would have saved money if it had written off the whole debt of Fergusson and Co. for £210,000. The debt of Messrs. Colville and Co. grew from 4 lacs of rupees in 1842, to 16 lacs in the year 1847. Mr. Grant says, that it was not to be wondered at that the Directors recommended, or that the proprietors sanctioned, the course which was adopted; for, if not adopted, there was the certainty that an enormous part of the Bank's capital would have been immediately written off as a bad debt. The result is admitted: the Bank was left with its original 60 lacs unpaid, and in possession of Indigo factories not worth the money as the debit.

We are not inquiring whether these advances were wisely or imprudently made, or the system prudently or imprudently continued, but we are inquiring, what

was the state of facts in 1847, when these reports were made; and we have the state of facts described as above by Mr. Grant himself, with this addition, that there was a long succession of Indigo crops that never paid the cost of cultivation.

With this undoubted evidence of the condition of the Bank in 1847, we will now proceed to examine the reports of 1847. In both of these reports, it is stated, that a larger amount of profit had been made than for several years past, and on each occasion a dividend, after the rate of seven per cent. per annum, is declared. The whole tenor of these reports is calculated to produce the impression, that the concerns of the Bank were in a favourable state; whereas, taking two items only, according to the statements of Mr. Grant himself, no less than £240,000, the debt due from Fergusson and Co., was a total loss, and the debt due from Colville, [155] Gilman, and Co. had become, in 1847, 16 lacs instead of 4 lacs, its original amount, and that without additional security; surely, if there were not losses absolutely ascertained, yet the sums so lent were in such extreme jeopardy, that to pass by the subject in silence, not to draw the attention of the shareholders to circumstances of such deep importance for their interests, was, in fact, to lull them into a false confidence in the stability of the concern.

By the 60th clause of the Deed of Co-partnership, it is provided, that no dividend shall be made whereby the capital of the Company shall be in any degree reduced or diminished.

Looking at the admitted state of things, that a large part of the capital was locked up, and not only unprofitable, but requiring constant outlay to maintain the securities as the only chance of repayment, and that could not, and did not, produce one farthing by way of interest, we are at a loss to understand how, with truth and justice, any such dividend could have been declared.

Having duly considered all these circumstances, we are compelled, by the strength of the evidence, to concur in the conclusion of the Supreme Court, that these reports are of a deceptive character.

The question then arises, how far Mr. Grant was privy to those reports, and to be held responsible for their contents, when we look at the 39th clause of the Deed, and turn our attention to the opinions expressed by Mr. Grant. As to the duties undertaken by those who allow themselves to be invested with the office of Director, we cannot but think, that Mr. Grant is in entire error as to what those duties were, or the responsibility they entailed. It may be true, indeed, [156] that for mere errors, in accounts for matters which would not come within the ordinary scope of their duties, but more properly within the province of paid officers, the Directors might not be personally answerable; but we must express our opinion, that those who accept such an office are bound to have, at least, a general knowledge of the affairs of the Company, and to exercise due care and superintendence for the protection of its interests.

But for the purpose of the present inquiry, we may relieve ourselves from all abstract consideration of the duties of Directors, or of possible responsibility for the faults of accountants and other officials, for it is clear from the statement of Mr. Grant himself, that he was cognizant of all the important transactions of the Bank, so far as they are involved in the present inquiry, and that he was actually consulted by Mr. Abbott as to the making of the report of July, 1847, which is now under our immediate examination. We think, therefore, that, within reasonable limits, Mr. Grant is responsible for the contents of those two documents.

We now direct our attention to the transactions of Mr. Grant with the Bank, whereby he, being a Director, became a debtor to the Bank, for a very considerable amount, on personal security only. We will take one transaction and Mr. Grant's account of it. It is in substance this, that in the year 1846, Mr. Grant, and six other persons, associated themselves for the purpose of buying Union Bank shares at a certain price; that this was done in the belief that it would prove a good investment, and would do good by checking what looked as if it would become a panic about Bank shares. That they applied to the Bank [157] for a credit on their joint and several securities to be opened for the purpose of purchasing those shares, that this credit was readily granted by the Directors, and the account was operated on by drawing on it for payment of the shares when bought, and paying into it when money was raised on the shares and elsewhere; a total

loss ensued, and Mr. Grant, with the gentlemen who joined him in this speculation, were, on the failure of the Bank, debtors to it to the amount of £42,000, as stated on behalf of the Bank, though Mr. Grant expresses his belief, that the account is overstated. What the original amount of the credit was, does not appear from the papers.

Two points arise for consideration: first, the original borrowing of this money; secondly, the propriety of borrowing it for the purposes intended.

It appears to us, that this loan having been made without any security whatever being given, was a direct violation of the first clause of the Deed of Co-partnership, and that the concurrence of the Board of Directors does not relieve Mr. Grant, being a Director, from the responsibility of having broken the obligations imposed by that Deed. The transaction was clearly a breach of trust, in one and all the Directors concerned, and it was a breach of trust of no ordinary importance, in principle and magnitude. It is obvious, that this first clause constitutes the chief provision for the safety of the shareholders in the employment of their capital; that if any part of the capital might be advanced in disregard of their safeguard, so might the funds of the Company to any extent be perilled. No attempt is made to reconcile the opening of this credit with the conditions of the Deed. But for what purposes was this money so to be lent to Mr. Grant [158] and his associates, with the concurrence of the Directors? To be applied to constitute a fund for the purchase of Union Bank shares, at a certain price, clearly to raise the price of the Bank shares out of the monies of the Bank itself; to create for these shares a false demand, for no other description is applicable to the transaction, and the end of all, to deceive the shareholders and the public.

We do not think it necessary to travel through, in detail, the circumstances which led to Mr. Grant being a debtor to the Bank on other accounts.

In forming our opinion upon the whole of this case, we have not lost sight of the difficulty in which Mr. Grant was placed as a Director of this Company. We can well understand how he, cognizant as he was of all the leading concerns of the Bank, knowing, as year after year rolled on, that the debts due to the Bank were augmenting until the property on which they were secured was unproductive, and that the only chance of saving a large part of the capital was founded on the speculation of extraordinary produce, we can, under such circumstances, well conceive that Mr. Grant was placed in a situation of great embarrassment, afraid to disclose the truth, unwilling to encounter the consequences of a public disclosure, hoping that some unexpected event would bring about a deliverance. We are willing to make all just allowances for the difficulties attendant on such a situation, but no embarrassment, and no difficulty, can excuse portraying, in false and delusive colours, the condition of the affairs of the Bank entrusted to the charge of himself and his co-directors: in absence of corrupt motives, no hope of saving a falling Company can justify a violation of the Deed, by which all were [159] bound, and a consequent misappropriation of the funds entrusted to their care, and misappropriated too (we regret to say) so as to deceive both the shareholders and the public, by enhancing nominally, though not in reality, the value of the shares.

We concur with Sir Lawrence Peel, that Mr. Grant may not have intended to wrong the Union Bank of a rupee, that there may have been no intentional or conscious fraud, but there was an absence of all just sense of the obligation of the duties undertaken, and a disregard of those principles of truth and sincerity and faithful adherence to contracts, which not only the shareholders, but the public at large, had a right to expect from those who had accepted the office of Director.

It is a matter of great regret, that a gentleman filling, and satisfactorily filling, such high offices in the administration of justice, should thus incautiously have mixed himself up with engagements so alien to the proper duties of his station, and should thus have been led into transactions which we cannot but disapprove and censure. We cannot deny, that the Supreme Court was justified in declaring, that their confidence in their most important officer was destroyed. The administration of justice must be kept most pure, and free from suspicion, and the public, who are so deeply interested in the due discharge of the duties incident to the offices of Master, Accountant-General and Examiner, are entitled to require, that those to whom such great interests are submitted, should be free from all suspicion

of disregarding the sacred obligation of duty, or of being tempted, for any consideration, to give their sanction to statements specious in appearance, but in fact and reality, erroneous and deceptive.

[160] We cannot conscientiously say, that Mr. Grant has relieved himself from the charges preferred against him; consequently, we think, that he is no longer fit to hold the offices he has hitherto filled in the Supreme Court, and we must humbly advise Her Majesty, to affirm the Order of the Court below.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*; tit. INDIA, 2. *Jurisdiction—Courts*; tit. PUBLIC OFFICER, A. JUDICIAL CAPACITY, 2. *Other Officers*, E. IN OTHER CASES, 2. *Determination of Appointment*.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

EDMUND HAMMOND and Others,—*Appellants*; JOHN ROGERS and JOHN RODD,—*Respondents** [Feb. 18 and 19, 1850].

THE "CHRISTIANA."

The duties of the Master and crew of a vessel, with a licensed Pilot on board, defined and pointed out [7 Moo. P.C. 171].

The *onus probandi* lies on the owner of a ship, claiming exemption from liability for damages, under the Pilot Act, 6 Geo. IV., c. 125, s. 55, by reason of having a licensed Pilot on board, to prove that the damage was occasioned by the fault of the Pilot [7 Moo. P.C. 171].

The 6th Geo. IV., c. 125, only relieves owners of vessels from liability for damages done by their ship, where the damage is occasioned by the fault, negligence, or misconduct of the Pilot alone [7 Moo. P.C. 171].

A ship, having a licensed Pilot on board, whilst at anchor in the Downs, the weather being bad, was run into by another vessel, and made to start from her anchorage, and was driven into a vessel at anchor. Held, that she was to blame and liable to damages, because

First, the ship, notwithstanding the bad weather, and a large number of vessels lying wind-bound in the Downs, had neglected to send down her top-gallant and main-royal yards, and also her short fore and mizen-top-gallant masts; and

Secondly, that she did not set her stay-sail and jib, and so drag her anchor off shore.

In such circumstances, held, (affirming the Decree of the Admiralty Court.) that the neglect to set the stay-sail and jib after she was driven from her anchorage, was the fault of the Pilot alone [7 Moo. P.C. 172]; but that the neglect in not sending down the top-gallant masts, etc., the cause of damage, was the joint fault of the Pilot and Master, and that the Owners were not exonerated by the Pilot Act, 6 Geo. IV., c. 125, s. 55 [7 Moo. P.C. 173].

When the vessel came to anchor in the Downs, the duty of the Pilot ended, but as he did not quit the ship, she continued under his charge [7 Moo. P.C. 170].

This was a cause of damage, civil and maritime, instituted in the High Court of Admiralty by the Respondents, the owners of the barque, "*Marshal Bennett*," of 360 tons, against the American ship, the [161] "*Christiana*" of 762 tons, to recover the loss sustained in a collision between the two vessels in the Downs.

The Act on Petition, alleged, that the barque "*Marshal Bennett*," bound for London to Constantinople, with a general cargo, on the 1st of December, 1848,

* Present: Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon. T. Pemberton Leigh.

came to anchor in the Downs, the wind blowing strong, with hard squalls from W.; that on the morning of the 4th, the wind blowing a strong gale from the W. S. W., and S. S. W., the best bower cable was veered out to the end, when about five A.M. the man on the look-out descried the ship "*Christiana*" right a-head, not more than three ships' lengths, driving fast into the hawse of the barque, the night being dark and the ship showing no light, whereas the barque had a bright light in her cuddy; that the ship drove so fast that it was impossible for the barque's chain to be slipped in time to avoid her, and very soon after she struck the "*Marshal Bennett*" and caused her considerable damage, and it alleged, that the collision was entirely owing to the carelessness or want of skill of those on board the "*Christiana*," who, notwithstanding the bad state of the weather, and the large number of vessels (above 100) lying wind-bound [162] in the Downs, and also notwithstanding she had been driving the greater part of the night, neglected to send down the "*Christiana's*" top-gallant and main-royal yards, but kept the same across, as also her short fore and mizen-top-gallant masts; although the same or similar precautions were adopted by the "*Marshal Bennett*" and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that had the "*Christiana*" adopted such precautions, she would, in all probability, have rode out the weather, and the collision been avoided; that even after the "*Christiana*" was found to be driving from her anchors, no measures were taken on board of her, by exhibiting a light, or otherwise, to give timely warning to other vessels, in consequence of which neglect, prior to her collision with the barque, she had come in collision with another vessel called the "*Rouennais*," and that, had her stay-sail and jibs been set, she would have dragged her anchor off shore and cleared the "*Marshal Bennett*," or to avoid the collision she might have slipped from her anchor and gone out to sea.

The answer of the owners of the "*Christiana*" alleged, that on the night of the 3rd of December, the wind blowing strongly from the W. S. W., she was brought up by her small bower anchor, and seventy-five fathoms of chain, under the directions of a licensed Trinity Pilot, there being about 150 vessels lying in the Downs, windbound; that early in the morning of the 4th, it being dark, the wind having veered to S. S. W., a heavy squall came on, during which a strange barque drove down, stern foremost, upon the "*Christiana*" and occasioned her to start her anchor-[163]-age: that the ship's best bower-anchor was then let go, under the Pilot's order, and the best bower-chain veered out to sixty fathoms, the ship continuing to drive, when, all at once, the barque was seen right a-stern, whereupon the Pilot, considering that veering out of more chain would be dangerous, from the close proximity of the two vessels, ordered the veering to be stopped, and that the fore top-mast stay-sail should be set, the fore yards filled, and the helm put hard a-starboard (which was instantly done), in order, if possible, to steer the ship clear of the barque; which was hailed to slack away or slip their chain; that the barque's crew paid no attention to the hailing, nor made any attempt to avoid a collision, and the ship drove down upon the barque; that at this time, only one of the barque's crew appeared on deck, and her chain was foul: that the entire management of the "*Christiana*" throughout the premises was in the hands of the Pilot only, and that all his orders were instantly and implicitly obeyed. The answer denied that there was any occasion for her to have sent down her top-gallant and main-royal yards, and her short fore and mizen-top-gallant masts, or either, at the period of her being brought up, or that her not having sent them down occasioned the collision, which was solely occasioned by the strange barque being driven into her; it further alleged, that the "*Christiana*" had a large and brilliant lamp burning in the after-cabin, the light from which could be seen a great way off through the large windows in her stern, and there was a large bright binnacle-lamp on the higher part of her poop, visible for three miles; it denied, that she had been in collision on the night aforesaid, save as aforesaid; and the answer alleged, that the collision in [164] question, if not the result of accident, was imputable to the negligence or seamanlike conduct of those on board the barque, "*Marshal Bennett*," and was in no degree imputable to the "*Christiana*," or to any one on board the "*Christiana*," but if to any one, it was imputable to the Pilot then in charge of the ship, and all whose orders and directions had been obeyed in the management thereof, and by reason thereof they submitted, that under

the provisions of the Act of Parliament [6 Geo. IV., c. 125, s. 55], the owners of the "*Christiana*" were not chargeable with the damage accruing to the "*Marshal Bennett*."

Witnesses were examined on both sides, the effect of whose testimony is stated in the judgment.

The Judge of the Admiralty Court (the Right Hon. Dr. Lushington), who was assisted by two of the Elder Brethren of the Trinity House, was of opinion, that the "*Christiana*" was to blame, and pronounced for the damages against the "*Christiana*;" first, because that vessel had neglected to send down her top gallant and main-royal yards, also her short fore and mizen-top gallant masts: and, secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore; that, though the latter was the fault of the Pilot alone, the first was a neglect, not only of the Pilot, but of the Master, and consequently the Owners, according to the rule laid down in the case of *The Diana* (4 Moore's P.C. Cases, 11), were not protected by the Statute [6 Geo. IV., c. 125, s. 55], there being joint negligence on the part of the Master and the Pilot.

From this decree the present appeal was brought, and now came on for argument.

[165] The Attorney-General (Sir John Jervis,) and Dr. Addams, for the Appellants.—The judgment of the Court below proceeds upon an erroneous basis. It has nothing to do with the true question to be tried, whether the "*Christiana*" had neglected to send down her top-gallant and main-royal yards, also her short fore and mizen-top-gallant masts or not, when she was started from her anchorage; since the Pilot on board has deposed, that there was no occasion to send them down, and that it did not occasion the collision. The cause of the collision was the "*Christiana*" being driven from her moorings, and assuming that, when so driven, she was rendered less capable of control in consequence of her yards and masts not having been sent down, was she, therefore, to be responsible for the damage? The collision occurred from an inevitable accident. *The Itinerant* (2 W. Rob. 236). There might be gross negligence in not sending down the yards and masts, yet, if the injury did not arise directly therefrom, it is too remote, and the "*Christiana*" cannot be made liable for it. *Lynch v. Nardin* (1 Q.B. Rep. 29). Assuming, however, that it was otherwise, the bringing up of the vessel, the manner in which she should be anchored was the duty of the Pilot; *The Gipsy King* (2 W. Rob. 537). The keeping up or sending down the yards and masts were exclusively the duties and within the province of the licensed Pilot in charge, whose functions when the vessel drifted re-devolved upon him. If the fault then was his, the Owners are not accountable for his fault, or incapacity. Abbott "On Shipping," pp. 182, 345 (6th Edit., by Shee): they are entitled to the protection of the Statute, 6 Geo. IV., c. 125, s. 55, and exonerated from liability. *The* [166] *Atlas* (2 W. Rob. 502). *Lucey v. Ingram* (6 Mee. and Wels. 302).—[Lord Campbell: Suppose the Pilot has a fit, or is drunk?—In the first case there would be no Pilot; in the second, he could be lawfully superseded. The case of *The Duke of Manchester* (2 W. Rob. 470; S.C. 6 Moore's P.C. Cases, 90) is an authority, that if the orders of the Pilot are wrong, the Master should not follow them. In a case of obvious danger the Master is bound to interfere in the management of the vessel, although a licensed Pilot be on board. *The Girolamo* (3 Hagg. Adm. Rep. 169). A Pilot is *pro hac vice* the commander of the vessel, and has absolute control, unless incompetent or disabled. There cannot be joint neglect when there was not co-equal authority, unless, as in the case of *The Diana* (4 Moore's P.C. Cases, 11), where the Master and crew neglected their duty, a distinction existing between acts of omission and commission. The "*Marshal Bennett*" herself was *in delicto*, for her anchor was not in a proper condition.

Sir Frederick Thesiger, Q.C., and Dr. Bayford, for the Respondents.—This case comes within, and must be governed by, the principles laid down in *The Diana* [4 Moo. P.C. 11]. That was a case of joint negligence of the Master and crew and the Pilot, and it was held, that the Statute, 6th Geo. IV., c. 125, s. 55. did not exempt the Owners of a vessel, having a licensed Pilot on board, from liability for damages done by their vessel, unless the damage was solely caused by neglect, default, incompetency, or incapacity of the Pilot. Here the negligence of the Master of the "*Christiana*" in not sending down the yards and the masts was the real cause of collision. The "*Christiana*" dragging her anchor was caused by [167] her not

adopting the precaution taken by other vessels, of sending down her yards and masts. This was not the duty of the Pilot.—[Mr. Baron Parke: If the dragging of her anchor was the cause of damage, whose fault was it that the main-royal yards and masts were not taken down? You say that the Master and Pilot were both to blame. If they were not, and it was the dragging her anchor that caused the injury, whose business was it to see to that and prevent it? Who is responsible for the neglect? In the case of *The Diana*, both Master and Pilot were to blame.]—It was the duty of the Master. The Pilot's duty was, in fact, at an end, the moment the vessel was brought to anchorage at the Downs.—[Baron Parke: In Falconer's Marine Dict., Tit. "Pilot," it is said that after a Pilot is taken on board, the Master is no longer answerable.]—A vessel at anchor is under the sole control of the Master.

The Attorney-General [Sir John Jervis], in reply.

The vessel being wind-bound in the Downs, and the Pilot not having quitted her, the duty of the Pilot had not terminated, as he was in charge of the vessel, and consequently exonerated the owners. The Pilot Act, 6th Geo. IV., c. 125, s. 55.

Mr. Baron Parke (July 4, 1850).—This case, which came before their Lordships on an appeal from the Admiralty Court, is of importance, inasmuch as it involves the consideration of the respective duties and liabilities of the Pilot, the Master, and crew, when the vessel is under the care of a Pilot. It is a cause of damage civil and maritime, prosecuted by the owners of the "*Marshal Bennett*" against the American ship "*Christiana*."

[168] The charges of negligence against those on board the "*Christiana*" appear, from the Act on Petition, to have been four: First, that, notwithstanding the bad state of the weather, the large number of vessels (about 100) lying wind-bound in the Downs, and also notwithstanding the "*Christiana*" had been driving about the greater part of the night, those on board her neglected to send down the top-gallant and main-royal yards, and also her short fore and mizen-top-gallant masts, though the same or similar precautions were adopted by the "*Marshal Bennett*" and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that, had the "*Christiana*" adopted the same precautions, she would in all probability have ridden out the weather, and the collision would not have taken place. Secondly, that, after the "*Christiana*" was driving, those on board did not take proper precautions, by exhibiting a light or otherwise, to give timely warning to other vessels. It was also stated that, besides the collision complained of, she fell foul of the French ship "*Rouennais*" before the "*Marshal Bennett*." Thirdly, that, after leaving the "*Rouennais*," those on board the "*Christiana*" might have cleared the "*Marshal Bennett*," if they had set their stay-sail and jib, and so might have dragged their anchor off shore. Fourthly, that they might also have slipped their anchors, and gone out to sea, and so have avoided the collision.

The answer on behalf of the "*Christiana*" was, first, that she was under the care and management, at the time of the collision, and before, of a duly-licensed Trinity Pilot, whose orders were implicitly obeyed. Secondly, that the collision was caused, not by the ship driving by the mere force of the wind, but in [169] consequence of a strange barque driving her from her moorings about half-past two A.M., during a heavy squall, and that every precaution was afterwards taken to prevent her coming in contact with other vessels. Thirdly, that a light was duly exhibited on board the "*Christiana*." Fourthly, that they did set their stay-sail and jib at the proper time to avoid the collision, and that there was no occasion to send down the top-gallant mast and main-royal yards, and her short fore and mizen-top-gallant masts. And, lastly, that the damage might have been prevented if the crew of the "*Marshal Bennett*" had kept a good look-out, and had slipped her cable; but that it was foul, and consequently that step was not taken, and, therefore, though the crew of the "*Christiana*" might be in fault, the Owners were not responsible.

The disputed questions of facts were disposed of, and we think satisfactorily, by the learned Judge below, with the assistance of the Trinity Masters. The neglect to exhibit a light, or give timely warning, by the "*Christiana*," after she broke from her mooring, was also disproved. We think also that the fact was, that the "*Christiana*" was driven from anchorage, not by the force of the wind, but by collision with

another vessel. Whether she afterwards ran into a French vessel (the "*Roucanais*") or not, does not appear to us to be material. Nor do we see any reason to disagree with the conclusion of the Trinity Masters that the "*Christiana*" was in fault in not setting the stay sail and jib, and so dragging the anchor from the shore, after she was driven from her anchorage, and that she was justified in not slipping from her anchor, and going to sea. We are satisfied with their opinion, that the "*Marshal Bennett*" was not guilty of any neglect whereby the collision could [170] have been avoided. We also think it clear that, though the "*Christiana*" came to anchor the night before, and the Pilot might have left her, yet that, as he did not, she continued under the charge of the Pilot. And we think also, that they came to a right conclusion, that, considering the state of the weather, and the position the vessel was in, with a large number of vessels lying wind-bound in the immediate neighbourhood, it was a neglect not to send down the top-gallant and main-royal yards, not even after she began to drift,—a fact admitted on both sides; and that, if this had been done, either when the vessel anchored, or after she drove, the collision might have been avoided, and that this neglect was the cause of it.

The disputed facts being thus disposed of, the question is, whether, upon these facts, the Owners of the "*Christiana*" are responsible or not?

This is a very important question, and it depends upon the extent of exemption which the shipowner is entitled to, when his vessel is in charge of a Pilot. The exemption depends upon the Statute, 6 Geo. IV., c. 125, sec. 55, which enacts that no Owner or Master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, incompetence, or incapacity of any licensed Pilot duly acting in charge of the vessel under the provisions of the Statute.

It was held, at first, in putting a construction upon this Statute, that if a Pilot was on board, and there was a neglect in the navigation of the vessel, it was *prima facie* attributable to him, and that he, and not the Owner, was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennet v. Moita* (7 Taunt. 258). Subsequently a different, and, we think, a more correct, view of this [171] subject was taken by Dr. Lushington, the Judge of the Admiralty Court, in the case of *The Protector* (1 Rob. Jun. 45), when, on a full consideration of the question, it was held, that the Master and Owners were *prima facie* liable, and that the *onus probandi* was thrown on them to show that the neglect was that of the Pilot. In order, then, to free the Owners in this case from responsibility, it was their duty to show, that the neglect to send down the top-gallant yards, masts, etc., was the neglect of the Pilot. Further, it was held in the case of *The Diana* (1 Rob. Jun. 181), affirmed on appeal by this Court (4 Moore's P.C. Cases, 11), that the Owners were responsible, unless the neglect which caused the damage was solely that of the Pilot. If it was the fault of both the Pilot and the Master or crew, the Owners are still responsible. The question then is, whether the omission which is decided to have been the cause of collision in this case, has been shown by the Appellants to be that of the Pilot only.

The duties of the Master and the Pilot are in many respects clearly defined. Although the Pilot has charge of the ship, the Owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the Master and crew, and their obedience to the orders of the Pilot, in everything that concerns his duty; and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

The expressions attributed to the learned Judge, in the report of his judgment in this case, we are perfectly satisfied, were never intended to suggest that, [172] under ordinary circumstances, the Master was to exercise any discretion whether he would obey the Pilot or not. There may be extraordinary occasions when the Master would be justified in disobeying the commands of the Pilot. If, from sudden illness or intoxication, he becomes incompetent to command, the supreme authority would revert to the Master during the period of the Pilot's temporary incapacity. It may be the same in the case of manifest incapacity of a permanent character; but any opinion upon these questions is unnecessary for the decision of the present case, as none of these circumstances occurred. The Pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required: the direction, the course, the manœuvres of the vessel, when

sailing, belong to him; and the Trinity Masters, therefore, rightly decided, that the neglect to set the stay-sail and jib, after the "*Christiana*" was driven from her anchorage, was the fault of the Pilot alone. It was also his sole duty to select the proper anchorage-place and mode of anchoring, and preparing for anchoring, as was held to be clear in the case of *The Gipsy King* (2 W. Rob. 537).

Whose neglect, then, was it, that the top-gallant yards, masts, etc., the cause of damage, were not sent down? The Trinity Masters considered that it was the fault, not of the Pilot exclusively, but of both the Pilot and the Master; that the former, when he brought the vessel to anchor, ought to have seen that the top-gallant yards, etc., were sent down, as a part of the proceeding of anchoring; and after the vessel drifted, he ought to have done so, as a part of his duty in navigating the ship; but that the Master was bound, in the ordinary course of navigation, and inde-[173]-pendently of local knowledge, to do the same thing, in the first instance, in such an anchoring ground, and under such circumstances as the "*Christiana*" was placed in. This, we have good reason to believe, was the ground on which their opinion was founded; had this been a local usage, depending on local circumstances, we should have thought that it was the exclusive duty of the Pilot to have taken care that that usage was complied with; but the step being one which every Master, according to the ordinary course of navigation, ought to have taken in every open roadstead, where many vessels were lying, and in blowing weather, that duty was not exclusively the Pilot's, but that of the Master also; and if the Pilot had given express orders to the Master not to send down the top-masts, etc., we do not say that the Owners might not have been excused from responsibility for the consequences of that omission.

We certainly are not bound, any more than the learned Judge of the Admiralty Court was, by the opinion of the Trinity Masters, but we, of course, give great weight to their nautical experience, and we do not see any ground for being dissatisfied with the opinion that they formed. We think, that the fault, in this case, was one for which the Pilot was not exclusively responsible, and, therefore, that we ought to advise Her Majesty to affirm the judgment of the Admiralty Court.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 1. *Negligence*; b. vii. *When at anchor or moored*; 10. *Compulsory Pilotage*; a. *Generally*; d. *Duties of Pilot*; e. *Duties of Shipowner, Master, and Crew*. See Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), Part X. As to liability of Owner when Compulsory Pilot on board, see *Pollok v. M'Alpine, The Lochlibo*, 1851, 7 Moo. P.C. 429; *The Argo*, 1859, Swab. 464; *The Iona*, 1867, L.R. 1 P.C. 432; 4 Moo. P.C. (N.S.) 336; *The Velasquez*, 1867, L.R. 1 P.C. 498; 4 Moo. P.C. (N.S.) 426. As to duties of Pilot, recognised and approved, *Wood v. Smith, The City of Cambridge*, 1874, L.R. 5 P.C. 459, and see Marsden, *Collisions at Sea*, 4th ed., pp. 266, *et seq.*, where the cases on the duties of Pilots are collected.]

[174] ON APPEAL FROM SIERRA LEONE.

MAGNUS SMITH,—*Appellant*: The JUSTICES of SIERRA LEONE. — *Respondents* *
[Feb. 24 and 25, 1848.]

Appeal allowed from Orders made by the Judges at Sierra Leone, striking a practitioner of the Courts in that Colony, off the rolls of Proctors of the Vice-Admiralty Court, and also off the rolls as Attorney of the Court at Freetown; upon terms, that the Petitioner gave notice of the allowance of such appeal to the Judges, with liberty to the Petitioner to set down his case to be heard *ex parte*, at the expiration of six months after notice served [7 Moo. P.C. 175, 176].

Two Orders made by the Judges at Sierra Leone, striking a practitioner of the Courts off the rolls, for alleged misrepresentation, contempt, and misconduct;

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Held on appeal by the Judicial Committee, to have been improperly made, and ordered to be discharged, and the Appellant restored to the rolls. But, under the circumstances of the case, the Judicial Committee directed the Appellant to apply to the Court, in the Colony, for such re-admission [7 Moo. P.C. 180, 185, 186].

This was a petition and appeal brought by the Appellant, an Advocate and Attorney, practising in the Courts in the Colony of Sierra Leone, complaining of three Orders made by the Judges of that Colony. First, an Order or proceeding, dated the 29th of January, 1844, whereby the Respondent, Chief Justice Carr, in his capacity of Chief Justice, in charging the Grand Jury at the General Quarter Sessions of the peace, held for the Colony of Sierra Leone, animadverted upon the practice of allowing legal practitioners to officiate professionally at the Police Office, and directed that such practice should not be permitted in future. Secondly, an Order of the Court, dated the 21st day of February, 1844, whereby the Appellant was struck off the roll of Proctors of the [175] Vice-Admiralty Court; and thirdly, another Order of the Court, dated the 4th of September, in the same year, whereby the Appellant was struck off the rolls of the Court of the Recorder, at Freetown, for alleged contempt, misrepresentation, and misconduct.

The circumstances of the case, and the nature of the proceedings which led to the making of these Orders, are fully stated in the Judgment.

The Appellant presented a petition to Her Majesty in Council, praying, that she would be pleased to admit an appeal from the several Orders, the effect of which precluded and disabled him from practising in the Colony, and that the same might be rescinded, and notice of the petition might be given to the Judge who made the Orders, and that an early day might be appointed for the hearing.

Mr. Edmund F. Moore, for the Petitioner (Dec. 16, 1846 *), relied upon the cases of *Smith v. the Justices of Sierra Leone* (3 Moore's P.C. Cases, 361). *In re Downie and Arrindell* (*ib.* 414). The Charter of Justice of Sierra Leone, dated 22nd of April, 1834 (Clark's Col. Law, p. 502).

Lord Brougham.—As this application is *ex parte*, notice ought to be given to the Judges. In the case of *Monckton* (1 Moore's P.C. Cases, 455), which was heard *ex parte*, the Judges in the Colony complained that they had not been served.

Leave to appeal was granted upon giving security for costs, and upon service of the Judges of the Court at Sierra Leone, with a copy of the Order admitting [176] the appeal; with notice to them to enter an appearance to the appeal; the petitioner being at liberty to set down the appeal *ex parte*, at the expiration of six months from the service of such Order upon the Judges in the Colony.

The Judges having been served with notice, in conformity with the above directions, appeared and lodged cases. Chief Justice Carr and Mr. Justice Hornell denied that the first-mentioned Order or direction was ever made by the Chief Justice; and further contended, that the other Orders removing the Appellant from the rolls of Proctors and Attornies, were justified by his conduct towards the Court. The other Judge, Mr. Hook, put in a separate case, stating that there had been nothing in the conduct of the Appellant towards the Court, which could justify his removal. Affidavits were filed on both sides.

The appeal now came on for hearing.

Mr. M. D. Hill, Q.C., and Mr. Edmund F. Moore, for the Appellant, contended, that such Orders were irregular; having been made without any just and proper grounds, or any evidence to warrant the striking the Appellant off the rolls; and ought to be reversed and rescinded.

Sir Frederick Thesiger, Q.C., and Mr. Lush, for the Chief Justice Carr, and Mr. Justice Hornell, in support of the Orders.

Lord Langdale (April 13, 1848).—This is the petition of Magnus Smith, praying

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

that three Orders, stated to have been made in the Courts of the Colony of Sierra Leone, may be rescinded, namely:—

First. An Order stated to have been made on the [177] 29th of January, 1844, whereby the Chief Justice Carr is alleged to have directed, that legal practitioners in the Colony should not be permitted to practise in the Police Office.

Second. An Order of the Vice-Admiralty Court of Sierra Leone, dated the 21st February, 1844, whereby Mr. Smith was ordered to be struck off the roll of Proctors of that Court.

Thirdly. An Order of the Court of the Recorder at Freetown, dated the 4th day of September, 1844, whereby Mr. Smith was ordered to be struck off the roll of Attornies of that Court.

As no such Order as that which is alleged to bear date the 29th day of January, 1844, was in fact made, we have no occasion to consider the circumstances under which Mr. Smith, in mistake, supposed it to have been made.

The second Order complained of, viz. the Order of the 21st of February, was made under the following circumstances:—

In the month of January, 1844, in the case of the Ship *Ocean*, (being a case of salvage,) the Salvage Proctor delivered the Act on Petition, to Mr. Smith, the Defendant's Proctor, who was ordered to deliver in his reply within fourteen days. The time was enlarged, but no reply having been delivered at the expiration of the enlarged time, application was made for the appointment of a day for hearing the case *ex parte*, and ultimately the Judge made an order for hearing the case *ex parte* on Wednesday the 21st of February.

It was of course open to the Defendants to move to discharge that order for sufficient cause. And Mr. Smith, being desirous to make an application for that [178] purpose on affidavits, attended at the Chambers of the Judge, on the 13th of February, with the parties whom he wished to be sworn. The Judge objected to administer the oaths, on the ground, that no previous appointment had been made with the Registrar. Mr. Smith thereupon procured from the Registrar an appointment for two o'clock, on the same day, at which time the witnesses attended, and were sworn to their affidavits, and so the business for which Mr. Smith attended was done.

But something which the Judge considered to be offensive was done or said, by Mr. Smith, during his attendance, and on the same day the Registrar, by the direction of the Judge, desired the attendance of Mr. Smith, at the Court Hall, next court day, the 21st instant, to receive the Judgment of the Court for his conduct in the Judge's Chambers on that day, as well as for the language used by him to the Judge at the same time. To this letter Mr. Smith returned an answer, on the 20th of February, in which he stated, that although he should have to attend the Court in the usual course of his professional duties, he would not attend for such a purpose, as that of receiving Judgment for a thing he knew nothing of, and with respect to which he was at a loss to conceive what it might turn out to be.

On the day before the date of this letter, namely, on the 19th February, Mr. Smith made an affidavit in the case of the *Ocean*, in support of an application to set aside the Order to hear the case *ex parte*.

The Respondent states, that on the sitting of the Court, on the 21st of February, he addressed Mr. Smith in open Court, on the impropriety of his conduct, and observed on the offensive tenor of his letter [179] to the Registrar, and of his affidavit of the 19th of February, in both of which he had not only imputed improper motives, but had misrepresented the facts.

The result was, that the Order of the 21st of February, 1844, which is complained of, was made. It is as follows:—"Magnus Smith appeared on this day, and after having been addressed by the Court, his name was ordered to be struck off the Rolls of Proctors of the Court, for gross contempt, misrepresentation, and misconduct." Mr. Smith's conduct during the Judge's address to him was one series of interruptions, repeatedly contradicting the Court, and making use several times of the expressions—"I distinctly deny that,"—"that is not true;" with many others of the like import, to the statements from the Bench.

Without meaning to say anything which can in any way justify or excuse the language used by Mr. Smith, in his affidavit of the 19th, or in his letter of the

20th February, we must observe with respect to this order for striking him off the Rolls,—

1st. It does not appear that there was, or, under the circumstances of the case, could be, any evidence of the conduct and language of Mr. Smith, on the 13th of February, for which he was desired to attend on the 21st. 2nd. That the particular grounds of complaint on which the Judge relied, and which were known only to himself, were not specified to Mr. Smith; he was not called upon to answer any specific charge, but to receive judgment for conduct and language not stated. 3rd. That Mr. Smith had no previous notice of any charge founded on his letter to the Registrar, or on the Affidavit of the 19th of February. 4th. That Mr. Smith had no notice that [180] the establishment of such charges as were meant to be alleged against him might lead to his being struck off the Rolls of Proctors. 5th. That whatever may have been the conduct and demeanour of Mr. Smith, on the 21st of February, and however much it may have deserved censure, and even punishment, a punishment so severe as striking him off the roll in a summary manner, and without affording any time for the offender to answer, or to consider the position in which he was, does not appear to have been required for the vindication of the dignity and authority of the Court.

We think that, under these circumstances, the Order of the 21st of February, 1844, to strike Mr. Smith off the roll of Proctors, is not supported by sufficient reasons.

The third Order complained of, viz. the Order of the 4th of September, 1844, was made under the following circumstances:—

The Appellant was employed as the Attorney for the Plaintiff, in an action of *Lemon v. Scale*. Judgment was signed on the 2nd of April, 1844, and a writ of inquiry was executed on the 16th of April, and the Plaintiff obtained a verdict for £29 6s.

On the following morning, the 17th of April, a letter from the Defendant was delivered to the Chief Justice [Carr] in Court, alleging, in substance, that he had paid the debt to Mr. Smith, the Plaintiff's Attorney, before the writ of inquiry was executed—and when Mr. Smith had moved for the return to the inquisition, the Chief Justice called upon the Defendant, and told him that he could not interfere in the action, or call on Mr. Smith to answer a mere written statement, and that he ought to have appeared before the Sheriffs' [181] Court the day before. The letter was, at Mr. Smith's request, handed to him, and he read it, but he was at that time refused a copy of the letter, on the ground, that the Chief Justice had refused to entertain the complaint. We regret this refusal; but on the 20th of April, the Chief Justice [Carr], of his own accord, sent a copy of the letter to Mr. Smith, desiring him to transmit any observations he might wish to offer in the matter. Mr. Smith took offence at the letter which accompanied the copy, and he made no observations on the matter, in compliance with the desire of the Chief Justice. But on the 13th of May, an affidavit was made by Scale, and his witness, Emperor, stating that a payment on account of the debt due from Scale to Lemon, had been made to Smith, as Lemon's Attorney, and thereupon it was ordered, by the Court of the Recorder of Freetown, that a copy of the affidavit be transmitted to Mr. Smith, and that he is desired to appear in Court next Court day, the 19th of June, to answer the matters contained in the affidavit. In consequence of this, and on the 18th of June, and in answer to the affidavit of Scale and Emperor, an affidavit was filed by Lemon and Macauley, and another by Mr. Smith. The affidavit of Mr. Smith is very long and special; he went minutely into the circumstances of the case of *Lemon v. Scale*, and so far as it related to the facts, showing that there was no foundation whatever for the charges which were brought against him by Scale, it appears to us to be perfectly proper and satisfactory; it unfortunately went into other matters, many of them by no means necessary for his defence, and his statements in respect thereof became the subject of complaint against him. On the 19th of June, when the case was heard, the three Judges, [182] taking the opposite statements in the affidavits into consideration, refrained from expressing any opinion upon the subject. Here ended the accusation which was made in Court against Mr. Smith by Scale, and it is very much to be regretted that there was any further proceedings in relation to these matters. But the Chief Justice, observing the account

which Mr. Smith had given of his demeanour on the preceding 17th of April, called upon the petitioners of the Court, on the 29th of June, to prepare a statement of what actually transpired on the 17th of April, between the Court and Mr. Smith, and in consequence of this call, on the 3rd of July two affidavits were filed, one by Dongan and Abbott, and the other by Oldfield. Besides these, another affidavit was, on the same day, filed by Oldfield and Macrae, for the purpose of showing, that an affidavit, sworn by Henry Price, in the matter of the *Ocean*, on the 25th of March, was, in the handwriting of Mr. Smith. The Court ordered these affidavits to be read, and then ordered, that copies be transmitted to Mr. Smith, and that he should appear on the 17th of July, to answer for his conduct in reflecting in contemptuous and disrespectful language on the Court, and misrepresenting its proceedings in an affidavit sworn to by him, and purporting to be an affidavit in answer to the complaint of one Bernard Scale, against the said Magnus Smith, as also for preparing and making out a false and scandalous affidavit for one Henry Price, an ignorant merchant captain, reflecting on the Chief Justice of the Colony, while sitting as Judge of the Vice-Admiralty Court. In consequence of this Order, five several affidavits were filed on behalf of Mr. Smith, in reference to his conduct on the 17th of April. On the 17th of July, Mr. Smith [183] appeared and addressed the Court, on his own behalf, refusing to give any explanation of his conduct in preparing the affidavit of Henry Price, and conducted himself in a manner, which, if correctly stated in the minute of that day's proceedings, ought to be very much reprehended; but his conduct on that occasion is not stated to be the ground of any further proceedings. On the 23rd of July, the Chief Justice stated, that it was the opinion of the Court, after a full consideration of the whole circumstances of the case, and from the documents before the Court, that Mr. Smith had reflected on the Court in language contemptuous and disrespectful, that he had wilfully and maliciously, in his affidavit in the matter of Bernard Scale, misrepresented the proceedings of the Court, and that he had left unexplained his conduct in preparing and writing out the affidavit of Henry Price, intended to be used in the Vice-Admiralty Court, reflecting upon the Chief Justice of the Colony, while sitting as the Judge of that Court, and on the same day, the Court founding itself on the opinion thus expressed, ordered Mr. Smith to show cause, on the 21st of August, why he should not be struck off the roll of the Attornies of the Court, for the reasons therein stated. The time for showing cause was afterwards extended to the 4th of September, on which day, Mr. Smith attended, and addressed the Court on his own behalf, and then the Chief Justice having referred to the affidavits and documents before the Court in the matter, as also to the minute of Court, of date the 23rd of July last, and to the Judgment of the Court delivered on that day, on the 3rd of July last, calling on Mr. Smith for an explanation of his conduct, declared it to be the opinion of the Court, after a full consideration of the [184] whole circumstances of this matter, that Mr. Magnus Smith was a very improper person to remain any longer as an Attorney of that Court, and ordered his name to be struck off the roll of the Attornies of the Court, for wilful and malicious misrepresentations, gross contempt and misconduct. Mr. Smith's name was accordingly struck off the roll of Attornies of this Court.

On consideration of this Order and the proceedings which led to it, it is plain that the whole is founded on the conduct of Mr. Smith, with reference to the affidavit of Price, sworn on the 25th of March, 1844, and the affidavit of Mr. Smith himself, sworn on the 18th of June, 1844. Whatever there may have been offensive and improper in the conduct of Mr. Smith on other occasions, or with reference to these proceedings against himself, was not made the subject of distinct charge, and is not stated to be the ground of ultimate decision. We have, therefore, thought it proper to consider this Order of the 4th of September on its own merits, and as depending solely on the documents referred to.

With respect to Price's affidavit, Mr. Smith was required to explain his conduct in preparing and writing out the affidavit, alleged to be false and scandalous, and reflecting on the conduct of the Chief Justice.

On reading the affidavit in question (and the affidavit of Dongan Macrae and Cathcart, sworn on the 27th of March, 1844), we are by no means disposed to excuse the improprieties which it contains; but Mr. Smith does not appear to have

known the facts therein stated, otherwise than from the information of Price; and although it does not appear to us, that an ex-[185]-perienced and fair practitioner ought to have given credit to the statement, yet considering the sort of bias under which Mr. Smith has too plainly acted, it is not impossible that he may have believed it; and although he prepared and wrote out the affidavit after he had ceased to be a Proctor, and this may have been improper, yet, as this was not made the subject of a specific charge, which Mr. Smith was called upon to answer, we do not think that the conduct of Mr. Smith, in reference to this affidavit, was such as to form a sufficient ground for his being struck off the roll of Attornies, and we are confident, that it would not have been so considered by the Chief Justice himself, if Mr. Smith, when asked for explanation, had given it in a manner becoming his own station and character, which he must desire to maintain as a respectable professional man.

With respect to Mr. Smith's own affidavit, a full statement of all the facts relating to the accusation was required from Mr. Smith, and he did right to give it. There are other statements in his affidavits from which he would have done much better to abstain; but thinking, as we do, that some considerable forbearance might have been not improperly shown to a man who found himself unjustly subjected to an infamous charge, we are of opinion, that several matters in this affidavit, though very improper for Mr. Smith to have used, are not, under the circumstances, properly characterized as false and malicious, and do not afford sufficient ground for striking Mr. Smith off the rolls.

Having come to the conclusion, that neither of the Orders complained of, is to be supported on the grounds stated in them, we should in an ordinary case have only to state our intention humbly to report to [186] Her Majesty that the Orders complained of ought to be discharged; but Mr. Smith having, as it appears to us, on various occasions, during the proceedings which led to the Orders in question, and during the prosecution of this appeal, conducted and expressed himself with great impropriety and disrespect to the Chief Justice of the Colony, we do not recommend that the Orders of the 21st of February, and 4th of September, 1844, be now discharged; but we recommend, that Mr. Smith be now at liberty to apply to the Vice-Admiralty Court, and the Court of the Recorder, at Freetown, to have the Orders discharged; and in case Mr. Smith should make such application, we think that the Orders respectively should be rescinded and discharged by the Courts respectively, unless some sufficient reason to the contrary (other than the reasons referred to in the Orders themselves respectively) should be alleged and established against Mr. Smith. We should hope, however, that no further proceedings will be necessary; that these proceedings will have their due weight with all parties, and that if Mr. Smith will make such apology for his past and disrespectful demeanour to the Chief Justice, as would well become his professional character and station, there will be no difficulty in restoring him to the rolls without delay.

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 20. *Sierra Leone*; III. *Appeals to Privy Council*; 3. *Leave to Appeal—Granted on Terms*. As to special leave to appeal in criminal cases, see note to *In re Ames*, 1841, 3 Moo. P.C. at p. 413. See also note to *In re Justices of Antigua*, 1829-30, 1 Knapp, 269.]

[187]

In re BERRY'S PATENT * [March 13, 1850].

An importer of a foreign invention, by which the public is benefited, is entitled to be put on the same footing as an original inventor, when applying for a prolongation for such foreign importation.

In a case, therefore, where the invention was of considerable commercial value, and the importers had embarked a large capital upon machinery in trying to introduce it to general use, and incurred considerable loss in so doing;

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

the Judicial Committee recommended an extension of the Letters Patent, for
SIX years.

This was an application for an extension of the term of Letters Patent, granted to Miles Berry, on behalf of the Petitioners, William George Bicknell and James Reginald Torin Graham, the importers of a foreign invention, described under the title of "certain improvements in machinery, or parts for cleansing, purifying, and drying wheat, or other grains or seeds."

The Petition set forth, that the invention was of great value for purifying, washing, and drying wheat, and other grain, whereby the dirt, smut, weavils, worms, and other prejudicial matters, were removed, the defective and light grain separated, and the grain [188] dried without injury, and brought to a fit state for grinding or putting in store. That by means of the invention, the injurious effects consequent on kiln drying, were avoided, and wheat grown in damp climates, and imperfectly dried in the sun, was rendered equal in commercial value to wheat grown in dry climates, and sufficiently dried in the sun. That a large proportion of wheat brought from the Mediterranean was mixed with grit and dirt, and was so hard and steely in its nature, as not to be suited for grinding, and was so affected by weavils, mites, and other matters, as not to be suited for the manufactory of flour until treated by the invention of the Petitioners. That the Petitioners having made themselves thoroughly acquainted with the nature of the invention, and being impressed with the great advantages which might result from introducing the same into this Country, agreed for the purchase of the invention, and arrangements were made with the proprietor of the invention in France, that patents should be taken out in this Country, in the name of Miles Berry, on the Petitioners' account, which was accordingly done. That the Petitioners had greatly exerted themselves in introducing the use of the said invention, by granting licences: but having failed in their attempts, they were obliged to embark a large capital in altering and adapting premises, and in constructing and erecting the necessary machinery for the purpose of establishing the invention. That although the invention was of great value, and adopted by the Government of Malta, yet the Petitioners had been great losers by their attempt to introduce the same.

Evidence was given, showing the great commercial [189] value of the invention, and that the Petitioners had embarked a large capital in importing and bringing the patent into general use, but from the expensive nature of the machinery a very great outlay was required in the first instance, and they had sustained a total loss of £9859 3s. 11d.

Mr. M. D. Hill, Q.C., and Mr. Webster, for the Petitioners.

The Attorney-General (Sir John Jervis) appeared for the Crown, and submitted to the Court, whether the fact of the Petitioners embarking capital in importing a foreign invention, alone, entitled them to the protection of the Act of Parliament, as no instance had occurred before of an application by an importer for an extension.

Lord Brougham.—Their Lordships have considered this case with the more attention, inasmuch as it is not very clear that it may not be considered the first case, in which we have ever granted an extension, solely upon the ground of importation. The Patent law is framed in a way to include two species of public benefactors: the one, those who benefit the public by their ingenuity, industry, and science, and invention and personal capability; the other, those who benefit the public, without any ingenuity or invention of their own, by the importation of the results of foreign inventions. Now the latter is a benefit to the public incontestably, and, therefore, they render themselves entitled to be put upon somewhat, if not entirely, the same footing as inventors. In this case, certain parties have by their [190] adventurous spirit, and by the outlay of capital, benefited the public in the proportion of the value of the foreign invention in question, which, but for that adventurous spirit and outlay of capital, would not have been available to the people of this Country. That, therefore, is to be considered as a solid claim to the exercise of the *quasi* Legislative power which the Statute vests in this Committee. It would have been so considered before, possibly, though we have no instance of it; there may be a doubt whether we have not something near to it, but there never has been an instance of an Act of Parliament

passed to extend a patent in respect of a foreign importation. However upon all principle, and all analogy, their Lordships are of opinion that we cannot do otherwise than regard this as a solid ground for the application made on the part of the importers.

It appears undeniable, that this is a useful invention to the public, and a very important one. It appears equally undeniable, that a very small gain has been made, only £7000 odd, in proportion to an expense of £17,000, and, therefore, that there has been a total loss, deducting £3000 for the present value of the plant, of between £10,000 and £11,000 to the importers, and we much fear, whether any extension that can be reasonably given will ever make up for the loss which has been sustained.

Their Lordships are of opinion, taking the whole of these matters into consideration, that the Letters Patent ought to be extended, and, therefore, they will advise the Crown to grant an extension for six years.

[Mews' Dig. tit. PATENT; F. CONFIRMATION, RENEWAL, AND EXTENSION OF LETTERS PATENT; 2. *Renewal and Extension*; c. *Foreign invention*. AS TO extension generally see now Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. 157) s. 25. Act of 1883 has not affected position of importer as inventor, see *Edmund's Patent*, 1886, Griffin P.C. 281, *Higgins' Patent*, 1891, 9 R.P.C. 74. As to merit in case of importer, see *Soames' Patent, In re*, 1843, 1 Webster, P.C. 733, *Claridge's Patent, In re*, 1851, 7 Moo. P.C. 396.]

[191] *In re* NOBLE'S PATENT * [March, 13, 14, and 15, 1850].

To entitle an equitable assignee, to appear with the legal assignees of a Patent, on a petition for a prolongation of the Letters Patent, the name of such equitable assignee must appear with the other petitioners, in the advertisements, required by section 4 of the Statute, 5th and 6th Will. IV., c. 83, and rule 2, made in pursuance thereof.

This was a Petition presented by Henry Rawson, George Edward Donisthorpe, and Samuel Cunliffe Lister, for an extension of the term of Letters Patent, originally granted to James Noble, for certain improvements in the carding of wool and other fibrous substances.

Shortly after the grant of the Letters Patent, Noble assigned them to Rawson and Donisthorpe. In 1842, Rawson and Donisthorpe entered into an agreement to assign the Letters Patent to Lister: but no legal assignment was executed by them, and the Letters Patent being about to expire, they now petitioned for an extension of the term.

The advertisements published in the newspapers, pursuant to the 5th and 6th Will. IV., c. 81, sec. 4, of the notice of the Petition, and the intended application for a day for hearing to be fixed, contained the names of Rawson and Donisthorpe, as the assignees of Noble, but Lister, the equitable assignee's name, was not included in the advertisement.

Mr. M. D. Hill, Q.C., Mr. Webster, and Mr. Esdaile, for the Petitioners.
Sir Frederick Thesiger, Q.C., and Mr. Forsyth, opposed the Petition.

[192] The Attorney-General (Sir John Jervis) for the Crown, and Mr. Terrell for Noble's executrix.

At the opening of the case it was objected, that Lister could not be heard upon the Petition, as the advertisement, upon which the Petition was founded, did not contain his name.

Sir Frederick Thesiger, Q.C., and Mr. Forsyth, in support of the objection.—

* Present: Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

The notice is insufficient. It does not contain the name of Lister, as required by the 5th and 6th Will. IV., c. 83, section 4 (*a*), and rule 2 of this Committee (3 Knapp's P.C. Cases, App. i.), passed in pursuance of that section. The Petition is by Rawson, Donisthorpe, and Lister, whereas the advertisement, upon which the Petition is grounded, is only in the names of the two first Petitioners.—[Lord Brougham: Your objection is, that the advertisement is a condition precedent to our jurisdiction, and that has not been complied with by Lister. Do you object to the other two Petitioners?—Solely to Lister. It is a real objection; [193] because Lister is the only substantive party. An extension is an indulgence; and, therefore, a party must bring himself within the Act of Parliament.]

The Attorney-General.—Lister has only an equitable interest; no assignment has been made to him: therefore, it is a question, whether Rawson and Donisthorpe are not trustees for him, and as such applying for a prolongation.—[Lord Brougham: It is quite immaterial whether a party has a legal or equitable interest. The words of section 4 are, "Any person who now hath, or shall hereafter obtain any Letters Patent as aforesaid, shall advertise." It would certainly have been more certain if the Act said that the person entitled should advertise.]

Mr. M. D. Hill, Q.C., and Mr. Webster, for the Petitioners.—We submit, first, that the advertisement was a sufficient compliance with the practice of this Court. It was not necessary to name the Petitioners at all; it was sufficient to show that it was in the matter of "Noble's Patent," the extension of which was sought.—[Lord Brougham: At the time of the advertisement there was no Petition. Does not the Statute intend, that the public should be informed, by advertisement, who intends to apply?—As a matter of fact, the Statute has been complied with, the agents signed the advertisement, and they are agents of all the Petitioners. Secondly, Rawson and Donisthorpe are the only proper persons to advertise. The words of the 4th section, are, "That if any person who now hath, or shall hereafter obtain any Letters Patent as aforesaid, shall [194] advertise." Now, the words "as aforesaid," refer to the first section, and there the words used are, "any person who, as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain Letters Patent." Here the word "assignee," clearly means "legal assignee," and Rawson and Donisthorpe have that title.—[Lord Brougham: In this Court we make no distinction between legal and equitable titles.]—In construing Acts of Parliament, words always receive their legal meaning. Thirdly, it is in the usual form; it would lead to grave inconvenience if it were held to be necessary, that every person who has an interest in a patent should be before the Court on a Petition for extension. It is conceded by the objectors, that there is some one answering the description required by the Statute, who has advertised, namely, the legal assignees, and to the legal assignees alone can the extension be granted. The Statute, therefore, has been substantially complied with, and this Court will not entertain an objection which is beside the merits of the case.—[Lord Brougham: We have our jurisdiction under the Statute, and if an objection is taken that the provisions of the Statute have not been complied with, so as to bring the case properly before the Court, it is one of substance. If the Statute requires any thing to be done which is not done, the Crown has no power to grant a prolongation.]

Sir Frederick Thesiger, in reply.

Lord Brougham.—Their Lordships are of opinion, that the advertisement is

(*a*) The material part of this section, is as follows:—"That if any person who now hath, or shall hereafter obtain any Letters Patent as aforesaid, shall advertise in the *London Gazette* three times, and in three London papers, and three times in some country paper, published in the town where or near to which he carried on any manufacture of any thing made according to his specification, or near to, or in which he resides, in case he carried on no such manufacture, or published in the country where he carries on such manufacture, or where he lives, in case there shall not be any paper published in such town, and he intends to apply to His Majesty in Council for a prolongation of his term of sole using and vending his invention, and shall petition His Majesty in Council to that effect, it shall be lawful for any person to enter a caveat at the Council Office."

not sufficient to make Lister a Petitioner, and that the 4th section of the Statute, 5th and 6th Will. [195] IV., c. 83, precludes us from hearing Counsel on his behalf. The case must proceed as the Petition of Rawson and Donisthorpe alone.

The case of the Petitioners, Rawson and Donisthorpe, was then proceeded with, but the proofs respecting the accounts of the patent being insufficient, an extension was ultimately refused.

[As to extension generally see Patents, Designs, and Trademarks Act, 1883, (46 and 47 Vict. c. 57), s. 25. As to Advertisements see Privy Council Rules 1897 (Stat. R. and O., 1899, p. 1837).]

ON APPEAL FROM THE SUPREME COURT IN JAMAICA.

ROBERT EMERY and DANIEL WINDER KELLY.—*Appellants*: EDWARD BINNS.—*Respondent** [Dec. 10, 1850].

Plaintiff sued in trespass in the Supreme Court of the Island of Jamaica, laying his damages at £3000, a sum above the limit of the jurisdiction of the Local Courts, in the Island, constituted by the Jamaica Act, 5 Vict., c. 26, and recovered a verdict for 40s. Held

First, that the sum recovered by the verdict and sanctioned by the judgment, and not the sum laid in the declaration, was the test to be applied, to ascertain the right to sue in the Supreme Court, and to entitle the Plaintiff to Supreme Court costs [7 Moo. P.C. 204].

Secondly, that the Plaintiff having recovered by the verdict, a sum not exceeding 40s., he was not entitled to more costs, than damages: and the judgment of the Court, giving Supreme Court costs, reversed [7 Moo. P.C. 204].

In this case, the Respondent brought an action of trespass, for assault and false imprisonment, in the Supreme Court of Judicature, of the Island of Jamaica, [196] against the Appellants, for acts done by them in their capacity of Stipendiary Justices of the Peace. The damages were laid at £3000. The cause was tried at the Assizes, held in the County of Cornwall, before Mr. Justice MacDougall, when the jury found for the Respondent, and assessed the damages at 40s.

The questions raised by the appeal were exclusively confined to the award of costs under this action, and were: First, whether, upon the true construction of the local Statute of Jamaica, 5 Vict., c. 26 (*a*), with [197] respect to the Local or Inferior

* Present: The Chief Baron (Sir Frederick Pollock), the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

(*a*) In Jamaica there are Local Courts, called "Common Pleas Courts," having a jurisdiction in civil suits, to the extent of £30, and protected in the exclusive exercise of that jurisdiction by provisions as to costs, contained in the several Island Statutes on the subject.

By the Jamaica local Court Act, 5 Vict., c. 26, section 1, jurisdiction is given over all causes wherein any freehold is not concerned, and in which the original amount claimed does not exceed the value of thirty pounds exclusive of costs.

Section 2 enacts "that nothing therein contained shall prevent any Plaintiff or Plaintiffs, if he or they shall think proper, from proceeding in the Supreme Court of the Island, in any action or actions of trespass, or trespass on the case of covenant or debt in specialty, where the original amount sought to be recovered should not exceed the amount thereinbefore provided. And no other causes, wherein any freehold is not concerned to the value thereinbefore mentioned, should be brought against any person within the jurisdiction of the said Courts of Common Pleas in any Court whatsoever."

Section 3 enacts "that in all actions thereby declared to be within the jurisdiction of the Courts of Common Pleas, so brought in the Supreme Court as last afore-

Courts, therein called "Common Pleas Courts," where a party sues in trespass in the Supreme Court, laying his damages at a sum above the limits of the jurisdiction of the Local or Common Pleas Courts, but recovering a sum below that limit, the sum, on which his right to the costs of the Supreme Court depends, is to be ruled by the amount of the damages laid in the declaration, or the amount of the damages recovered by the verdict. Secondly, whether a Plaintiff in a personal action brought in the Supreme Court, not being for any "title or interest of lands, or concerning the freehold or inheritance of any lands," recovering by verdict a sum not exceeding 40s., can have judgment for more costs than damages.

After the verdict, an application was made to the Judge for a certificate, pursuant to section 3 of the Jamaica local Act, 5 Vict., c. 26, to entitle the Plaintiff to Supreme Court costs. The application being granted, a certificate of allowance was endorsed on the Record. [198] and in pursuance of this certificate, the Clerk of the Supreme Court taxed the Plaintiffs costs at the sum of £85. 2s. 9d.; but in the course of the succeeding June term, the Supreme Court, on having the matter brought before it, ordered that the certificate should be cancelled, and erased from the Record, on the ground, that such certificate was not endorsed in accordance with the provisions of Act, 5 Vict., c. 26, and that the Plaintiffs' bill of costs should be referred back to the Clerk of the Court for re-taxation.

The Clerk, under this order, re-taxed the Respondents' costs at the sum of 40s. only. The Plaintiff then moved for, and obtained from the Court, on the 16th of June, 1849, a rule *nisi*, for a re-taxation, with a direction to allow to the Plaintiff the full costs of suit of the Supreme Court: contending, that the original amount sought to be recovered in the action exceeded the jurisdiction of the "Court of Common Pleas," and that, therefore, a certificate to entitle him to costs was unnecessary.

Cause was shown by the Appellants against this rule, and on the 9th of October, 1849, the Court pronounced the following judgment:—"This rule has raised a question, which has not hitherto been brought before the Court. What is the construction to be put on the first and second sections of the 5th Vict., c. 26, on the question of the jurisdiction of the Court of Common Pleas, in actions of trespass, because, if this is a case which clearly falls within that jurisdiction, this rule must be discharged. The first section fixes the jurisdiction of the Courts of Common Pleas, by declaring, that from a day there named, those Courts shall have jurisdiction over all causes wherein any freehold is not concerned, and in which the original amount claimed, does not exceed thirty pounds, exclusive of costs, and [199] no more; and if this section stood alone, it might have been fairly argued, from its terms, that actions relating to a money demand were alone intended to be included, as the words, 'original amount claimed,' could scarcely be said to apply

said, the Clerk of such Court shall not tax for costs to the Plaintiff or Plaintiffs any greater costs than such Plaintiffs would have been entitled to if such action had been brought in the inferior Court, unless the Judge before whom such action shall be tried, shall, before the expiration of the Court, certify on the Record, that, in his opinion, the costs of the Supreme Court should be allowed."

Section 4 enacts "that the Plaintiff or Plaintiffs in every action depending or thereafter to be brought in the several Courts of Common Pleas of the Island (except as hereinafter excepted) in which he, she or they shall recover damages, shall be entitled to costs out of purse, to be taxed as between party and party."

Section 5 enacts "that in every personal action depending or thereafter to be brought in the said Courts of Common Pleas, when the debt or damage recovered in such action shall not exceed the sum of 40s., the Judge before whom such action shall be tried, shall not award, nor shall the proper Officer of such Courts, (that is to say) the Clerks of the said Courts of Common Pleas, tax for costs to the Plaintiff or Plaintiffs in such actions, any greater or more costs than the sum recovered for the debt or damages, but less in his discretion, unless the Judge before whom the action shall be tried, shall within three days after the determination of the Court at which such trial shall take place, certify on the Record, that in his opinion costs to be taxed as between party and party, ought to be allowed to the Plaintiff or Plaintiffs therein."

to actions of tort. But the following section of the Act shows that the legislature meant to include them. The words of the second section are, 'That nothing herein contained shall prevent any Plaintiff, if he shall think proper, from proceeding in the Supreme Court in any action of trespass, or trespass on the case, covenant, or debt on specialty, where the original amount sought to be recovered shall not exceed the amount hereinbefore provided.' And then goes on to declare, that 'no causes wherein any freehold is not concerned to the value hereinbefore mentioned shall be brought against any person within the jurisdiction of the Court of Common Pleas in any other Court whatsoever.' And the third section enacts, 'that the Plaintiff shall only have the costs of the Court of Common Pleas, when he brings an action in the Supreme Court, which is within the jurisdiction of the Court of Common Pleas, unless the Judge certify that the costs of the Supreme Court shall be allowed.' The second section is an odd jumble of actions of tort, assumpsit, and specialty, and it is difficult to see how the same phraseology can be made applicable to all, so as to define that which shall give jurisdiction to the inferior Court, but we must apply it to each description of action, so as to carry out, if we can, the intention of the Legislature. Now, in the second section, as in the first, the jurisdiction of the Court of Common Pleas arises, when the 'original amount claimed' does not exceed the sum of thirty pounds. [200] and in putting a construction on these words, as applicable to an action of tort, we must endeavour to ascertain what, in those actions, is 'the original amount claimed.' In actions of assumpsit, debt or covenant, it may well be held, that the 'original amount claimed' shall be that which the jury may, by their verdict, decide to be due, on the ground, that in them the cause of action is capable of accurate calculation, which it is the duty of the Plaintiff to make; but we cannot think it was ever meant to place actions sounding altogether in damages, and which cannot be the subject of accurate calculation, on the same footing with actions founded on contract. It is this consideration which distinguishes this case from all the English authorities, which proceed on the construction of Statutes which contemplate only the recovery of a money demand, and in those cases the Courts have held that the original debt must be that found by the verdict, except in the case of the reduction of the debt by set-off, on the ground that the Plaintiff had the means of knowing and ascertaining the amount due before action brought. But even in these cases the verdict could not always be held conclusive, as is shown by the opinion of Lord Ellenborough, in *Horn v. Hughes* (8 East, 317), which has been recognised as good law by the Court of Common Pleas, in *Harsant v. Larkin* (3 Brod. and Bing. 257). Now if this be the ground on which the English decisions proceed, how can it be applied to actions of tort, in which the damages that a party may be entitled to recover depend upon the ever-varying circumstances of each particular case? The 'original amount claimed' in actions of tort, we conceive can only be the damages laid in the declaration: for how otherwise can the [201] amount claimed be fixed than by that which the Plaintiff states as the measure of compensation he demands? We, therefore, think, that this case must fall within the principle of the decision in *Gilmore v. Horton* (Ridgw. 29), and the rule of the American Courts as stated in 1 Kent's Comm. 302 n. a., and hold, that when the cause of action is not susceptible of accurate calculation, but sounds altogether in damages, the damages laid in the declaration, and not the verdict of the jury, must decide the question of jurisdiction. The rule will, therefore, be absolute. We may add to these reasons, that in the Island Act we have been considering, there is no provision such as the 128th section of the 9th and 10th Vict., c. 95, the County Courts Act, which declares that the costs shall depend on the amount of the verdict; and on this section we refer to the case of *Woodhams v. Newman* (7 Com. Ben. Rep. 654)."

The rule nisi of the 16th of June was accordingly made absolute, and the Clerk of the Court re-taxed the costs, at £85. 2s. 9d., for which amount, together with 40s., the amount of damages, the Respondent recovered and entered up judgment in the Supreme Court.

From the judgment of the 9th of October, 1849, the Appellants presented a Petition to her Majesty in Council, praying for leave to appeal.

Mr. McMahon, in support of the Petition (25th June, 1850*).—The amount involved is under £500, the sum limited for appealing to the Queen in Council; but the question is most important, as the principle established by the [202] judgment of the Supreme Court is calculated to have a pernicious tendency to the Inferior Courts, as the certainty of Supreme Court costs attaching in all cases, irrespective of the verdict of the jury, would prevent actions being brought in the Courts created by the local Act, 5 Vict., c. 26, and carry them into the Supreme Court, whereby Defendants, circumstanced as the Petitioners, would be exposed to Supreme Court costs. The judgment of the Court is contrary to law. *Harsant v. Larkin* (3 Brod. and Bing. 257).

Baron Parke.—You may take leave to appeal upon the usual terms.

The Respondent did not appear. The appeal now came on for hearing *ex parte*.

Mr. McMahon, for the Appellants.—The rule of the Court of the 14th of June, 1849, under which the costs were taxed at 40s. only, was in accordance with the true construction of the local Statute, 5 Vict., c. 26. The sum laid as the damages in the declaration cannot be the test to ascertain the right of the Respondent to Supreme Court costs. Such a test has been rejected by Courts in this Country, on similar enactments, under the County Courts Act, 9th and 10th Vict., c. 95. The sum recovered has been always held to be the test of a Plaintiff's right to Superior Court costs. There is no foundation for the distinction adopted by the Court, that the words in the 5th Vict., c. 26, "amount claimed" or "amount sought to be recovered," mean, in actions of tort, the amount laid in the declaration, and, in actions of contract, the amount recovered by the verdict. If such a distinction were to be [203] recognised, the object of the Legislature would be defeated, as a Plaintiff in actions of tort could always entitle himself to Supreme Court costs, by merely laying his damages at a sum beyond the jurisdiction of the Court. He cited *Woodhams v. Newman* (7 C. B. Rep. 654). *Cross v. Collins* (5 Bing. N. C. 194). *Williams v. Sharwood* (5 Dowling, 371). *Clark v. Askew* (8 East, 28). *Horn v. Hughes* (8 East, 347). 1 Kent's Comm. 302, n.a.

The Right Hon. T. Pemberton Leigh (11th Dec. 1851).—The question, in this case, turns upon the true construction of the 5th Vict., c. 26, of the local Acts of the Island of Jamaica, and upon the legal meaning (in that Act of the local Legislation) of the expression, "original amount claimed."

If the first section had stood alone, it might well have been contended, that the Act applied to cases of debt or contract only, and not to cases of tort; but it is manifest, from the second section, that cases of tort, as well as cases of debt or contract, are intended to be included, and are expressly mentioned, as actions in which "the original amount sought to be recovered" may be important, with reference to the Court in which the action is to be brought, and the costs to which the Defendant is to be liable. If then we are to decide that the first section includes actions for tort, as well as actions relating to a money demand, the expression "original amount claimed" must have the same meaning with reference to both descriptions of actions.

Now, in actions on debt or contract, if the words be [204] construed literally, the amount claimed, and not the sum recovered, would decide in what Court the action ought to have been brought; but it is agreed on all sides, that in actions of debt or contract, it is the amount recovered by the verdict, and sanctioned by the judgment of the Court, that decides the question of costs; therefore, the expression "original amount claimed" cannot, in that case, be understood literally, and it must mean "the amount (justly or properly) claimed;" otherwise, by an exorbitant (though unfounded) claim, any Plaintiff might, in any action of contract or tort, free himself altogether from the restraint of the Act, and if such be the meaning of the expression in one case, it must have the same meaning in the other; and, in this case, the jury having decided that 40s. is the proper amount of damages, that verdict (followed by a judgment) must be taken as the measure of what is justly or properly claimable, and that the sum demanded in this action, viz. £3,000, was an exorbitant, unjust, and improper claim; the action, therefore,

* Present: Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

might have been brought in the Inferior Court: and section three applies, so as to deprive the Plaintiff of any costs, beyond what he would have been entitled to, if the action had been brought there; and by section five, as the damages recovered do not exceed 40s., the Plaintiff is not entitled to more costs than damages.

The rule, therefore, in our opinion, ought to have been discharged, and we shall advise the Crown, that the judgment of the Court below ought to be reversed.

[Mews' Dig. tit. COSTS; I. EFFECT OF COUNTY COURTS ACT; 2. *Amount recovered*.
Approved. *The Young James*, 1869, L.R. 3 Ad. and E. c. 5.]

[205] ON APPEAL FROM THE EXECUTIVE COUNCIL OF WESTERN CANADA.

TERENCE SMYTH and HENRY GEORGE SMYTH,—*Appellants*: WILLIAM SIMPSON and Others,—*Respondents* * [June 25, 1850].

By the law of Canada (before the passing of the Canada Chancery Act, 7 Will. IV., c. 2), the relative position of mortgagor and mortgagee was governed entirely by the Common Law, and there was no equitable jurisdiction for redemption or foreclosure. When a mortgage in fee was made, giving the legal title to the mortgagee, and the mortgagor remained in possession; if the mortgagee was desirous of obtaining possession, and making his title absolute, he could only do so by an action of ejectment, and the mortgagor could, during the pendency of such action, come in, and by payment of the money obtain a compulsory right of redemption; but if the mortgagor abandoned that right, and the mortgagee obtained possession, the title of the mortgagee became absolute and indefeasible [7 Moo. P.C. 123, 224].

The Canada Act, 7 Will. IV., c. 2, established a Court of Chancery, in Canada, and gave, as appurtenant to such jurisdiction, an equitable right of foreclosure to mortgagees, and an equitable right of redemption to mortgagors. Section 11, of that Act, after reciting that, as to questions between mortgagors and mortgagees, a strict adherence to the rules established in England might be attended with injustice, gave to the Court, power and authority, in all cases of mortgage, where, before the passing of the Act, the estate had become absolute in law, by failure in performing the conditions, to make such order and decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, as might appear just and reasonable under the circumstances of the case.

Bill filed in 1810, for redemption of a mortgage, executed in 1810. Judgment had been recovered, in an action of ejectment, by the mortgagee against the mortgagor; and under an execution issued upon such judgment, the Sheriff, in the year 1825, sold and conveyed the equity of redemption to a person who had acquired the legal fee from the mortgagee. The purchaser took possession of the estate, and sold and leased various parts of it, and large sums of money were expended by him, and those claiming through him, in building and other permanent improvements upon the estate, whereby the property had greatly increased in value. Held by the Judicial Committee, affirming the decree of the Executive Council in Canada,—

First, That by the 11th section of the Act, 7 Will., c. 2, the right to redeem was in the discretion of the Court of Chancery in Canada [7 Moo. P.C. 225, 226]; and,

Secondly, That, the mortgagor having abandoned possession, giving up the

* Present: Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

legal estate without enforcing his right of redemption, and the subsequent dealings with the property by the purchaser, and those claiming under him, did not present a case sufficient to justify the Court of Chancery in Canada, to proceed to enforce the right of redemption on the part of the mortgagor, and that such right was properly held to be absolutely extinguished [7 Moo. P.C. 226, 227].

This was a suit for the redemption of an estate in Western Canada, which had been mortgaged in fee, [206] in 1810, and had been forfeited at law through non-payment of the mortgage debt. Judgment had been recovered by the mortgagee against the mortgagor upon the covenant contained in the mortgage deed, for payment of the mortgage debt, and the execution had issued upon such judgment, under which the Sheriff, in 1825, sold the equity of redemption to a person who, by conveyance, had acquired the legal fee from the mortgagee. The purchaser had been in possession of the estate for many years, and had sold and leased various parts of it. The purchaser, and those claiming under him, had expended large sums of money in permanent and substantial improvements of the property.

Previous to the establishment of the Court of Chancery, in Upper Canada, by the Colonial Statute, 7 Will. IV., c. 2 (a), commonly called "The [207] Chancery Act," the relative rights of mortgagor and mortgagee were governed entirely by the Common Law, and there was no equitable jurisdiction for redemption or foreclosure. The Chancery Act [s. 11], after reciting that as to questions between mortgagors and mortgagees "a strict adherence to the rules established in England might be attended with injustice," gave to the newly constituted Court of Equity, power and authority, in [208] all cases of mortgage, where, before the Act, the estate of the mortgagee had become absolute at law, generally to make such order and decree, with regard to the rights and claims of mortgagor and mortgagee, as should seem just and reasonable, under all the circumstances of the case.

The question turned entirely upon the construction of the eleventh section of this

(a) The sections of the Canada Chancery Act, 7 Will. IV., c. 2, bearing upon the question, are the sixth and eleventh.

Sixth Section.—"And be it further enacted, by the authority aforesaid, that the rules of decision in the Court of Chancery hereby constituted and established, shall be the same as govern the Court of Chancery in England; and it shall possess full power and authority to enforce and compel obedience to its orders, judgments, and decrees, to the same extent as is possessed by the Court of Chancery in England, in respect of all matters within its jurisdiction, except when otherwise provided by the laws of this Province."

Eleventh Section.—"And whereas the law of England was, at an early period, introduced into this Province, and has continued to be the rule of decision in all matters of controversy relative to property and civil rights, while at the same time, from the want of an equitable jurisdiction, it has not been in the power of mortgagees to foreclose, and mortgagors being out of possession, have been unable to avail themselves of their equity of redemption; and, in consequence of the want of these remedies, the rights of the respective parties, or of their heirs, executors, administrators, or assigns, may be found to be attended with peculiar equitable considerations, as well as in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case; and a strict application of the rules established in England might be attended with injustice: be it therefore enacted by the authority aforesaid, that the Vice-Chancellor of the said Court shall have power and authority in all cases of mortgage, where, before the passing of this act, the estate has become absolute in law by failure in performing the condition, to make such order and decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators, or assigns, as may appear to him just and reasonable, under all the circumstances of the case, subject, however, to the appeal provided by this Act."

Statute, whether there was a discretion vested in the Court, to grant or withhold the right of redemption of the mortgaged estate, and if so, whether the circumstances of the case warranted such refusal.

The facts of the case were shortly these:—

Thomas Smyth, of Elizabeth town, in the Johnstown District, in Western Canada, since deceased, was seised in fee simple, in possession, of the lands in question, comprising 400 acres in the Fourth Concession of the township of Elmsley, in the County of Leeds, in the District of Johnstown. By an indenture dated the 8th day of December, 1810, made between Smyth, of the one part, and one Joseph Sewall of the other part, Smyth, in consideration of £233 11s. 3d. currency, conveyed these lands by way of mortgage to Sewall, his heirs and assigns, subject to a proviso for redemption on repayment of the sum of £233 11s. 3d. currency, with interest, on the 3rd of August, 1811. The lands comprised in the mortgage, consisted of 400 acres, at that time in a wild and uncultivated state, situate on the river Rideau, affording a site on the bank of the river for the erection of mills to be turned by water power of vast extent, but remote from any settlement, and without any roads. The amount of the mortgage was the then full value of the property. The mortgage money was not repaid, and [209] Sewall, the mortgagee, in Trinity Term, 1819, recovered a judgment in the Court of King's Bench, in Upper Canada, against the mortgagor, Smyth, for £467 2s. 6d., (being the amount of the mortgage debt and interest,) and £13 13s. costs.

On the 8th of August, 1825, Sewall, by deed-poll, absolutely conveyed the mortgaged premises to Charles Jones, in fee, and all his right to the money secured by the mortgage.

On the 27th of August, 1825, the mortgaged premises were put up for sale by public auction by the Sheriff, under a writ of *fiat facias*, sued out on the judgment against Smyth, as being still the lands of Smyth; and at this sale, Charles Jones, being the highest bidder, became the purchaser thereof for the sum of £105 currency; and the Sheriff, by a deed-poll, dated the 27th of August, 1825, conveyed in the usual form to Jones, his heirs and assigns, all the lands seized under the execution.

At the time of the sale the only erections or buildings upon the lands were a small shanty and saw-mill of very trifling value; and the lands themselves, being in almost a totally unreclaimed state, not more than an eighth of an acre being cleared, were also of very little value. Shortly after this sale the mill-irons belonging to the saw-mill were removed from off the premises by Smyth, who delivered up possession to Jones, as purchaser under the Sheriff's deed.

In the year 1826, Abel Russel Ward made a proposal to Jones for the purchase of the lands and hereditaments; but from a desire to accommodate Smyth, and to reinstate him in the possession of the lands, Jones declined to enter into any treaty without first giving Smyth an opportunity of re-purchasing the lands; and Jones [210] communicated to Smyth his intention of allowing him the refusal of purchasing the property by payment of the debt, interest, and costs incurred in respect of the mortgage transaction with Sewall. Upon receiving this communication, Smyth endeavoured to raise the necessary money for the purpose of such purchase, but finding it impossible to accomplish his object, he was obliged at last to decline the offer. Jones then entered into an arrangement for the sale of the hereditaments to the Respondent, Abel Russel Ward, and one James Simpson; and by a deed-poll dated the 30th of July, 1827, in consideration of the sum of £600 currency of the province, conveyed the lands and hereditaments to Truman Hicock, as trustee for Ward, and James Simpson, their heirs and assigns, as tenants in common in fee, in undivided third parts; viz. two undivided third parts thereof to Truman Hicock, and the other one undivided third part to James Simpson.

In 1831, Hicock conveyed to James Simpson two sixths of the estates, and the remaining one third he conveyed to Ward. In February, 1832, James Simpson and Ward conveyed the entirety of the estate to the Respondent, William Simpson, and afterwards by a deed of partition between Ward and Simpson, it was agreed that Simpson should be entitled to two thirds, and Ward to one third of the estates.

Under the provisions of the Provincial Act, 8th George IV., (the Rideau Canal

Act.) certain portions of the mortgaged land were taken for the purpose of constructing the canal, and the same have since become vested in the Crown.

James Simpson and the Respondent, Abel Russel Ward, entered into possession of the premises, and [211] made very extensive improvements upon the same, by clearing portions of the lands, and by opening roads and erecting buildings; and the Respondent, William Simpson, entered into the joint possession of the premises, with the Respondent Abel Russel Ward, and shortly afterwards, and before the execution of the Deed of Partition, the Respondents agreed between themselves to lay out a portion of the said premises as a village. This scheme was accordingly carried into effect, and the village is now called "Smyth's Falls." Part of the village lots became, upon the partition, vested in the Respondent, William Simpson, and the other part thereof in the Respondent, Abel Russel Ward.

Through the energy and enterprise of the Respondents, the premises at length became of great value, and they afterwards sold many of their village lots to different persons; the purchasers of such lots, or those claiming under them, being now in the possession and enjoyment of the parts of the land so acquired by them.

During the whole of this period the Appellants, the sons of Thomas Smyth, resided in the vicinity of the village. And Thomas Smith, the original mortgagor, up to the time of his death, which happened in the year 1839, also lived in the neighbourhood of the village. Thomas Smyth by Will devised all his lands and hereditaments to the Appellants.

Soon after the death of Thomas Smyth, the Appellants brought an action of ejectment against the Respondent, William Simpson, to obtain possession of the lands; and the Respondent having appeared and pleaded thereto, the action was subsequently abandoned. This action was the first intimation received by the [212] Respondents, that the Appellants intended to make any claim to the property in question.

In November, 1840, the Appellants filed a Bill in the Vice-Chancellor's Court, in the Province of Upper Canada, against the Respondent, William Simpson, as the sole Defendant thereto; thereby stating the seisin of Smyth, the mortgagor, at the date of the mortgage in 1810, to Sewall; and stating the mortgage, and that the mortgage debt not having been paid at the time appointed, the estate of Sewall became absolute at law, but redeemable in equity; also stating the Will and death of Smyth, and that the estate of Sewall had, after divers conveyances, become vested in the Respondent, William Simpson, and praying for an account and redemption.

To this Bill, Simpson put in a plea, averring that the Appellants had no title in law or equity to redeem.

The plea was argued before the Vice-Chancellor, who overruled the same with costs.

Simpson then put in his answer to the Bill, and relied upon the Sheriff's deed as a good conveyance of the whole of Thomas Smyth's interest in the lands; and also upon the acquiescence of Thomas Smyth in the sale, evidenced by his having then relinquished possession of the premises, without any steps having been taken to eject him therefrom; and by his having withdrawn not only his personal property but also the fixtures of the saw-mill. The answer also stated, that the price paid at the sale was the full value of the property, and relied upon the legal effect of the several deeds hereinbefore mentioned, and upon the constructive assent of Thomas Smyth, as well as of the Appellants, to the sales effected by such deeds; and he [213] set out and relied upon the 11th section of the 7th Will. IV. c. 2. And the Respondent also set forth the particulars of the sales made by him to different persons of some of his village lots; and insisted, that these several persons, as well as the Respondent, Abel Russel Ward, and those claiming as purchasers or incumbancers under him, and also Her Majesty's Attorney-General of the Province, in respect of those portions of the premises which had been set apart for the Rideau Canal, were all necessary parties to the suit.

On the 24th of December, 1842, the Appellants filed their amended Bill against the Respondents, and also against Tierney, Brown and Ward, thereby stating the several conveyances hereinbefore mentioned; and that subsequently to the execution of the deed of partition the Respondent, Simpson, conveyed several of his

village lots to the several persons named in the above answer, and praying, that the Defendants might answer, and that an account might be taken of what remained due for principal and interest on the mortgage, and of the rents and profits of the mortgaged premises received by Defendants, and others, the purchasers of any of the village lots so conveyed as aforesaid, or any other person or persons by their order, or for their use, or which, without their wilful default, might have been received; and that upon payment of what, if anything, should appear to be due for principal and interest on the mortgage, after deducting the rents and profits, the Appellants might be admitted to redeem the premises, and that the same might be re-conveyed to the Appellants and their heirs, and that any surplus of the rents and profits, above what should appear to be due for principal and interest on the mortgage, [214] might be repaid to the Appellants: or that an account might be taken of the rents and profits of the mortgaged premises received by the Respondents and other Defendants, or any other persons or person by their order, or for their use, or which, without their wilful default, might have been received; and that upon payment of a proportionate part of what (if anything) should appear to be due for principal and interest on the mortgage, after deducting the rents and profits, the Appellants might be admitted to redeem so much of the mortgaged premises as the Respondents and other Defendants were interested in, and that the same might be re-conveyed to the Appellants; and that any surplus of the rents and profits, above the proportionate part, might be repaid to the Appellants, without prejudice to their proceeding against the other purchasers of the village lots for the redemption of the same: or that upon payment of what (if anything) should appear to be due for principal and interest on the mortgage, after deducting the last-mentioned rents and profits, the Appellants might be admitted to redeem the parts of the mortgaged premises wherein the Respondents and other Defendants were interested, and that the same might be re-conveyed to the Appellants, and that any surplus of the same rents and profits, above what should appear to be due for principal and interest on the mortgage, might be repaid to the Appellants, and that the Respondents might pay to the Appellants the value of the residue of the mortgaged premises, and a compensation for the rents and profits thereof not accounted for, or the purchase monies or money received in respect thereof, with interest from the times or time of receiving the same, at the option of the Appellants: or that upon payment [215] to the Respondents of what (if anything) should appear to be due for principal and interest on the mortgage, after deducting the rents and profits of the mortgaged premises received by the Respondents, or any other persons or person by their order, or for their use, or which, without their wilful default, might have been received, the Appellants might be admitted to redeem such parts of the mortgaged premises as the Respondents continued interested in, and that the same might be re-conveyed to the Appellants, and that any surplus of the last-mentioned rents and profits, above what should appear to be due for principal and interest on the mortgage, might be repaid to the Appellants by the Respondents, and that the Respondents might pay to the Appellants the value of the residue of the mortgaged premises, and a compensation for the rent and profits thereof not accounted for, or the purchase monies or money received in respect thereof, with interest, from the times or time of receiving the same, at the option of the Appellants, and for further relief.

To this amended Bill, Simpson put in a demurrer, for want of parties, alleging, as cause of demurrer, that the several sub-purchasers, named in the Schedule annexed to the amended Bill, were necessary parties. This demurrer was, on the 11th of July, 1843, overruled by the Vice-Chancellor.

The answer of Ward to the amended Bill, set up the same defence, and relied upon the same equitable grounds, as were set up and relied upon by the Respondent, Simpson, in his answer to the original Bill.

Simpson, in his answer to the amended Bill, alleged, that in 1825, the estate was not worth the sum due [216] upon the mortgage: he admitted that Jones, James Simpson and Ward had notice of the mortgage to Sewall, but that he believed that no legal or equitable title any longer existed in Smyth, and insisted, that Smyth had his remedy under the Statute, 5 Geo. II., c. 7, to have had paid to him the amount

due before he was deprived of his property, and submitted, that the Canada Chancery Act, 7 Will. IV., c. 2, contemplated cases like the present, and that the Appellants were not entitled to redeem.

The other Defendants put in their answers, submitting, that they were purchasers for valuable consideration, without notice, and that the Appellants had no equity to redeem the premises.

The suit being at issue, admissions were made, and witnesses examined on both sides. The cause was heard before the Vice-Chancellor of Upper Canada, on the 4th day of June, 1848 [1845], when the Court decreed redemption, upon terms of making compensation for improvements made, and directing an account to be taken of the mortgage money and interest, and of the sums received upon the sale of any portion of the mortgaged property.

The Respondents presented a petition of appeal to the Governor and Court of Appeal for that part of the Province of Canada, formerly Upper Canada, against the order, dated the 30th day of July, 1841, overruling the plea of the Respondent, William Simpson, to the original Bill, and stated the reason or grounds of such appeal:—Because the Imperial Act, 5 Geo. II., cap. 7, sec. 4, rendered the equity of redemption upon a mortgage in fee saleable, under a writ of *fiat facias* against lands. The Respondents also by the same petition appealed against the order of [217] the Vice-Chancellor, of the 11th day of July, 1843, overruling the demurrer of the Respondent, William Simpson, to the amended Bill, upon the following grounds:—Because a Bill to redeem which does not bring before the Court all the persons in whom the legal estate is vested, is unprecedented, and because the sub-purchasers from the mortgagee are interested in the account asked by the prayer of the Bill, which account could not be taken in their absence. The Respondents also appealed against the decree dated the 4th of June, 1845, and after referring to the evidence taken in the cause, submitted, that the true effect of all the evidence was, that the debt due to Sewall, upon the mortgage in 1825, was the full value of the property at that period; that Smyth having tried in vain to raise the money necessary to redeem or to sell at any advance, assented to the sale to Ward; that Smyth and the Appellants witnessed the various improvements carried on by the Respondents, not only without complaint or notice of their title, but in many instances with approval; that under the circumstances, a decree for redemption would be contrary to equity and good conscience; and they urged the following reasons for the reversal of the decree,—

First,—Because the equity of redemption was well conveyed by the Sheriff's deed, and so the Appellants had no right to redeem.

Second,—Because the suit was defective for want of parties on the grounds pointed at as error in the order on the demurrer in the cause.

Third,—Because whatever might be the legal effect of the various deeds, the acquiescence, as well of Thomas Smyth, as of the Appellants, in them, or some [218] of them, ought to have been regarded as estopping those parties from disputing the validity of such conveyances.

Fourth,—Because the Court is empowered by the second chapter of the 7th of Will. IV. to refuse to give effect to the right to redeem; and, under all the circumstances of the case, the Court ought in the exercise of a sound discretion to have dismissed the Bill.

Fifth,—Because the decree, instead of ordering an account to be taken of the mortgage money and interest, ought to have ordered an account of the purchase-money paid by the Respondents, and interest thereon: or at all events ought to have ordered an account of improvements made by those through whom the Respondents claim, and to have allowed interest for the same.

Sixth,—Because the decree, instead of directing an account of the present value of the improvements made by the Respondents, ought to have directed an account of the sums expended by the Respondents on permanent improvements, laying out the village, making roads, surveys and defence of title; and to have allowed interest thereon.

Seventh,—Because the decree, in directing an account to be taken, as against the Respondents, of the sums received by them on sales of any portion of the mortgaged property, and in directing an assignment to the Appellants, of such con-

tracts for the sales of portions of the mortgaged premises as were in any respect open and unperformed, was plainly erroneous in the absence of those parties, and of all evidence as to the nature of the contracts upon which those monies have been paid, an account of which was directed. And in [219] the absence of all evidence, respecting such of the contracts spoken of as being open, were directed to be assigned.

Eighth,—Because some of the purchasers, at all events, ought to have been regarded as purchasers for valuable consideration without notice, and the Bill as to them should have been dismissed.

The Appellants, in answer to the petition of appeal of the Respondents, insisted, that the orders and decree so appealed from, were good, for the following grounds. As to the Order overruling the plea—because an equity of redemption is not saleable by a Sheriff under a writ of execution upon a judgment at law. As to the Order overruling the demurrer—because the rule of equity as to parties is a rule of convenience, and subject to the discretion of the Court, and is relaxed wherever the purposes of justice require it, and under the circumstances of the present case, (in which a rigid adherence to the rule would have caused a failure of justice,) its relaxation was attended with no injury or inconvenience to any one; it was proper to dispense with the presence of the persons whose absence formed the ground of the demurrer. As to the decree in the cause—

First. Because the Act by which the Court of Chancery was established, and its jurisdiction defined, gives it no power in any case by its decree to extinguish the equity of redemption, and thereby to deprive the mortgagor of his property, but merely invests it with a more extensive discretion than was possessed by the Court of Chancery in England in regulating the terms upon which redemption shall be decreed.

Second. Because if the Court possessed the power of extinguishing the equity of redemption by its decree, [220] this case did not call for or warrant the exercise of such a power; but, under the circumstances disclosed by the evidence, it was proper to permit redemption upon such terms as were conformable to equity and justice.

Third. Because the terms upon which redemption has been decreed were equitable and just, and perhaps more favourable to the Respondents than the circumstances of the case in strictness warranted.

The appeal came on to be heard before the Court of Appeal at Toronto, on the 25th, 26th, 27th, 28th, and 29th of August, 1846, and such Court consisted of the Honourable Chief Justice Robinson, the Honourable Mr. Justice M'Lean, the Honourable James Buchanan Macauley, and the Honourable Attorney-General Smith, members of the Executive Council.

The Court being equally divided in opinion, delivered their judgments *seriatim*. Chief Justice Robinson and Mr. Justice M'Lean being of opinion, that the decree of the Vice-Chancellor ought to be reversed, and the original Bill dismissed, and the Honourable James Buchanan Macauley and Mr. Attorney-General Smith being of a contrary opinion; and thereupon it was ordered by the Court that the cause be re-argued at the next sittings.

In the interval, the Honourable Henry John Boulton was sworn in a member of the Executive Council, and on the 8th of March, 1847, the Court of Appeal met pursuant to adjournment, to proceed with the re-argument of the Petition, and the Court, as then constituted, consisted of the Honourable Chief Justice Robinson, Mr. Justice M'Lean, the Honourable James Buchanan Macauley, and the Honourable Henry John [221] Boulton; and the case was then re-argued by one Counsel on each side, the argument being, by the direction of the Court, confined to the construction of the eleventh section of the Canada Chancery Act, 7th Will. IV., cap. 2, and at the close of the argument the Court adjourned until the 27th of March, 1847, on which day the Court again met pursuant to such adjournment; and such Court then consisted of the Honourable Chief Justice Robinson, Mr. Justice M'Lean, the Honourable James Buchanan Macauley, the Honourable Henry John Boulton, and also the Honourable Jonas Jones, a member of the Executive Council; and at such sitting the Honourable Chief Justice Robinson, Mr. Justice M'Lean, the Honourable James Buchanan Macauley, and the Honourable Henry John Boulton, delivered their respective judgments, *seriatim*, concurring in the reversal of the decree of the 4th of June, 1845, and in ordering the original bill to

be dismissed, but the question of costs was reserved. The Honourable Jonas Jones did not deliver any judgment.

The Court of Appeal again met on the 15th of December 1847, and the Court then consisted of the Honourable Chief Justice Robinson, the Honourable James Buchanan Macauley, and the Honourable Jonas Jones; and it was then ordered that the original Bill be dismissed with costs, and that the judgment of the Court of Appeal be dated, as of that day, on the ground, that by the 11th section of the Canada Chancery Act, 7 Will. IV., cap. 2, the right of mortgagors to redemption, though asserted by suit within twenty years after the mortgage title had been acknowledged, was in the discretion of the Court of Chancery, and that, under the circumstances which [222] were proved to have existed in this case, it was not a case in which such right ought to be refused.

From this decree the Appellants appealed to Her Majesty in Council, and the appeal now came on for hearing.

Mr. Turner, Q.C., and Mr. W. T. S. Daniel, for the Appellants.—The principal question arises upon the construction to be put upon the 11th section of the Act of the Canadian Legislature, 7 Will. IV., c. 2, by which the Court of Chancery in Canada was established, and its jurisdiction defined. We submit, that the Court of Equity in Canada, had no power, by its decree, to extinguish the equity of redemption, and thereby deprive the mortgagor of his property, but that the Act merely invested the new Court with more extensive discretion than was possessed by the Court of Chancery in England in regulating the terms upon which a redemption should be decreed. The Vice-Chancellor held, that according to the true construction of the Act, the right of redemption was a right of property belonging by law to the mortgagor, and that the discretion vested in the Court by the Act, was to be exercised only as to the terms upon which such redemption should be granted with reference to the compensation to be made to the mortgagee, and those claiming under him, for improvement of the mortgaged property. The Executive Council wrongly reversed this decree; as they had no power to refuse the right of redemption, inasmuch as the mortgagee had not been in possession for a period of twenty years without the recognition of the mortgagor's rights. The law of England is conclusive on that point, and the [223] Canadian Act introduced such law with respect to mortgages. Assuming, however, the right of redemption to be in the discretion of the Court, by virtue of the Act, the circumstances of the case were not such as to justify the absolute refusal of such right, which totally extinguishes the equity of redemption.

Their Lordships, without calling upon Mr. Stuart, Q.C., and Mr. Hore, for the Respondents, delivered judgment, as follows, by

The Right Hon. T. Pemberton Leigh.—Had their Lordships entertained any doubt in this case, they would have heard the Respondents' counsel before coming to a decision, but it really appears to us, that the case admits of no doubt at all.

The first question which is made, is, whether the Canada Chancery Act authorised the Court of Chancery in that Country to refuse the right of redemption, when it appeared the mortgagee had been in possession for a period of twenty years without recognition of the mortgagor's right.

It is said, that the object of that Act was to introduce into Canada the law of England, relative to mortgages, and that the application of that law in Canada, in this particular case, would entitle the Plaintiffs in the suit to redemption of the property.

Now, in order to see what the intention of that Act is, it is necessary to consider what the state of the law in Canada was at the time when the Act passed in respect of mortgages. And, as we understand, it was this: when a mortgage was made, giving the legal title [224] to the mortgagee, the mortgagee might permit, as he usually does here, the mortgagor to continue in possession, and as long as that arrangement went on, and the mortgagee brought no ejectment, the relative position of the parties was the same as it would be in this country. If the mortgagee were desirous of converting his mortgage into an absolute and indefeasible title, in this country, he must proceed by Bill of foreclosure, unless he procures a release of the equity of redemption. In Canada there was no Court in which any such right could be exercised; there was no Court that could decree a foreclosure; and all

that the mortgagee could do there, was to recover possession by an action of ejectment: while on the other hand, the mortgagor, if he desired to redeem the property, was entitled, under the Statute, 5 Geo. II., c. 7, s. 4, at any time during the pendency of that action, to come in, and, by payment of the mortgage-money, put a stop to the action, and retain possession of his property.

That being the law then, what is the situation of a person who, having obtained possession, and thereby done all he could to obtain an absolute title, proceeds to sell the property? Why, he is in this situation: he has a title which, at all events, is a perfectly good possessory title, which there is no power in law to disturb; persons deal with him on that assumption; they treat it as an absolute legal title; lay out money in buildings and improvements, and deal with the estate as their own. In this state of things the Canada Chancery Act is passed, which establishes for the first time a Court of Chancery in Canada, and directs, that the general rules and principles of the Courts of Equity in England shall be administered in the Court of Chancery in Canada. But we feel that we cannot administer [225] those principles with justice between the parties in respect of mortgages, because, by the law of England, no absolute title can be obtained, except by foreclosure; and in Canada, during all the period in which the transactions in this case took place, there was no possibility of obtaining a right of foreclosure. On the other hand, there was no mode of obtaining the right of redemption, except in the particular form I have mentioned, and, therefore, it was necessary (and with a providence which one does not always see in Acts of Legislature, a provision is found here) to guard against the inconvenience of applying strictly to one state of circumstances, a series of laws and principles which were introduced with respect to another.

Now, the case has been argued, as if there was a law in England, by which a mortgage is absolutely redeemable after a period of twenty years, unless there has been a voluntary release of the equity of redemption on the part of the mortgagor.

The law is no such thing. The law does not go beyond this, that if the mortgagee rely simply on the title acquired by possession, there being no dealing between the parties, as a bar to the right of the mortgagor to redeem, then the mortgagee must show uninterrupted possession for the period of twenty years. The rule does not go beyond that. A dealing between the mortgagor and the mortgagee may take place, notwithstanding that interval, which might very easily alter that relation.

Now, the Act provides, in terms as extensive as it is possible for language to furnish, not merely for the circumstances under which redemption shall be extinguished, but for the question, whether redemption shall [226] be decreed or not, under the peculiar circumstances of the case.

Then, if such be the spirit, as we think it is, of the Canada Act, what are the circumstances here? And is it possible to state circumstances, which more strongly illustrate the enormous injustice of doing what it is contended the Court of Chancery in Canada ought to have done in this case?

The mortgage was made in 1810: in 1819, judgment was recovered upon the mortgage debt. In 1825, not one single shilling, as far as it appears, of principal or interest, having been paid, steps are taken, for the purpose of extinguishing, as far as they could extinguish, any right which the mortgagor might have in the property, and to put up the property to sale, which we agree must be considered as the mere machinery: but still it is notice to the mortgagor, that at that time the mortgagee means to convert his mortgage title into an irredeemable title, and to prevent any right of redemption on the part of the mortgagor.

At this period, in 1825, it is quite clear that Smyth, the mortgagor, was in possession of the estate. Now, if he chose to exercise his right of redemption, what had he to do? Simply to refuse to deliver up possession of the land, and require an action of ejectment to be brought against him, and when that action of ejectment was brought, to bring the money into Court, and put a stop to the proceeding.

But is that the step which he takes? Why, instead of taking that step, it is distinctly stated here, that he, being under no apprehension that he had power or right to resist the proceeding, retired from the possession of the land, and removed the machinery from [227] the mill. What could he do more? He had given up the legal estate; he had conveyed the legal estate; he gave up the possession, having

the power by retaining that possession, to enforce the right of redemption, if that right of redemption still subsisted.

But instead of taking these steps, he voluntarily retires from the possession, knowing that the mortgagee is doing all he can for the purpose of making his title, which was previously a redeemable title, an irredeemable title, and thus barring his right of redemption.

Now, after that, is it possible for us to say, that he had, subsequent to that period, a right, by any means then existing in the law, to enforce that claim of redemption? Yet after this, after this property has been sold, it is here again stated, that so far from any harshness being practised against the mortgagor, after the purchase has been made by Simpson, the property is offered to Smyth, if he will pay the mortgage debt and redeem it. He did neither: and under these circumstances, the property passes from hand to hand, and the vendor and purchaser might well consider the title, a title at that time absolutely incapable of being disturbed by any process of the Court.

It appears to us, therefore, that under these circumstances, there never was a case in which a Court was more fully justified in refusing the right of redemption; that the decree, therefore, is perfectly right, and that the appeal must be dismissed with costs.

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 4. *British North America. Mortgage—Canada—Redemption.*

[228] ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF JAMAICA.

RICHARD JAMES CADE HITCHINS.—*Appellant*; JOHN REED HOLLINGSWORTH.—*Respondent** [Dec. 9, 1850; June 16, 1852].

Error will lie on a non-suit [7 Moo. P.C. 237].

Nonsuit will not lie upon a wrong *venue*, if there is no issue in the pleadings upon the locality [7 Moo. P.C. 236].

In an action of debt upon a bond, the jury returned a verdict for the Plaintiff. The Supreme Court of Jamaica, afterwards, upon motion by the Defendant, ordered a judgment of nonsuit to be entered for the Defendant, upon the ground, that the action was a local one, and that the venue was laid in a wrong country. The Plaintiff had not been called at the trial, nor was any leave reserved to enter a nonsuit. Such judgment, upon appeal, reversed, the Judicial Committee holding, that the Supreme Court had no authority to grant such judgment of nonsuit, and the judgment ordered to be set aside, and a *venire de novo* awarded [7 Moo. P.C. 238].

Under the Statute, 7th and 8th Vict., c. 69, an appeal allowed direct from the Assize Court, at Kingston, in Jamaica, to the Queen in Council, without an intermediate appeal to the Court of Error in the Island [7 Moo. P.C. 233].

This was an action of debt, brought by the Appellant, as a public officer, and on behalf of a Bank called the Planter's Bank, in the Island of Jamaica, against the Respondent, one of several sureties to a bond given to secure the balance of account current which might at any time become due on advances made by the Bank to Messrs. Prescott and Hamilton of the Island. It appeared that the bond was executed in the county of Middlesex, in the Island, but that the action was brought and the *venue* laid in the county of Surrey, where the alleged breach was committed. The Defendants pleaded several pleas to the action, but [229] no issue was raised on the *venue*, not being the county where the bond was executed.

* Present: The Right Hon. Sir James Knight Bruce, L.J., Lord Cranworth, L.J., the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patterson.

At the trial before the Chief Justice, at the Assizes held at Kingston, it was proved, that the bond was executed at Manchester, in the County of Middlesex. A verdict was returned for the Plaintiff, the Appellant, upon the several issues. The Defendant was not called, nor was leave reserved to enter a nonsuit on any point of law.

The Defendant afterwards obtained a rule *nisi*, for a nonsuit, on the ground of misdirection of the Judge, in not charging the jury that no action would lie in the county of Surrey, the bond having been proved to have been executed in Middlesex. The Defendant also moved upon other grounds, not material to the appeal, that a verdict might be entered for him, or for a new trial, or for reduction of the damages.

Cause was shown on behalf of the Plaintiff against the rule, and the Supreme Court ordered that the rule *nisi* for a nonsuit should be made absolute.

The Chief Justice (Sir J. Rowe) delivered the judgment of the Court, and stated the reasons of the Court for making the rule absolute for a nonsuit, as follows: "We are of opinion the rule must be disposed of on one of two grounds, which, as distinguished from the others which go to the merits, may be called technical; viz., that the action being on a bond, which is not, according to the laws of the Island, negotiable, the *venue*, under the Dividing Law, 31st Geo. II. (a), is still [230] local, and the same having been shown to have been executed in Middlesex, the action should have been brought in that county, the 8th section of the 8th Vict., c. 28 (b), making the *venue* transitory, being confined to mere money bonds. It was contended, that looking at the preamble of the 8th section of the 8th Vict., c. 28, 'that it is expedient in all actions brought upon bonds, bills, notes, or other negotiable securities for money, the *venue* should be transitory,' the words 'or other negotiable securities,' limit the securities previously enumerated to those of a negotiable character, and that the *venue* in all others is still local. It was further contended, that this is carried out in the enacting part of the clause, which states, 'that in all actions that shall hereafter be brought in the Supreme Court for the recovery of money secured by any bond, bill, note, or other negotiable security, it [231] shall be lawful for the Plaintiff to lay the *venue* in either of the three counties, although the cause of action shall have arisen in any other county, any law, usage, or custom to the contrary, in anywise notwithstanding.' After a careful consideration of this section of the Act, we cannot put any other construction on the language used by the Legislature, than that contended for by the Defendant. If we were to hold that any bond, meant all bonds, whether negotiable or not, under the Island Acts, then we must also hold, that any bill or note, whether, by the terms of it, it is negotiable or not, comes within the clause.

(a) Previous to the year 1758, the Island of Jamaica was not divided into counties. In October of that year, the local Act 31 Geo. II., c. 4, was passed, entitled, "An Act for dividing the Island of Jamaica into three counties, and for appointing Justices of Assize, and Oyer and Terminer." The 5th section of that Act, enacted, that all actions brought in the Supreme Court should be brought, and filed in the said Court, and the name of the county in which the cause of the action shall arise, should be endorsed on the Declaration, and wrote in the margin. Where the cause of such actions should arise in Middlesex, to be tried in the Supreme Court. If in Surrey, to be tried at Kingston; and if in Cornwall, to be tried at Savanna-la-Mar.

(b) The other local Act, 8th Vict., c. 28, referred to, is entitled, "An Act for the further improvement of the Law, in certain cases, and for the more speedy administration of Justice." The 8th section enacts as follows:—

"And whereas it is expedient that the *venue* in all actions brought upon bonds, bills, notes, or other negotiable securities for money, should be transitory and not local; Be it further enacted, That in all and every action or actions, suit or suits, that shall hereafter be brought in the Supreme Court of Judicature, for the recovery of money secured by any bond, bill, note, or other negotiable security, it shall and may be lawful for the Plaintiff or Plaintiffs therein, to lay the *venue* in any one of the three counties of this Island, although the cause of such action or actions shall have arisen in any other county, any law, usage or custom to the contrary, in any wise notwithstanding."

"This, in our opinion, would be doing a violence to the language of the Act, as we think the enlargement of the *venue* is confined by the terms of the section to such securities as in their nature are transferable; for, according to grammatical construction, the words, 'or other negotiable security,' override and limit those which precede. Is the bond which has been put in suit in this action of that nature, which according to the laws of the Island is transferable, and when transferred, gives a right of action on it to the assignee? This must be decided by a reference to the 14th Geo. III., c. 28 (a), and when we consider what [232] the assignee of a bond is directed to do, it will, at once, be evident that such an obligation as this cannot be considered in the light of a 'negotiable security.' The third section gives the form of the assignment, which directs the sum actually due for principal and interest to be stated. The Legislature, therefore, clearly contemplated simple money bonds, for on no other could the assignors state the sum due for principal and interest. In all bonds of indemnity, of which this is one, the liability to pay depends on some breach, the damage on which must be the subject of assessment by a jury, and then the bond being merged in the judgment, that, and not the bond, would be the subject of transfer under the provisions of the same Statute. Where then, in this case, did the cause of action arise? The answer is, where the bond was executed, the bond being distinct from and complete without the condition. The bond or the penal sum is the debt at law, and, therefore, the cause of action; the obligation depends wholly upon the obligatory part of the bond, the condition is introduced subsequently, for the obligor's advantage. The obligor, in the first [233] instance, acknowledges himself indebted; he is bound, unless he gets rid of the obligation; a condition is stated by means of which that is to be done; if the condition be not fulfilled, the obligation remains. In this case, as the evidence shows the bond to have been executed in Manchester, the *venue* should have been in Middlesex."

The Appellant presented a special petition to Her Majesty in Council, praying for leave to appeal direct to the Judicial Committee against this judgment, without proceeding to the Court of Error in the Island, pursuant to Statute 7th and 8th Vict., c. 69, s. 1 (b), which their Lordships admitted upon terms of giving security for £300.

The Respondent did not appear. The appeal came on for hearing *ex parte* (9th Dec. 1850 *).

The Attorney-General (Sir Frederick Thesiger), and Mr. Leith, for the Appel-

(a) The local Act, 14th Geo. III., c. 28, sec. 3, above mentioned, is as follows:—"And be it enacted, by the authority aforesaid, That every bond that shall be passed or paid away, from and after the passing of this Act, shall have on the back of it an assignment, written in the following word or words to that effect: Be it remembered that I, A. B., have this day of in the year of our Lord assigned the within bond to C. D., his executors, administrators, and assigns, and that the sum of is due thereon for principal and for interest, and that no payment has been made thereon, more than is this day set forth and allowed, which assignment shall be made under the hand of the obligee or obligees, or his, her or their attorney, or under the hand of one or more of his, her or their executors or administrators, which assignment, so made, shall be good and valid, to all intents and purposes, as if the assignee or assignees of such bond had actually been the obligee or obligees named therein, with all such rights and powers as such obligee or obligees could have to put the said bond in suit, to take a Judgment thereon in his, her, or their own names, and to issue writs for the recovery thereof, anything in this Act or any law, custom or usage to the contrary thereof notwithstanding: Provided always that the name or names of the obligee or obligees, and the assignment or assignments, shall be set forth in the declaration, that all kind of fraud may be prevented."

(b) See the cases of *Re Barnett* (4 Moore's P.C. Cases, 453), and *Att.-Gen. of Jamaica v. Manderson* (6 Moore's P.C. Cases, 239), where the Committee admitted appeals direct under this Statute, without resort to the intermediate Court of Appeal in the Island.

* Present: Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

lant.—There was no ground for a nonsuit. The proceedings are altogether irregular and informal. The Plaintiff was not called, nor upon any objection raised was leave reserved to the Defendant on the trial to move to enter a nonsuit. Yet the Court afterwards directed a judgment of nonsuit to be entered, upon the ground, that the action was a local action, and that the *venue* should have been laid in the county of Middlesex. In-[234] dependently of the irregularity of the course taken, of nonsuiting without leave being reserved, the ground upon which the Court directed the nonsuit was erroneous in law. *Boyes v. Hewetson* (2 Bing. N.C. 575) is an express authority against such ruling. In that case, as in the present, the question of locality was not raised by any issue, and the Court, therefore, held, that the Defendant was not entitled to a nonsuit. Even if the bond had been executed by the Defendant, in any other county than that laid in the declaration, still, we submit, the action was properly brought in the county of Surrey, and the ruling of the Chief Justice upon that point was contrary to law; first, because under the local Act, 8th Vict., c. 28, sec. 5, all actions upon bonds are transitory and not local; and, secondly, because the breach of the bond was the cause of action, and that arose in the county of Surrey. The learned Judge seems to have mistaken the law. Although, *prima facie*, the bond itself may be said to be the original cause of action, yet the actual cause of action arose upon the breach of the condition of the bond by non-payment. The breach having taken place in Surrey, the *venue* was rightly laid there. *Sanders v. Coward* (13 Mee. and Wel. 65), *Tuckey v. Hawkins* (4 C.B. Rep. 655).—[Sir John Patteson.—The doubt is, whether we have jurisdiction. If the present case arose in this country, a Court of Error could not take notice of the nonsuit, for whether there is error in law or fact, does not appear upon the record. All the record sets forth, is this:—"But because the said Plaintiff doth nothing further prosecute his suit in this behalf it is considered he takes nothing by reason [235] of his declaration aforesaid."]—There is error of law and fact apparent upon the face of the record. The record does not state that the Plaintiff was called; and upon this alone the Plaintiff might have brought a writ of error, *Coram nobis*. In *Castledine v. Mundy* (4 Bar. and Ad. 90), it was held, that a Court of Error would give judgment of reversal, if there was error of law on the face of the record, although error in fact only be assigned. All doubt upon this point however is set at rest by the Statute, 7 and 8 Vict., c. 69. By that Statute this Court has jurisdiction to entertain matters which a Court of Error in this country could not. In fact, the appeal in this case is from an order of the Court, not as in an ordinary case of nonsuit. In *Strother v. Hutchinson* (4 Bing. N.C. 83), it was held, that a bill of exceptions would lie on a nonsuit. Nothing can be better established than this, that the Court has no power to enter a nonsuit without the Plaintiff's consent. Lord Ellenborough, in *Minchin v. Clement* (1 Bar. and Ald. 252), says, "It is the Plaintiff's option to be nonsuited or not." It was held, in that case, that where a legal objection was taken at the trial and overruled by the Judge, without reserving the point, and the Court was afterwards of opinion that that objection was a good ground of nonsuit, they would grant a new trial only, and would not permit a nonsuit to be entered. Upon these grounds we submit that this judgment cannot stand. This nonsuit must be set aside, and the case sent back to the Court below for a new trial. It will be unnecessary to argue the other question in this appeal, namely, that the construction put upon the local Act, 8 Vict., c. 28, by the Chief Justice, is incorrect.

[236] At the conclusion of the Appellant's argument judgment was delivered, as follows, by

Sir John Patteson.—We are all agreed that this nonsuit was clearly wrong. It is not necessary for us to give any opinion, as to the construction of the Colonial Local Acts referred to in this case, because, even supposing this were a local action, that was not a matter of nonsuit, because the locality does not appear upon the face of the record, and there was no issue which could be given to the jury as to the locality: and, therefore, if the Plaintiff had refused, at the trial, to be nonsuited, and had actually appeared, what question could the Judge have put to the jury with respect to the locality, there being no issue upon it? To nonsuit him, therefore, for a wrong *venue* was clearly wrong: besides the wrong *venue* is cured by the Statute

of 16th and 17th Car. II., c. 8. The case of *Boyes v. Heartson* (2 Bing. N.C. 575) is a direct authority to that effect.

Then again, even supposing there had been any ground of nonsuit at the trial, yet no such ground was taken, and no nonsuit was applied for at the trial, and nothing can be clearer, than that without leave reserved to enter a nonsuit, the Court itself, sitting in Banco, cannot afterwards grant a rule *nisi*. That has been refused over and over again, and it is the admitted and acknowledged practice; therefore, we are surprised that a rule *nisi* should have been granted at all, upon that ground; but we see that the rule *nisi* was granted on other grounds besides, namely, for a new trial, or to reduce the verdict, and so on; and, therefore, the nonsuit was perhaps put [237] in, as things are sometimes, inadvertently; and the Court seems to have overlooked the fact, that it had no authority or power to grant any such nonsuit as was sought.

But then a question arises, whether or not it is a matter of error. Now, it is clearly laid down in *Newell v. Pidgeon* (1 Str. 235), that error will lie on a nonsuit. That case has been considered, and is alluded to in *Strother v. Hutchinson* (4 Bing. N.C. 83), in which it is said, that a Bill of Exceptions will lie where the Judge directs a nonsuit wrongly; even though it appeared, upon the face of the Bill of Exceptions, that the party had appeared and had refused to be nonsuited. In *Corsar v. Reed* (21 Law Journal, Q.B. 18), the case of *Strother v. Hutchinson* [4 Bing. N.C. 83] came under the consideration of the Court of Queen's Bench, and the Court ruled, that a Bill of Exceptions would not lie in a case where, upon the trial, the Judge directed a nonsuit, the Plaintiff not appearing when called.

Now, in this case, when we look at the pleadings, it is not asserted on the face of the record, that at the trial the Plaintiff was called. It is only stated that the Plaintiff and Defendant came, and that the jury were sworn, and then it goes on to say, not that the jury were ready to give their verdict; not that any evidence was given; but that "the Plaintiff did not further prosecute." That is alleged in an ungrammatical way: it is not alleged, that the jury were ready to give their verdict; and, thereupon, the Plaintiff having been called, did not come; and, therefore, if it was asserted that he was called, and did not come, it would not, in truth, contradict the record in this case. However, the record is defective. This is not a right form of [238] judgment. It should have stated that the Plaintiff was called, and that he did not come, "therefore, it is considered that the Plaintiff take nothing by his writ." Whereas the judgment says, "take nothing by his declaration," which leaves the writ untouched; and the action still pending, if we may so say. But it should have gone on to say, that "he be in mercy, and that the Defendant go thereof without a day." There is no entry of that kind at all; but it is at once said, that "the Plaintiff should take nothing by reason of his declaration;" and then "that the Defendant should recover his costs." Those matters are not very stringent; but this, at all events, (if there were any doubt as to the other part of the case, whether there could be a writ of error on a nonsuit, directed as this was,) clearly shows, that there was an error in the record, by the judgment not being correctly entered.

For these reasons, we think it clear, that this judgment must be set aside. We need not enter into the other parts of the case, which the Attorney-General told us there were, but we must leave the case to take its course, when it comes to a new trial. We think that the judgment must be set aside, and a *venire de novo* awarded.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 1. *When an appeal lies generally.*]

[239] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

DOOLUBDASS PETTAMBERDASS and Others. *Appellants*: RAMLOLL THACKOORSEYDASS and Others. *Respondents* * [June 27 and 28, 1850].

Wager contracts between the Plaintiffs and Defendants upon the price that Patna opium would fetch at the next Government sale at Calcutta; each party knowing that the other might use means to enhance or depress such price. Held, that the bidding at the sale by one of the Plaintiffs, though done colourably, and as it appeared only to enhance the price, was no fraud on the Defendants, or upon the public, as he had a right in common with all the world to bid at such sale, and was not precluded from recovering the amount of such wager contracts by the fact, that such bidding tended to bring about the event by which the wager was to be won [7 Moo. P.C. 261].

Held also, that employing agents at such sale (all of whom were cognizant that the object was to enhance the price of opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy, or such fraud as would vitiate the wager contracts [7 Moo. P.C. 263].

The common law offence of engrossing or regrating applies only with respect to the necessities of life [7 Moo. P.C. 262].

By the 6th Article of the Convention between Great Britain and France, the French Government had a right to demand, out of the quantities sold at the Government sale, 300 chests of opium at the average rate of sale. Held, that no fraud on the vendors was committed by inducing the French Consul to exercise that option in favour of the Plaintiffs [7 Moo. P.C. 264].

After the contracts were entered into and an action commenced in the Supreme Court, wager contracts were declared invalid by the Act of the Indian Legislature, No. 21 of 1848, which enacts "that all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void, and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager, or intrusted to any person to abide the event of any game, or on which any wager is made."

Held, that this Legislative Act did not affect existing contracts, or actions already commenced upon such contracts; there being no words in the Act sufficient to show the intention of the Legislature to affect existing rights [7 Moo. P.C. 256].

Statutes are, *prima facie*, deemed to be prospective only, "*Nova constitutio futuris formam imponere debet, non praeteritis*" [7 Moo. P.C. 256].

Moon v. Durden (2 Exch. Rep. 22) approved of [7 Moo. P.C. 257].

The case of *Levi v. Levi* (6 Car. and Pay. 239), observed upon and questioned [7 Moo. P.C. 263].

This was an action on promises brought by the Respondents, Ramlooll Thackoorseydass, Luckinschund [240] Munneeram, and others, trading in Bombay, in the name and firm of "Ragoonathdass Ramlooll," against the Appellants, Doolubdass Pettamberdass, Lellachund Pettamberdass, Ambaram Pettamberdass, and Jetta Pettamberdass, trading in Bombay under the name and firm of "Doolubdass Pettamberdass," to recover the amount of forty-five wager contracts made between the Plaintiffs and Defendants in October, 1846, on the average price of Patna opium at the next Government sale at Calcutta. The parties were Hindoo merchants and bankers at Bombay.

The plaint contained forty-five counts. The first count stated, that on the 20th of October, 1846, in consideration that the Plaintiffs, at the request of the Defendants, then promised to pay the Defendants within a reasonable time after notice of

* Present: Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

the first public sale of opium to take place at Calcutta, next, after the making of the said promise, such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of Patna opium of the opium to be sold at such first public Government sale (to be calculated according to the actual price which the whole amount of Patna opium, which should be sold at such first public Government sale, should be sold for and realize), and the sum of Rs. 1386, if such average should be less than the sum of Rs. 1386 per chest, the Defendants promised to pay the Plaintiffs within a reasonable time, after notice of such first public [241] Government sale of opium, at Calcutta, such sum as should be equal to five times the amount of the difference between the sum of Rs. 1386 and the average price of one chest of Patna opium, of the opium to be sold at such first public Government sale, to be calculated as aforesaid, if such average should exceed the sum of Rs. 1386 per chest. That the average price per chest of the Patna opium sold at the first public sale of opium, which took place at Calcutta, next after the making of the said promise, viz., the 7th of December, 1846, was Rs. 1793, one quarter of a rupee, and 44 Reas per chest, and exceeded the sum of Rs. 1386 per chest by Rs. 407, one quarter of a rupee, and 44 Reas per chest; and that five times the amount of such excess amounted to Rs. 2036, 3 quarters, 19 Reas, of which the Defendants had notice, and that the Defendants, although a reasonable time had elapsed, did not pay such difference or any part thereof. The Plaint contained thirty-two other counts upon similar contracts, varying, however, in dates and amounts. The thirty-fourth count stated, that on the 19th of October, 1846, in consideration that the Plaintiffs, at the request of the Defendants, would then pay the Defendants the sum of Rs. 450, the Defendants promised the Plaintiffs to pay the Plaintiffs within a reasonable time after notice of the first public Government sale of opium, to take place at Calcutta, next, after the said promise, such a sum as should be equal to five times the difference between the sum of Rs. 1400 and the average price of one chest of Patna opium, of the Patna opium to be sold at the first public Government sale of opium, to take place at Calcutta, next, after the said promise, whether the said average should exceed or be less than the said sum of [242] Rs. 1400 (such average to be calculated in the same manner as the average in the first count mentioned). The remaining eleven counts were upon similar contracts, whereby, in consideration of a present payment, the Respondents were to receive the differences of the average above the fixed sum.

The Defendants pleaded, first, *non assumpsit*, denying the several contracts as made; secondly, that the Plaintiffs caused the Defendants to enter into and make the several contracts and promises in the plaint mentioned, and that the Defendants were, in fact, induced to enter into, and make the same and each of them, through the fraud and covin of the Plaintiffs and divers other persons in [collusion] with them. Thirdly, that the average price per chest of the Patna opium, so sold at the said public Government sale as in the said several counts was alleged, was an average price, enhanced by and through the fraud and covin of the Plaintiffs and others in concert and collusion with them. Fourthly (an additional plea, filed by leave of the Court), that the East India Company, for a long time previously to, and until, and at the respective times of the making of the promises in the above counts mentioned, had been, and were accustomed to hold periodically, public and auction sales of Patna opium, at Calcutta, upon, under, and subject to, certain accustomed terms and conditions, and which terms and conditions were, during and at the several times aforesaid, publicly known; to wit, at Bombay aforesaid, and that during all the times aforesaid, it was a practice and usage, in Bombay, to speculate and traffic by way of wager, upon the chances and contingencies of the prices of, and for which, the Patna opium to be offered for sale, and bid for at the said accustomed [243] sales, should be sold and knocked down, and that, according to the course of dealing and usage of and amongst merchants and others engaged in the said speculation and traffic, in Bombay, the words "First public Government sale," "First sale," "First sale to be made by Government," "First auction," or any other words, phrase, or expressions whatever, signifying or referring to either of the public sales hereafter to be held, did, during and at the times aforesaid, when written, or used and employed, in any and every contract, engagement, or promise, in or connected with the said speculation and traffic, signify, refer to, and denote a sale or sales to be held under, upon, and subject to the accustomed terms and conditions,

and not otherwise: and that the several contracts and promises of the Defendants, in the above counts mentioned and set out, were respectively made at Bombay aforesaid, and subject, according to the usage and course of dealing, and with reference thereto, and that the first public Government sale in the contracts and promises, and in the above several counts respectively mentioned, was, and signified, and, at the respective times of the making of the contracts and promises, and all along was, by the Plaintiffs and by the Defendants, intended to signify, such usual public auction sale of the East India Company, under and subject to the accustomed terms and conditions as should then next take place; and the Defendants averred that no public Government sale under or subject to the terms or conditions, or according to the usage and course of dealing, or according to the intent and meaning of the contracts and promises respectively, and of the parties thereto, as in this plea above de-[244] scribed, had, since the making of the contracts and promises, or either of them, and before the commencement of the suit, taken place; but that on the day in that behalf in the several counts described, a certain public Government sale of opium at Calcutta, being the next public Government sale of opium after the making of the several contracts and promises, did in fact take place, the terms and conditions of which sale last aforesaid, were and are materially different from the accustomed terms and conditions.

The Plaintiffs joined issue on the first plea, and traversed each special plea by the general replication *de injuria*.

The cause was tried before the Chief Justice (Sir Erskine Perry) and Sir William Yardley, Puisne Judge, in March, 1849. From the evidence, taken under a commission at Calcutta, and given *viva voce* at the trial, it appeared, as laid in the plaint, that on the 20th of October, 1848, the Appellants and Respondents mutually entered into verbal contracts, by way of wager, to the effect, that the Respondents would pay to the Appellants such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of Patna opium, of the opium to be sold at the first public Government sale of opium at Calcutta, to be calculated according to the actual price which the whole amount of Patna opium which should be sold at such sale should realise, and the sum of Rs. 1386 if such average should be less than Rs. 1386, and that the Appellants would pay the Respondents a similar sum if such average should exceed the sum of Rs. 1386. That on the 20th of August, 1846, the Government issued a noti-[245]-fication or advertisement, that the next Government sale would take place on the 30th of November, 1846, and that 2405 chests of opium would be put up for sale at Calcutta: under these conditions (among others) of sale: that the opium would be offered at the upset price of 400 Rs. per chest: that if 2405 chests should not be sold, it should be competent to the Board of Customs, Salt and Opium, to dispose of the lots which remained on hand at future sales: that eight other sales would take place in the seven ensuing months; that under the sixth article of the convention between Great Britain and France, of the 7th of March, 1815 (*a*), the agents in India of His Majesty the King of the French, or persons duly appointed by them, were entitled to demand that out of the quantities of the Behar and Benares

(*a*) The 6th Article of the Convention between Great Britain and France, dated the 17th of March, 1815, above referred to, is as follows:—

“Article 6th.—With regard to the trade in opium, it is agreed between the high contracting parties that at each of the periodical sales of that article, there shall be reserved for the French Government, and delivery upon requisition duly made by the agents of His Most Christian Majesty, or by the persons duly appointed by them, the number of chests so applied for, provided that such supply shall not exceed three hundred chests in each year, and the price for the same shall be determined by the average rate at which opium shall have been sold at every such periodical sale, it being understood that if the quantity of opium applied for at any one time shall not be taken on account of the French Government by the agents of His Most Christian Majesty, within the usual period of delivery, the quantity so applied for shall nevertheless be considered as so much in reduction of the three hundred chests hereinbefore mentioned. The requisition for opium as aforesaid, are to be addressed to the Governor-General at Calcutta, within thirty days after notice of the intended sales shall be published in the Government Gazette.”

opium declared as above for sale at the nine sales, there should be deli-[246]-vered to them, at the average of the particular sale or sales to which opium so applied for might belong, a quantity not exceeding in the aggregate 300 chests. It further appeared, that the Government of India possessed the monopoly of cultivating and the sale of opium in India. That the sales were conducted in the same manner as sales in general by public auction, with unrestricted public competition, and that such sales afforded the public in India opportunities of purchasing opium, the Government of India having bound themselves, by the published conditions, to sell to the highest bidder above the upset price of Rs. 400 per chest. That it was very usual in India for parties to make wagering contracts upon the average price of opium at these public sales. That the native merchants' houses entered extensively into such transactions, and had done so for the last thirty years; that parties who speculated for the rise usually attended at the sales, and bought the opium themselves; that it was always known beforehand who were the great speculators; and that it was well known in India that the Respondents intended and had threatened to buy up all the opium. It was also in evidence, that the Respondents and their brokers, having entered into a number of similar contracts with other parties to a very large amount, to effect a rise in the price of opium, procured certain persons to bid at the first sale, which took place on the 30th of November, and that the biddings were forced up till the price bid for the first lot was Rs. 130,000, a price so extravagant, that the Government Officer stopped the sale, without having knocked down a single lot. That the opium was again put up for sale on the 4th of December, 1848, with an additional condition, that it should [247] be lawful for the Government Officer to withdraw any lot, and put it up again at an upset price, diminishing the same until a *bona fide* bid was obtained. That about this time the Respondents' agents purchased from the French Consul at Calcutta, representing the French Government, the right to demand 300 chests of opium, paying him Rs. 30,000 for it, in order to reduce the number of chests to be offered for sale. That the sale took place on the 7th of December, 1846, when the Respondents and their agents, and many other persons, attended, and 1315 chests of opium were purchased by the Respondents, through their agents, at an average price of Rs. 1793 per chest.

The Court took time to consider their verdict and judgment; and on the 4th of April, 1849, pronounced their judgment. The Chief Justice [Sir Erskine Perry] was of opinion, that the verdict should be entered for the Plaintiffs upon each of the issues; that the Plaintiffs were not bound by any rule of law to disclose to the Defendants that they intended to make larger purchases than they did on former occasions; that it was their interest to raise the price as high as they could, on this as on all former occasions, and it was the Defendants' own fault for not perceiving that circumstances in the present case enabled the plaintiffs to do so with effect, and that, therefore, judgment should be entered for the Plaintiffs for the difference on the several contracts declared upon in the plaint.

Sir William Yardley differed from the Chief Justice, and expressed his opinion, that the Plaintiffs, having, at the time of the making of these bargains, cherished the design of forcing up the prices by the expenditure of a very large sum of money, in the purchase of the opium, at a price very much higher than it would have [248] otherwise fetched, in order that they might win a much larger sum of money on the wagers they had made, and having in pursuance of such design, by themselves and agents, attended the sale, and by advancing on their own biddings, actually forced up the price to a fictitious and delusive height, and thus greatly enhanced the average price; the second and third pleas on this record had been proved, and that, consequently, there ought to be a verdict for the Defendants, upon the issues raised by those pleas. As the Chief Justice had the casting vote, the verdict was entered generally for the Plaintiffs, for the whole amount claimed, with interest and costs.

From this verdict and judgment the present appeal was brought, and the Appellants contended that the same was erroneous, and ought to be reversed, for the following reasons:—

1st. Because the verdict and judgment ought to have been given in favour of the Appellants.

2nd. Because the contracts alleged were not proved, and because evidence was improperly received and admitted in support of the same, and that the Respondents ought to have been nonsuited at the trial.

3rd. Because, although the Court would not, upon appeal, as in a somewhat similar case, upon demurrer (*Ramlooll Thackoorseydass v. Soopjunnul Dhandnull*), 6 Moore's P.C. Cases, 330, presume that the Respondents intended to act, or would act, illegally or improperly, yet the Respondents in this case are now proved to have done so, and, upon facts given in evidence, were not entitled to recover.

4th. Because the whole of the transactions were, upon the facts proved at the trial, illegal and void, and were contrary to public policy, as prejudicially affect[249]-ing the interests of the public and the State, and the public market and price of an article of State monopoly.

5th. Because the transactions were illegal and void by Hindoo law; were contrary to the policy of that law; and the Respondents having been guilty of artifice and collusive practice, deceit and fraud, were not, according to Hindoo law, entitled to recover.

6th. Because the Respondents had secured the power and control over the result of the wagers in their own hands, and intended to use, and in fact did use, such power in their own favour, and in fraud of the Appellants.

7th. Because the Respondents were guilty of a conspiracy, and also of fraudulent and illegal concealment, practices and contrivances to defraud the Appellants, in inducing them to enter into the alleged contracts.

8th. Because the alleged contracts refer only to one particular time and occasion, viz., the Government auction, advertised for the 30th of November, 1846; that they related only to an average to be ascertained at that date, and on that occasion; and it was from that date only that the time for payment was to be calculated; and that as no opium was sold, nor any average ascertained on that occasion, the contracts became inoperative, and the Respondents were not entitled to recover the damages awarded to them.

9th. Because the auction on the 7th of December was not the sale to which the alleged contracts were intended to apply; that it was not a continuation or adjournment of the auction of the 30th of November; that it was an entirely new sale, at a different time and on different terms; and its nature and character entirely changed from that contemplated by the Ap-[250]-pellants, and to which the alleged contracts were intended to apply.

10th. Because the Respondents were guilty of conspiracy and fraud, and illegal and improper conduct at and prior to the last-mentioned sale, whereby the price of opium was improperly enhanced in fraud of the Appellants, as well as to the injury and prejudice of the public.

11th. Because the Respondents, in fraud of the Government and public, as well as in fraud of the Appellants, did unlawfully conspire, and, by artifice and collusion, contrive to keep out of the Government sale, and prevent the Government from then selling, a large quantity of the opium advertised and intended to be there sold, and to the sale of which the alleged contracts of the Appellants had reference.

12th. Because the conduct of the Respondents, in respect to the sale of the 7th of December, prevented any legal average from being struck or ascertained.

13th. Because the Respondents caused delusive biddings to be made at such sale, in order to compel the public to bid larger sums, and to purchase at higher prices than they would otherwise have done, and succeeded by such delusive biddings in compelling a *bona fide* purchaser to give such increased amount, whereby the average price was enhanced for the Respondents' own benefit.

14th. Because the Respondents prevented a fair and *bona fide* sale taking place, and were guilty of a conspiracy in fraudulently enhancing the price to the public, and preventing their purchasing at fair prices at such sale.

15th. Because, under Act, No. 21 of 1848, passed by the Governor-General of India in Council, and [251] intituled, "An Act for avoiding wagers," the Court below ought not to have allowed and entertained the suit, or to have heard or tried the same after that Act was passed.

16th. Because, even if the verdict and judgment were rightly entered for the Plaintiffs, interest ought not to have been awarded to them.

17th. Because no costs ought to have been awarded to them.

The Respondents relied upon the following reasons in support of the judgment appealed from:—

1st. Because, there was legal evidence of the contracts set out in the plaint, and the verdict was unanimously given upon the first issue.

2nd. Because, the said first sale referred to by the several contracts mentioned in the plaint took place, and there was such an average price as that referred to by the contracts at the first sale.

3rd. Because there was no evidence to support the fourth plea, and there is no sufficient ground for disturbing the verdict upon the issue raised upon that plea.

4th. Because the verdict of the Chief Justice upon the issues raised upon the second and third pleas is correct, and there are no sufficient grounds for disturbing it.

Mr. Bethell, Q.C., Mr. Leith, and Mr. Bovill, for the Appellants; and Sir Fitzroy Kelly, Q.C., Mr. Peacock, Q.C., and Mr. Leach, for the Respondents.

The argument turned upon the questions raised in the above reasons of appeal.

As to the conduct of the Plaintiffs in bidding and [252] employing agents to bid at the sale, to enhance the price of the opium, amounting to a fraud and conspiracy at Common Law, so as to prevent the Plaintiffs recovering upon such contracts, *Leri v. Leri* (6 Car. and Pay. 239), *Bexwell v. Christie* (Cowper, 395), *Fuller v. Abrahams* (3 Brod. and Bing. 116), *The King v. Waddington* (1 East, 143), *The King v. De Berenger* (3 Mau. and Sel. 67), *Rex v. Marsh* (3 You. and Jer. 331), *Thornett v. Haines* (15 Mec. and Wel. 367), *Fisher v. Waltham* (4 Q.B. Rep. 889), *Ramloll Thackoorseydass v. Soojumull Dhondmull* (6 Moore's P.C. Cases, 300), *Sahajram v. Chytun Doss* (not reported), 4 Steph. Com., p. 264 (Edit. 1841.) 2 Russell on Crimes, p. 677, were referred to.

And that being a gambling transaction, it was illegal and void by the Hindoo law, *Mateelal Heeralal v. Jumnadas* (2 Borr. Bom. Rep. 621), *Jetha Bhaee Mooljee v. Hutesingh Lala Hurukchund* (2 Borr. Bom. Rep. 415), were relied upon.

Upon the construction of the Act of the Indian Legislature, No. 21 of 1848, having a retrospective operation, and being a bar to the suit, *Freeman v. Moyes* (1 Ad. and Ell. 338), and *Moon v. Durden* (2 Exch. Rep. 22), were cited.

Mr. Baron Parke (9th Dec., 1850).—This case was fully argued before their Lordships at the sittings after last Trinity term.

It is an appeal from the judgment of the Supreme Court of Bombay, in an action commenced in January, 1847, on forty-five wager contracts, entered into in October and November 1846, that the average price which a chest of Patna opium should be sold for and [253] realize, at the first Government sale, should exceed a certain fixed price. The Plaintiffs in the different counts aver what the average price at that sale was, and seek to recover the differences between that price and the fixed sum per chest, amounting to a very large sum of money.

The Defendants pleaded:—First. The general issue. Secondly. That the Plaintiffs caused them to enter into and make the several contracts, and that the Defendants were, in fact, induced to enter into and make the same, through the fraud and covin of the Plaintiffs, and of other persons in collusion with them. Thirdly. That the average price per chest of the Patna opium so sold, at the said public Government sale, was an average price obtained by and through the fraud and covin of the Plaintiffs and others, in concert and collusion with them. And lastly, a plea was added, which was in substance, that the term, "first Government sale," etc., denoted such a public auction sale, as should be held, subject to certain accustomed terms and conditions, and not otherwise, as should then next take place, and that no such public sale did take place, but that a sale took place subject to terms materially different.

The Plaintiffs traversed such special plea by the general replication *de injuria*, and the cause came on to be tried, in March, 1849, before the Chief Justice Sir Erskine Perry and Mr. Justice Yardley, who, after time taken to consider, differed in opinion, and pronounced their verdict on the 2nd of April, 1849. Both agreed in finding a verdict for the Plaintiffs on the first and last issues; but on the second and third, the Chief Justice was in favour of the Plaintiffs; Mr. Justice Yardley, of the Defendants; but, as provided for in such a case, [254] the judgment was given

according to the opinion of the Chief Justice, and the sum recovered was given with interest and costs, and against that judgment there is an appeal.

In the argument before us, the objections which, we collect from the papers, were taken in the Court below, were renewed, and additional objections urged to the Plaintiffs' right to recover.

I will shortly recapitulate those objections, and it will then be found, that the main question to be decided is a mere question of fact. One of those objections which were taken at the trial was, that the contracts were not proved to have been made by the Defendants' authority, and that, if proved, they were not properly described, being contracts, as they were in form, for the purchase and delivery of opium, not wagers or contracts for the payment of differences as alleged.

Their Lordships were of opinion, and expressed that opinion in the course of the argument, that there was ample evidence of the authority of the Defendants' brokers to make the contracts, and also that the real nature of those nominal purchases was, that they were contracts to pay differences; so that the unanimous decision of the Court on these points must be deemed quite satisfactory.

Another objection also was taken on the trial, arising on the fourth plea. It appeared that the course was, that all sales of opium, of which the East India Company had the monopoly, took place at stated periods, which were advertised; and at the time of the contracts the first sale of opium was advertised for the 30th of November, 1846, subject to certain conditions. This sale turned out to be abortive, as the whole day was [255] spent in bidding up the opium to an extravagant price, and the Company's agents would not allow the sale to take place. The sale intended for the 30th of November was postponed till the 7th of December, and fresh conditions were prescribed for that sale, which took place then; all the opium was sold, and the average price of a chest exceeded that which the Plaintiffs and the Defendants had fixed upon in their wagers.

It was contended for the Defendants, that the first sale mentioned in their contracts was meant to be a first sale, subject to the then usual conditions, and as there had been no such sale, the event contemplated had never occurred, and, therefore, the wager had not been lost.

If the additional qualification, that the first Government sale should be a sale subject to the same conditions as were then imposed, could be imported into the contract by parol (which we need not decide), the evidence, as the Court has already intimated, did not prove any usage of trade to that effect. Indeed, there is evidence to the contrary. That objection, therefore, fails.

But it was also contended, that the exposure to sale on the 30th of November was the first sale meant by the contract, and that on that sale there was no difference between the price fixed and that actually realized, because no price was obtained, and, therefore, the wager had not been lost; and though this had not been made the subject of a plea, yet, that it was an available objection in reduction of damages, and that only nominal damages should be recovered, as there was in effect no difference to be paid.

We, however, think, that according to the true construction of the contract, the price of the first actual [256] sale was the object of the wager, and the intended sale on the 30th of November was not a sale, but the sale on the 7th of December was the first sale. This objection, therefore, also fails.

Two other objections, one of which could not be, and the other was not urged in the Court below, were also taken, in both of which their Lordships intimated their opinion in favour of the Respondents, and they see no reason now to alter it.

The first was, that since the contracts were entered into, and since the commencement of the trial in the Court at Bombay, these contracts were rendered invalid by the Act of the Governor-General in Council, of the 10th of October 1848, intituled, "An Act for avoiding wagers," and, therefore, the Plaintiffs could not have judgment, and that this judgment ought to be reversed.

That Act provides, "That all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void; and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager, or entrusted to any person to abide the event of any game, or on which any wager is made."

Their Lordships are of opinion, that this Legislative Act is not to be construed as affecting existing contracts; at all events, not those contracts on which actions have already been commenced, for Statutes are *prima facie* deemed to be prospective only "*nova constitutio futuris formam imponere debet, non praeteritis*" (2 Inst. 392), and there are no words in this Act sufficient to show the intention of the Legislature to affect existing rights. Their Lordships agree in the [257] judgment of the majority of the Court of Exchequer, on the construction of the corresponding Act of Parliament of the United Kingdom, in *Moon v. Durden* (2 Exch. Rep. 22).

In the next place it was contended, that by the Hindoo law such contracts were void, and that this objection was open to the Appellants, the declaration being on the face of it bad.

Their Lordships have already said that they are not satisfied from the authorities referred to, that such is the law among the Hindoos, and supposing that *prima facie* the contracts are to be taken to be between persons of that nation, a point on which we need say nothing, we think we cannot say that the contracts were illegal, especially as the point was not made in the Court below, which had better means of deciding that question than we have.

It remains, therefore, for us to consider the other and the main objections to the right of the Plaintiffs to recover, arising on the second and third pleas, which have been most relied upon in the argument before us.

For the Appellants (the Defendants below), it was contended, that it was a fraud on the Defendants, in such wagers as these, to bring about the event by which each wager could be won by acts of their own, that such fraud was meditated and prepared by the Plaintiffs before the contracts were entered into, and, therefore, the Defendants meditating no such acts on the part of the Plaintiffs, the contract was void on the ground of fraud on them; and the second plea should have been found for the Defendants, or, if not, that, at all events, the meditated fraud having been carried into effect, and the prices raised by the acts of the Plaintiffs and their agents, those prices were fraudu-[258]-lently raised as against the Defendants, and, therefore, the third plea ought to have been found for the Defendants.

This point appears to their Lordships to be purely a question of fact, depending on the evidence.

It may be conceded that there was evidence, not that any steps were taken to enhance the price, by employing persons to bid at the intended sale, prior to the date of the contracts, but to raise a reasonable inference that the Plaintiffs at that time meant by their own acts to raise the market, and then the question would be, whether this intention would enable the Defendants to avoid the contracts under the second plea. Further, there was ample evidence, no doubt, that the Plaintiffs did try to raise the price at the sale, by their own acts, and did succeed in so doing; and the question is, whether these acts are a fraud on the Defendants, within the meaning of the third plea. This, the main point in the case, and which applies to both pleas, depends entirely on the question of fact, what was the understanding of the parties to the contract when it was made?

Both the learned Judges of the Court below appear to have agreed upon this being the question.

The Chief Justice [Sir Erskine Perry], in his very learned judgment, most correctly states, that if the event, on which both parties were speculating, was the market price, as it should be governed by the ordinary cases of supply and demand, or as it should be governed by the contests of speculators, wholly unconnected with the Plaintiffs, then, undoubtedly, the Plaintiffs would have taken a fraudulent advantage, and the event brought about by their own agency is not the event which was contemplated in the contract of hazard entered into by [259] the parties; and Mr. Justice Yardley agrees in that position, and illustrates it by a simple supposed case, in which it would be manifestly a fraud in one of the contracting parties against the other, himself, by his own act, to win the wager; as where a man bets that a horse would fetch a certain price at an auction, he could not win the wager by bidding that very sum; and there can be no doubt upon that proposition.

But the true question is stated most correctly by the Chief Justice, to turn on one point, was it understood by the parties at the time the bets were made, that it was competent for the Plaintiffs to enter into the market as speculators, and endeavour to raise the price by their own biddings? And this is the question of fact on which the two learned Judges differed. Mr. Justice Yardley thinking, that the evidence did not prove any such understanding; indeed, going so far as to intimate an opinion, that nothing short of the expression of that understanding in the contract itself would be sufficient. The Chief Justice [Sir Erskine Perry] being of opinion, that the understanding was most clearly proved, that the Defendants knew well when they made the wagers, that the Plaintiffs would use all their efforts and all the power which their command of capital gave them, to run up the prices at the sale, and that the Defendants contracted with them on those terms, and that the wagers were in fact nothing more than one speculator backing his own opinion against that of another, on an event to be operated upon by the wealth, faculties and judgment of both parties; that according to their mutual understanding, each, therefore, had a right to use the means in his power, one to elevate the market price by bidding and inducing others to bid; the other to depress it, by persuading persons not [260] to bid, always supposing that such means were otherwise legal.

Upon a full consideration of the evidence, their Lordships are of opinion, that the view taken of it by the Chief Justice [Sir Erskine Perry] is the correct one, and we think his decision as to the matter of fact fully warranted and called for by the evidence in the case.

The Plaintiffs had entered into a great speculation, the success of which was very doubtful, and depended on the amount of capital they could produce, when the opium was to be paid for, and the number of wagering contracts they could make upon the price of it in the meantime, and also upon the greater activity of themselves and their agents in bidding to raise the price, than that of the Defendants or their agents in endeavouring to lower it. This, we think, is clearly proved.

It is true that some witnesses use the expression, that it was the practice for the speculators for a rise, to attend themselves and bid at a sale; and an argument is used that the evidence shows only an understanding that the contracting party should himself bid; but the witnesses do not state negatively that another, or others, might not attend on his behalf; and one of the witnesses, Dadebhoy Rustomjee, gives evidence that speculators for such a rise influence the market, and that a large purchaser always bought through several hands.

So far as relates to the understanding between the parties as to what it is competent for either to do, we think, that the evidence does not show that the parties were to be confined to their own personal efforts, by bidding themselves, or inducing others not to bid, but that they are at liberty to employ agents, and not one [261] agent only, for these purposes, without breaking the contract between them. Whether the employing of more agents than one will render the act of bidding illegal, as to third persons, is another point, which will afterwards be considered. Between the parties, we think it was clearly no violation of their mutual understanding so to do.

Their Lordships think, therefore, that the efforts made to raise the market by the Plaintiffs, by bidding by themselves and agents, were no fraud on the Defendants, as such course was, according to the understanding of both parties, to be pursued, and consequently, that the intention to use those efforts was not a fraud which rendered the contract voidable by the Defendants.

But it was further argued, that even admitting that there was no fraud on the Defendants by pursuing that course, the acts done by the Plaintiffs and their agents were a fraud on third persons, and, therefore, illegal, and that the contract might be avoided by reason of that intended fraud: or, at all events, that the Plaintiffs could not recover damages which they were only entitled to do by reason of that fraud on third persons. It would seem from the report of the judgment in the Court below, that this view of the case was not pressed on the learned Judges. Both consider only whether this conduct would be a fraud on the contracting parties, and the Chief Justice [Sir Erskine Perry] states that the acts were admitted to be "not otherwise illegal."

But, on the hearing of this appeal, this further objection is brought forward, and we are bound to dispose of it. The objection is, that the means used by bidding merely to enhance the price, was a fraud on [262] those who were intending to purchase *bona fide*, and especially when others conspired with the Plaintiffs to bid for the same purpose; and, further, that the act of giving to the French consul the sum of Rs. 30,000, to induce him to exercise the option given by treaty to the King of the French, to buy 300 chests, was also a fraud on the East India Company, and the average price having been raised by these acts conjointly, the Plaintiffs could not recover if either was illegal.

It was argued on behalf of the Respondents, that this species of fraud and consequent illegality did not fall within the meaning of the third plea: and so their Lordships are disposed to think: but, being unwilling to dispose of so great a case upon a point of pleading, they proceed to consider whether the Defendants are entitled to succeed on the merits.

With respect to the bidding by one of the Plaintiffs himself, said to be done merely to enhance the price, their Lordships think it was no fraud on any one. There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself, or to sell again in gross or by retail, or to give away, or to prevent another having it, provided always, that he does not commit the Common Law offence of forestalling and regrating, which this is not, or ingrossing, which the authorities show can be committed only with respect to the necessities of life; provided, also, that he makes no false representation in order to effect the purchase.

In all these cases, the buying of any commodity when the purchaser does not want it, necessarily raises the price, and so causes a damage to all others who do, and who buy for the purpose of using it; but the purchase is not on that account a fraud on them. [263] The market is open to all who buy, whatever their object may be: whether the Plaintiffs meant to buy to sell again at a profit, or to make their profits by the collateral contracts that they had entered into with others, appears to their Lordships to make no difference.

But it is said, that the fact of employing several agents who were all cognisant of the purpose as well as the Plaintiffs, constituted an illegal conspiracy, an indictable offence; and the Plaintiffs cannot, therefore, recover a difference of price created by that illegal conspiracy. But so far as the doctrine of conspiracy has been extended, we do not find that there is any satisfactory authority that this would be an indictable offence where there was no *crimen falsi* committed, when the commodity is not a necessary of life, to which only, as has been said, the offence of ingrossing or regrating applies; a charge of a description which not only ought not to be extended, and which itself would not meet with much countenance in these times, when the true principle of trade and commerce are better and more generally understood.

The *dictum* of Baron Gurney in the case of *Levi v. Levi* (6 Carr. and Pay. 239) was much relied upon, to show that an agreement of several not to bid at an auction was an indictable offence, but this was a mere *dictum* in a *Nisi Prius* case, and cannot, we think, be relied upon.

It is argued, however, that this proceeding by bidding by the Plaintiffs themselves, or in conjunction with others, is analogous to "puffing," and is illegal on the same principle. But the distinction is in our judgment plain. A puffer is not a real bidder. By arrangement between him and the vendor his bid is to [264] go for nothing; but as to the competing bidders, it appears to be what it is not, a real bidding, and the vendor, by authorizing it, is guilty of a fraud on them, and cannot profit by it.

Here the Plaintiffs and their agents are all real bidders. He whose bid is the highest is bound to pay the price, and no false colours have been held out to other intended buyers.

Another point insisted upon before us was, that the purchase of the option reserved to the French Government was illegal.

By the sixth Article of the Convention between Great Britain and France, there is reserved to the French Government, or those employed by them, the right to

request a reserve of not exceeding 300 chests a year, and if the quantity required is not taken and paid for in the agreed period, the quantity required is to go in reduction of the 300 chests.

The Plaintiffs purchased from the French Consul this option, for Rs. 30,000, meaning not to exercise the right of purchase, but to cause the quantity to be retained, and so diminish the quantity of opium to be sold at the sale. The requisition was accordingly made, and the quantity offered for sale at that sale, diminished by 300 chests.

It was argued that this was a fraud against the East India Company, the vendors, who were thereby prevented from selling the 300 chests at that sale, which they would have done if the French Government had been left to itself. But their Lordships do not think that this is a fraud on the Company. By the Treaty, the French Government has an unlimited power of exercising the option, and may do so for any reason they may think fit, and the East India Company have [265] no right which is infringed upon by the exercise of the option for a collateral pecuniary advantage. It was indeed insinuated that this sum was given as a bribe to the French Consul, and was, therefore, a fraud on his Government; but it is not proved that the money was given as a bribe, but it must be intended that it was given for the use of the French Government.

Their Lordships, therefore, think that none of these objections are sustained, and that the Plaintiffs' conduct does not appear to have been illegal. However much they disapprove of these wagering transactions (which happily are now put an end to), however disreputable and unbecoming in men of a nice sense of honour, or of high mercantile character, were the means adopted by the Plaintiffs to win their wager may be, still we cannot pronounce them to be fraudulent in contemplation of law, which only seeks to lay down broad rules for the Government of human conduct applicable to all classes of persons, and does not exonerate parties from their contracts (which it is its primary duty to enforce) on the ground of fraud, except where they are distinctly shown to be in violation of the ordinary rules of morality. Our attention was called to the decision of the learned Judges of the Supreme Court of Calcutta in a similar case (*Sahajram v. Chytun Doss*, decided by the Supreme Court at Calcutta, on the 28th of January, 1850). The Judges of that Court on the trial considered the conduct of the Plaintiffs as not fraudulent, and gave their verdict for the Plaintiffs at *Nisi Prius*. That opinion they subsequently changed. What the particular facts in evidence were, to show that it was the understanding of the contracting parties as to using all means to raise or depress the price, does not appear, and, there-[266]-fore, we are not in a condition to say what the verdict ought to have been; but the opinion delivered by these learned Judges on the supposition that there was such an understanding, that the bidding was a fraud on third parties, we cannot think to be well founded.

We are of opinion, therefore, that the Plaintiffs were entitled to recover in this action.

Two subordinate points remain for consideration.

First, as to interest, we think the Court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions.

Lastly, as to costs, we concur in the opinion of the Chief Justice, that the general rule should be that they follow the event of the verdict, and in this case, as the verdict for the Plaintiffs was, in the judgment of their Lordships right, they ought to have their costs.

We shall, therefore, recommend to Her Majesty that the judgment should be affirmed, and the appeal dismissed, with costs.

[Mews' Dig. tit. GAMING AND WAGERING, B. WAGERS, 1. *Invalidity Generally*; tit. LOCAL GOVERNMENT, III. JURISDICTION, 13. *Food and Drink*, d. *Other Offences*; tit. MARKETS AND FAIRS, k. ENGROSSING, REGRATING, AND OTHER OFFENCES; tit. STATUTE, c. CONSTRUCTION GENERALLY, 3. *Prospective or Retrospective*. S.C. 5 Moo. Ind. App. 109; 15 Jur. 257. As to retrospective operation of statute, see *Moon v. Darden*, 1848, 2 Ex. 22; and *ex parte White*, *In re White*, 1864, 33 L.J. Bk. 22.]

[267] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

DANIEL HARMER, — *Appellant*; WILLIAM ERRINGTON BELL and Others, —
Respondents * [Dec. 16, 1850; May 16, and Dec. 10, 1851].

THE "BOLD BUCCLEUGH."

Damage creates a lien on the ship causing the collision [7 Moo. P.C. 283].

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the Court of Admiralty in England, by the owners of the English vessel, against the owners of the steamer, and a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer, in the Court of Session in Scotland, for the damage, and the steamer was arrested under process of that Court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Court of Session were still pending, when the steamer having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that Court, for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the Court of Session. The owner of the steamer appeared under protest in the Admiralty Court, and pleaded, first, *lis alibi pendens*; and, secondly, that he was a purchaser for value without notice. Held by the Judicial Committee, overruling such protest,—

First, that the plea of *lis alibi pendens* was bad, as the suit in Scotland was, in the first instance, *in personam*, the proceedings being commenced by process against the persons of the owners of the vessel, (the Defendants,) and the arrest of the steamer only collateral to secure the debt, while the proceedings in the Admiralty Court in England were, in the first instance, *in rem*, against the vessel, and, therefore, the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other [7 Moo. P.C. 286].

Secondly, that as, by the Civil law, a maritime lien does not include or require possession, but being the foundation of proceedings *in rem* (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosoever possession it may come, and when carried into effect by a proceeding *in rem*, relates back to the period when it first attached; the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her [7 Moo. P.C. 284, 285].*

Semble: Such lien arising out of damage is not indelible, but may be lost by negligence or delay, where the right of third parties are compromised [7 Moo. P.C. 285].

Distinction between proceedings *in rem*, in the Admiralty Court in England and Foreign attachment in the City of London [7 Moo. P.C. 282, 283].

This appeal originated in a cause of damage, civil and maritime, promoted by the Respondents, the own-[268]-ers of the barque *William*, against the steam-ship, the *Bold Buccleugh*, by reason of a collision between these vessels.

* Present at the first hearing, on the 16th of December, 1850, and 16th of May, 1851:—Lord Langdale, Mr. Baron Parke, Sir Herbert Jenner Fust, and the Right Hon. Sir Edward Ryan.

Present at the second hearing, on the 10th of December, 1851:—The Chief Baron of the Exchequer (Sir Frederick Pollock), the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

The *Bold Buccleugh* belonged to the Edinburgh and Dundee Steam Packet Company, trading between Leith and Kingston-upon-Hull, in Yorkshire, the partners of which Company were all resident in Scotland. The collision took place in the river Humber, on the 14th of December, 1848, when the barque *William* was run down by the *Bold Buccleugh*, and totally lost.

On the 19th of the same month, an action for damage was entered in the High Court of Admiralty in England, on behalf of the Respondents (who were domiciled and resided in England), the owners of the barque *William*, against the *Bold Buccleugh* and the partners of the Edinburgh and Dundee Steam Company, and a warrant of arrest was extracted and forwarded to Hull to be executed; but the *Bold Buccleugh* had left that port for Leith, before the arrival of the warrant, and consequently could not be arrested. [269] The owners of the *William* then applied to the owners of the *Bold Buccleugh* to give bail to the action, which they declined to do, and the *Bold Buccleugh*, still continuing out of the jurisdiction of the Admiralty Court, and within the jurisdiction of the Scotch Courts, the owners of the *William*, on the 30th of January, 1849, commenced a suit against the owners of the *Bold Buccleugh*, in the Court of Session in Scotland, and the steamer was forthwith arrested in Leith harbour; but on bail being given to answer the action in that Court, she was released. By a bill of sale, dated the 26th of June, 1849, the owners of the *Bold Buccleugh* sold her absolutely to the Appellant for £4800, without notice to him of any unsatisfied claim arising out of the damage done to the *William*, or any suit pending in regard thereto, in the Court of Session in Scotland; but in August following, the vessel having returned to Hull, was again arrested by virtue of a warrant, under seal of the High Court of Admiralty, and a fresh action commenced in that Court, instructions being sent to Scotland for the immediate abandonment of the suit in the Court of Session. An appearance under protest was entered by the Appellant, and an Act on Petition brought in on his behalf, disclaiming the jurisdiction of the Court of Admiralty to entertain the second suit.

The Act alleged, that on the 30th of January, 1849, a suit was commenced in the Court of Session in Scotland, on behalf of the owners of the *William*, against the Edinburgh and Dundee Steam Navigation Company, the then owners of the *Bold Buccleugh*, in order to obtain compensation for the loss sustained by them in respect of the barque having been run [270] down by the *Bold Buccleugh*, and totally lost. That in pursuance of the writ of summons issued in the said suit, the *Bold Buccleugh* was arrested, but bail having been given on behalf of the owners, she was released. That this suit and also another suit instituted in the same Court, on behalf of the owners of the cargo laden on board the *William*, against the then owners of the *Bold Buccleugh*, was still pending in the Court of Session in Scotland, and expected to come on for hearing in that Court, in the month of December then next. That the cause of action in the present suit was the same as in the suit then depending in the Court of Session in Scotland. That on the 26th of June, 1849, the then owners of the *Bold Buccleugh*, for a valuable consideration, absolutely sold and conveyed the steamship to Daniel Harmer, her present owner.

The answer of the owners of the *William*, after setting forth the fact of the running down of the barque, alleged, that an action was brought by them in the Court of Admiralty, against the steamship, in respect of the loss they had sustained, and a warrant, under the seal of the Court, extracted and forwarded to Hull, for the purpose of being there executed upon the steamship, which had quitted the port before the arrival of such warrant, and that (whether by accident or design) the *Bold Buccleugh* never came within the jurisdiction of the Court of Admiralty, so that she could not be arrested by authority of that Court, and the owners of the *Bold Buccleugh*, when applied to, refused to appear and give bail to the action so entered against them. That a suit was commenced in the Court of Session in Scotland, by the owners of the *William*, and for a time was prosecuted, but that such suit was not still pending, or at least then [271] being proceeded with there as alleged; on the contrary, that the *Bold Buccleugh* having, in the month of August then last, arrived in the port of Hull, the owners of the *William*, on being informed thereof, immediately caused a second warrant for her arrest to be obtained and executed against her, being the earliest period at which the *Bold Buccleugh* could be arrested, and whereupon the Respondents abandoned absolutely, and caused to

be discontinued, the suit so of necessity commenced by them in the Court of Session in Scotland, and in which Court accordingly there was no longer any suit pending. That the present owner of the *Bold Buccleugh*, at the time of the purchase from her former owners, well knew of the unsatisfied claim outstanding against her, on account of the damage done to the *William*, and did provide or might have provided accordingly.

In reply, it was pleaded, that the present owner of the *Bold Buccleugh*, being advised that he had an interest to oppose the dismissal of the suit in the Court of Session in Scotland, on the 6th of November instant, being the day on which the warrant was given in; the agent for the Defenders in the said suit alleged in Court, before the Judges then present, that the Defenders had an interest to oppose the motion for leave to abandon the suit, and intended to assist the present owner of the *Bold Buccleugh*, interested to maintain the defence, whereupon the Judges allowed the Defenders to put in a minute of answer between that day and the 8th of the same month, and also a minute professing to assist the then new Defender referred to; that on the 9th of the said month, in consequence of the Defender having failed to lodge any minute as aforesaid, the Court dismissed the action, but that such [272] order of dismissal was not final, and that the agents of the Defender had lodged an application to the Court, to recall the same, and grant permission to state the grounds upon which the present owner of the *Bold Buccleugh* contended that he had a sufficient interest to oppose the said dismissal, and that the dismissal or otherwise of the said suit still remained subject to the order of the Court, to be made in the matter of the said application. That the present owner of the *Bold Buccleugh* was not aware, at the time of the purchase of the same, that there was any unsatisfied claim outstanding against her, on account of the damage sustained by the *William*, or on any other account, nor did provide, nor could have provided, accordingly.

The rejoinder alleged, in reference to the averment, that the order of dismissal was not final, that the application to the Court of Session in Scotland had not only been made by the Defenders, but had been granted, and that the Defenders, having complied with the orders of the Court, in reference to the lodging of the minutes, the question of the dismissal of the suit was, on the 6th of December instant, fully argued before the Court of Session, and the suit was then finally dismissed.

On the Act of Protest being brought in, an affidavit of the Appellant was filed, which stated, that he had no notice of the unsatisfied claim by the *William* against the *Bold Buccleugh*, when he purchased the steamer. The owners of the *William* also filed an affidavit by their attorney in Scotland, from which it appeared, that, subsequent to the second action being brought in England, they had offered to abandon the Scotch suit, and that, though this was opposed by the Appellant, who applied to be made a party, yet, in [273] respect of this abandonment, the suit was at length finally dismissed by the Court of Session, on the 6th of December, 1849.

The Judge of the Admiralty Court (the Right Hon. Dr. Lushington), by his judgment (reported, *nom. The Bold Buccleugh*, 3 W. Rob. 220), pronounced on the 18th of January, 1850, overruled the protest containing the plea of *lis alibi pendens* to the Court's jurisdiction, holding, first, that the proceedings in Scotland had been abandoned by the owners of the *William*, at the earliest possible time they could withdraw the action after the second arrest; and, secondly, that the mere transfer of the property in the *Bold Buccleugh* did not release the purchaser from the responsibility of the original collision.

From this judgment the present appeal was brought.

Mr. Peacock, Q.C., Dr. Haggard, and Mr. J. Anderson, for the Appellant.—Two questions are raised for the Court's consideration upon these pleadings:—First, whether the plea of *lis alibi pendens*, was not a good defence in abatement of the suit; and secondly, whether the ship was liable by a proceeding *in rem* as against the present owner, he being a purchaser for a valuable consideration, without notice of the damage. Upon the first point: In collision, the action is transitory, and could have been brought in England, Scotland, Ireland, or France, but not in two Courts at the same time; the steamer was arrested in Scotland, under process issued out of the Court of Session, a competent Court, having jurisdiction to entertain such a suit, 11 Geo. IV. and 1 Will. IV., c. 69, s. 21. And the proceedings were carried on according to the form of process prescribed by the Statute, [274] 6 Geo.

IV., c. 120.—[Sir John Jervis: The ancient maritime jurisdiction in Scotland is explained by Erskine (1 Inst. of the Law of Scotland, tit. III. sec. 34.)—The history of the Court of Admiralty in Scotland is fully treated of by Bell (1 Coms. on Mercantile Law, p. 497). Such suit was pending in that country when the second warrant was extracted and the *Bold Buccleugh* arrested in England for the damage in question, the subject of the Scotch suit. It is contrary to every principle of justice, that a party shall be sued in two different Courts for the same subject-matter, at one and the same time; the plea, therefore, of *lis alibi pendens*, in abatement of the English suit, was proper, and ought to have been allowed. *The Mayor of London v. B.* (Freem. 401; S.C. 3 Keb. 491); Com. Dig., tit. "Abatement," H. 24; Bac., Abr., tit. "Abatement," M. Gilbert's Hist. of Com. Pleas, pp. 254-5-6.—[Sir John Jervis: Suppose a suit for bottomry, and a suit for salvage, could the vessel be arrested in both suits?—It is different here; the two suits are for the same cause of action, and the practice of the Admiralty Court is against the allowance of a second suit for the same subject. *The Fortitudo* (2 Dodson, 58)—[Mr. Pemberton Leigh: The proceedings are of a different nature; in Scotland, it appears from the protest, that the process is against the person of owner; in the Admiralty Court in England it is *in rem*.]—The arrest of the steamer is in the nature of a foreign attachment. *The Johann Friederich* (1 W. Rob. 37). A proceeding *in rem* merely to compel appearance. Foreign attachment exists in Scotland as in the City of London.

But, secondly, we submit, that by the *bona fide* sale [275] of the steamer to the Appellant, subsequent to her release upon bail, and before her arrest at Hull, the property in her was absolutely transferred to him, and that she was not liable for the damage, by a proceeding *in rem* in the Admiralty Court in England. The *locus contractus* was Scotland, and the purchaser's rights are governed by that law. Story (Coms. on Conf. of Laws, ch. viii., sec. 242 (I), sec. 286, c. (2 Edit.)). The remedy by the law of Scotland, is *in personam* (1 Shand's Prac. of the Court of Session, p. 413; and see Ersk. III., sec. 37). At the time of the purchase, the Appellant was in ignorance of any outstanding liability against the steamer, on account of the damage caused by her to the *William*, and it will be a great hardship upon him if he is to be held liable for the consequences of a misfeasance committed by the vessel, at a time when he was not her owner. There is no knowledge of the damage or fraud imputed to the purchaser: the steamer had been released upon bail, so that he cannot be fixed with notice before his purchase. In the case of *The Alexander Larsen* (1 W. Rob. 294), the Court said, that they would protect "subsequent purchasers without notice."—[Mr. Pemberton Leigh.—The plea does not show what was the nature of the bail in Scotland, what in fact it was for. Ought not that fact to have been pleaded?—The effect of the steamer being released, was to render the then owners personally liable for the damage. No lien attaches upon a ship for damage. *The Volant* (1 W. Rob. 387); *The Druid* (1 W. Rob. 399). And the only reason for the arrest of the ship, is, to quote the language of Dr. Lushington in *The Volant* (1 W. Rob. 387), that such "arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment."

The Attorney-General (Sir Alexander Cockburn), and Dr. Addams, for the Respondents.—First. The plea of *lis alibi pendens* of a suit in Scotland is no bar to the jurisdiction of the Court of Admiralty in England entertaining the present suit for damage. In *Foster v. Vassall* (3 Atk. 587), Lord Hardwicke decided, that if an action was brought in England, and the Defendant pleaded to it an action in Ireland, or the plantations, it would not be a bar to the jurisdiction of the Court, in England. So in *Dillon v. Alvares* (4 Ves. 357), a plea of a suit depending in the Court of Chancery in Ireland, for the same matter, was overruled by Lord Loughborough. Again, in *Maule v. Murray* (7 Term Rep. 470), a Defendant who had been arrested in America, under a process out of the Court, was arrested again in this country for the same cause of action, and the Court of King's Bench refused to discharge him out of custody. An American writer, Kent (2 Coms. p. 124 (2 Edit.)), in treating of "*Lis pendens*," refers to Merlin, Répertoire, tit. "Judgment," sec. 6, and Pardessus, Droit Commercial, t. 5, 1488, in which the French Court overruled a plea of a foreign judgment in bar to a new suit for the same cause of action. Ad-

mitting that two suits could not be sustained in two Courts of concurrent jurisdiction, for the same subject-matter, and that the second suit would be bad, yet in this case the objections to the plea are twofold: first, the suit was originally instituted in England; and, secondly, the relief sought by the proceedings in Scotland was totally different from that in England. In the [277] former country the proceedings are *in personam*; in the latter the remedy is *in rem*. The same rule prevails in America. *The Brig Nestor* (1 Sumner, 78). In that case Mr. Justice Story lays it down as unquestionable, that whenever a lien or claim is given upon the thing by the Maritime law, the Admiralty Court will enforce it by a proceeding *in rem*. The case of *The Aline* (1 W. Rob. 111) strongly illustrates our position, that a lien attaches in case of damage, and that the proceedings in the Admiralty Court in England are *in rem*. It has no resemblance to foreign attachment in the City of London. Here a lien attaches by reason of damage, and the Admiralty Court enforces it by a proceeding *in rem* against the ship. The observations of Dr. Lushington in the case of *The Johann Friederich* [1 Rob. W. 37], were extrajudicial.

Secondly. The fact of the Appellant being a *bona fide* purchaser without notice of the damage, will not avoid the liability of the steamer. Such liability attached at the moment of the collision, creating a lien which followed the ship into whose-soever hands she might come. At the most, if the Appellant was imposed upon, and the fact of the damage occasioned by her designedly kept from him, his remedy will be to seek for redress against the former owners by an action at law. It is no defence to this proceeding, which is a proceeding *in rem*.

The case stood over for consideration.

Their Lordships afterwards directed the appeal to be re-argued by one Counsel on each side, upon the question, whether the *bona fide* sale of the vessel after [278] the damage, without notice to the purchaser, discharged the vessel from liability.

The case was now re-argued, on that point (Dec. 10, 1851).

Mr. J. Anderson, Q.C., for the Appellant.—The reserved point involves a question of the first importance to shipping interests; it is confined to this, whether a lien arises out of damage; and, if so, whether it follows the vessel causing the damage into whosoever hands it comes. It must be considered under two heads:—

First. It is submitted, that no lien attaches by reason of damage. A lien on ships may be created, by bottomry, mortgage, salvage, and wages, but there is no authority to be found in the books that it extends to damage. In the case of *The Volant* (1 W. Rob. 387), the learned Judge of the Admiralty Court laid down the rule of law to be, that “the damage confers no lien upon the ship,” and this opinion is confirmed in the case of *The Druid* (1 W. Rob. 398). Liens are not favourites of the law. The *onus* lies upon the Respondents to establish such lien, *The Alexander* (1 W. Rob. 346): it cannot be inferred. As then there was no lien for the damage in this case, the arrest of the steamer must be considered in the nature of an attachment only.—[Sir John Jervis.—Abbott, in his treatise “On Shipping” (6th Edit. by Shce, pp. 121-2), lays it down, that by the Civil law, all who repaired, or fitted out a ship, or lent money to be employed in those services, had a lien, without any instrument of hypothecation. At Common Law, what is called a “lien” is more strictly construed, and is only when the thing is in actual or constructive possession.]

—There is no lien upon the [279] steamer. The Court of Admiralty has undoubtedly jurisdiction in cases of collision, and the proceedings in the first instance is *in rem* against the ship; but the arrest of the ship is only to compel the appearance of the owners; if they appear, the question is then to be decided according to the interests of the parties, without reference to the liability of the ship causing the collision.—[Sir John Jervis.—When does the proceeding *in rem* commence?—It is only a mode of compelling appearance, analogous to foreign attachment in the City of London. *The Johann Friederich* (1 W. Rob. 37). The mode of procedure is this: the ship is arrested under a warrant, and if the owners do not appear and give bail, the ship is sold. If they appear, then the proceeding is *in personam*. *The Aline* (1 W. Rob. 111); *The Hope* (1 W. Rob. 154); *The John Dunn* (1 W. Rob. 159). Foreign attachment like that of the City of London prevails in Scotland, and the sole object of that attachment is to compel appearance.—[Sir John Jervis.—It seems more like a proceeding in the Exchequer to recover a Crown debt, which is against the person

and the goods. In a note to Turbill's case (1 Wms. Satnd. 67, n. 1), the doctrine of foreign attachment is fully examined, but it appears to bear no analogy to a proceeding *in rem* in the Admiralty Court.]—In equity, if a vendor keep the title deeds and conveyance of the estate, as a security for part of the purchase money unpaid, he will have an equitable mortgage on the estate, and this lien prevails against the purchaser and his heir, but the vendor's lien is not good against a purchaser for valuable consideration without notice (Sug. Vend. and Pur. 536; Edin. 1851). Proceedings in the Admiralty Court most resemble [280] the case of cattle damage feazant being sold. There the proceeding is also *in rem*, but then it must be taken at the time. As, therefore, there was no lien upon the steamer for the damage, what was the effect of her release in Scotland, after the arrest, which was a mere *modus procedendi*? Why, upon the owners appearing and giving bail, the proceedings *in rem* terminated, and the remedy became *in personam*. Bail in the Court of Admiralty is regarded as a pledge for the thing itself. *The Acad Etain* (1 Dodson, 50, 53). The object being not to make available any lien, for such did not exist, but merely to get a fund to satisfy the damage. The release discharged the steamer from arrest, and left her *in statu quo*, as before the arrest. The suit in Scotland being, therefore, for the same cause of action, and the proceedings being substantially the same, the plea of *lis alibi pendens* was a bar to the action.—[Sir John Jervis.—You need not go into that question, as we have made up our minds upon that plea.]

Secondly. There being no lien upon the steamer, how can this indefinite claim of damage travel with her wherever she goes? Can a ship, which at some former time may have caused a collision, and which may have subsequently passed through various owners' hands, be arrested in any part of the world she may be for this damage? Surely not; for, if so, the rights of third parties, including innocent purchasers without notice, would be involved.—[Sir Frederick Pollock.—Suppose the case of a collision upon the sea, caused by a vessel going to India, and the ship sold there, is not the vessel liable to be seized when she returns to England for the damage?—The damage [281] founds no lien, and her arrest is only to compel appearance. Our proposition is, that the steamer being released, there is no unsatisfied liability left; the presumption being, that the damage is satisfied, and the bail taken in substitution of the steamer.

Dr. Addams for the Respondents.—This is a proceeding *in rem* in the usual form against the steamer itself, and not *in personam* against the owners. The proposition now urged by the Appellant is quite novel, and certainly untenable. Proceedings in the Admiralty Court in cases of damage are *in rem*, and that has been the practice for this last forty years. Such an objection as this has never been urged before; even in this case it was not taken in the Court below.

Judgment was reserved, and now delivered by

Sir John Jervis (April 24, 1852).—There were two questions in this case: First, the effect of the pendency of another proceeding in Scotland for the same cause of action. Secondly, the liability of the vessel by a proceeding *in rem* after a *bona fide* sale, without notice.

It is manifest that these two defences are of a totally different nature; the first being a declinatory plea properly the subject of a protest; and the second, an absolute bar. Generally, it is inconvenient to depart from the settled rules of procedure, and to raise such questions differing in degree by the same defence; but as the Court below did not object to this course, we merely notice it to observe, that we do not approve of such a proceeding, and pass on to deliver our opinion upon the two points raised.

Upon the first point we have not, from the com-[282]-mencement of the discussion, entertained any doubt; but we desired the second question to be re-argued, because it was of great general importance, and because we were unable to find any authorities bearing directly upon it; and some of the cases to which we were referred, were apparently conflicting with each other.

The course which was taken upon the second argument, makes it convenient to dispose of the second question in the first instance.

It is admitted that the Court of Admiralty has jurisdiction in a case of collision

by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners; that the damage confers no lien upon the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, *dicta* have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited. In *The Johann Friederich* (1 W. Rob. 37), Dr. Lushington is reported to have said that proceedings *in rem* in the Court of Admiralty were analogous to those by foreign attachment in the Courts of the City of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the Courts of the City of London, the two proceedings may be analogous; but in other respects they are altogether different. The foreign attachment is founded upon a plaint against the principal debtor, and must be returned *nihil* before any step can be taken against the garnishee; the pro-[283]-ceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case, the proceedings are *in personam*, in the latter, they are *in rem*. The attachment, like a Common Law distringas, is merely for the purpose of compelling an appearance; and if the Defendant appears within a year and a day, even after judgment and execution against the garnishee, and puts in bail, the attachment is at an end. If the owners do not appear to the warrant arresting the ship, the proceedings go on without reference to their default, and the decree is confined exclusively to the vessel. Many other distinctions will be found upon reference to the notes to Turbill's case (1 Wms. Saund. 67, n. 1). It is not correct, therefore, to say, that the proceeding *in rem* is in all respects analogous to the proceeding by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only.

In all proceedings *in rem*, whatever be the foundation of the jurisdiction, the warrant is the same, and the proceedings are conducted in the same form, and there is no reason for saying that a different rule is to prevail, where the foundation of the jurisdiction is a collision, from that which is admitted to be the practice, when the suit is instituted for salvage, or the recovery of wages against the ship.

But it is further said, that the damage confers no lien upon the ship, and a *dictum* of Dr. Lushington, in the case of *The Volant* (1 W. Rob. 387), is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases, 508), it seems doubtful whether the learned Judge did use the expression attributed to him by [284] Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of that case, cannot be taken as a binding authority.

A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may [285] come. It is inchoate from the moment the claim

or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the Civil Law, cannot be better illustrated than by reference to the circumstances of *The Aline* [1 Rob. W. 111], referred to in the argument, and decided in conformity with this rule, although apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the Court held, that the claim for damage in a proceeding *in rem*, must be preferred to the first bond-holder, but was not entitled against the second bond-holder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bond-holder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

This rule, which is simple and intelligible, is, in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised: but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosoever possession the thing may come.

[286] The remaining point may be disposed of in a few words. The pleadings show that the proceedings in Scotland were commenced by process against the persons of the Defendants, and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding *in rem* differs from one *in personam*, and it follows, that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other.

For these reasons, we are of opinion, that the judgment of the Court below must be affirmed, with costs.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 3. *Liability*, b. S.C. below 3 Rob. W. 220. On point (i.) as to maritime lien (7 Moo. P.C. 283, 284, 285), see *The Mary Ann*, 1865, 1 Ad. and E. 11; *The Halley*, 1867, 2 Ad. and E. 21; *The Feronia*, 1868, 2 Ad. and E. 72; *The Charles Amelia*, 1868, 2 Ad. and E. 333; *The Two Ellens*, 1871, 3 Ad. and E. 357; *The Parlement Belge*, 1880, 5 P.D. 219; *The City of Mecca*, 1881, 6 P.D. 106; *Stoomvaart Maatschappij Nederland v. P. and O. Steam Navigation Co.*, 1882, 7 A.C. 817; *The Heinrich Bjorn*, 1885-86, 10 P.D. 54, 11 A.C. 284; *The Tasmania*, 1888, 13 P.D. 115; *Currie v. McKnight* (1897), A.C. 97; (ii.) as to *lis alibi pendens*, see *The Mali Ivo*, 1869, 2 Ad. and E. 359.]

ON APPEAL FROM THE COURT OF APPEALS FOR THE PROVINCE OF LOWER CANADA.

THE QUEBEC FIRE ASSURANCE COMPANY.—*Appellants*; AUGUSTIN ST. LOUIS and JOHN MOLSON,—*Respondents* * [Feb. 5 and 6, 1851].

The parish church of Boucherville, in Lower Canada, having been in great part destroyed by a fire, which was occasioned by the negligence of the Respondents' servants, and being at the time insured by a policy effected by the *curé* upon the church and sacristy; the *curé* and one of the *marquilliers-en-charge*, by a notarial instrument, transferred to the Appellants ("the Quebec Fire Assurance Company," who had granted the policy),

* Present: Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

in consideration of the payment by them of part of the amount of the damage sustained by such fire, the right to sue and claim from the Respondents, the amount so paid.

Held, that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique*, according to the French law prevailing in Lower Canada [7 Moo. P.C. 317].

Held, also, in an action brought upon the notarial *Acte*, that though the declaration was not strictly in form, yet it was substantially good; for the Plaintiffs (the Appellants) could not be held to sue as assurers, (in which character they had no title;) but as being subrogated to the debt due to the *fabrique* of the church by the Defendants (the Respondents), by reason of the payment made on their behalf in respect of the damage occasioned by them [7 Moo. P.C. 315].

Semble, By the old French law, the *curé* and *marguilliers* together could not convey by way of assignment without the consent of the *Bureau*, though they might subrogate a debt due to them in their official character [7 Moo. P.C. 315, 318].

The Appellants in this case were an incorporated Company established in Lower Canada, by an Act of [287] the Legislature of that Province, of the 14th of March, 1829, for assurance against fire, under the name and style of the "Quebec Fire Assurance Company."

On the 27th of February, 1841, that Company, through the agency of the Rev. Thomas Pepin, *Curé*, entered into a policy of assurance upon the church and sacristy of Boucherville, and the property therein; whereby it was witnessed that the Rev. Thomas Pepin, for the *fabrique* of Boucherville, had paid to P.H. Maitland, Esq., agent for the Quebec Fire Assurance Company, the sum of £16 10s. currency, on condition, that the Rev. Thomas Pepin, acting as aforesaid, in case of any loss or damage occasioned by fire to the property specified, named, and described in those presents (in the place or places mentioned and not elsewhere), should have a remedy, not exceeding in any case the sum or sums therein specified, on the joint stock and the subscribed securities, and at the disposition of the president and directors of the Quebec Fire Assurance Company, to the amount only of the funds on the terms and conditions contained in it, and annexed to and specified on the back of those presents, and not on any other terms and conditions whatsoever, viz., on the building only of the church of the parish [288] of Boucherville, including the steeple and the bells, £2200; on the organ contained in the church, £500; on the building only of the sacristy, £150; on the pictures contained in the church, comprising the curtains used to cover them, £250; on the linen and ornaments contained in the church and sacristy aforesaid, £100; on the furniture and plate of the church and sacristy, and contained in it, £100. The policy was in other respects in the usual form of policies against fire effected in this country.

The policy was afterwards continued in force up to the month of February, 1844, and receipts were given for the premiums for the years 1842 and 1843, as received from the Rev. Thomas Pepin for the *fabrique* of Boucherville.

On the 20th of June, 1843, a fire broke out in a hanger or shed, in the village of Boucherville, about one hundred yards from the shore of the river St. Lawrence, and separated therefrom by a house and stable, and a shed; and the fire communicated with other buildings, and destroyed the parish church of Boucherville, with its sacristy and a quantity of valuable property therein, all of which was comprised in the policy of assurance above stated. The extent of the loss and damage sustained by the *fabrique*, or parochial corporation of the church, was estimated and established according to the tenor of the policy of assurance, at the sum of £4230 12s. currency; and the Appellants, on the 4th of August, 1843, in fulfilment of their contract as assurers, paid by a cheque upon the cashier of the Quebec bank, dated the 19th of July, 1843, and payable sixty days after date, to the *fabrique de Boucherville*, or order, the sum of £3045 15s. currency, in full satisfaction of all demands against [289] the Company for the loss by fire, being a less sum than that of £4230 12s., the sum at which the loss and damage had been

established, and a less sum than that of £3300, the sum to which the liability of the insurers was limited by the above policy.

On the same day a notarial instrument was executed by and between the Rev. Thomas Pepin and Louis Favreau, one of the *marguilliers en charge*, or one of the churchwardens of the parish, and John H. Maitland, Esq., agent at Montreal for the Quebec Fire Assurance Company, which instrument was in the words following:—“On the 4th day of August, in the year of our Lord 1843, before the undersigned public notaries, duly commissioned and sworn in and for that portion of the province of Canada, late the Province of Lower Canada, residing in the city of Montreal, in the said Province, personally appeared the Rev. Thomas Pepin, *curé* of the parish of Boucherville, in the district of Montreal, and Louis Favreau, of Boucherville aforesaid, farmer, *marguillier en charge* of the said parish, acting as well for themselves as in their respective capacities, and for and in the name and on behalf of the *fabrique de Boucherville*, of the one part, and John H. Maitland, Esq., of the said city of Montreal, agent in Montreal for the Quebec Fire Assurance Company, of Quebec, of the other part: which said parties declared that, whereas on the evening of Tuesday, the 20th day of June last past, a conflagration took place at Boucherville aforesaid, by which the church and much valuable property thereto attached and belonging was destroyed, and that the said conflagration is supposed to have originated (and indeed much positive evidence has occurred) from the boiler-chimneys of a steamer *St. Louis*, whereof Augustin St. Louis is master: and [290] whereas the said church, the sacristie, the organ in the church, pictures, linen and furniture, with other property thereto belonging, was at the time under insurance at the said Quebec Fire Assurance Company's Office, under Policy numbered X. 17585, at a sum of £3300 current money of the said province of Canada: and whereas the said assurers and assured have caused an estimate to be strictly made of the liabilities of the said assurance Company toward the said *curé* and *marguilliers*, and others, under the aforesaid policy, in consequence of the aforesaid destruction by fire of the property set forth in the said policy, which estimate amounts to the sum of £3045 15s. current money, and which the said Company, on the demand of the said party hereto of the first part is now ready to pay, satisfy, and discharge. Now these presents witness that the said Rev. Thomas Pepin and Louis Favreau, acting as aforesaid, doth hereby acknowledge and confess to have had and received of and from the said Quebec Fire Assurance Company, by the hands of the said agent, well and truly paid in presence of us notaries at and before the execution hereof, the aforesaid sum of £3045 15s., said current money, in and by a bill or draft signed by D. R. Stewart, treasurer of the said Company, countersigned by Jeremiah Leaycraft, the president, dated 19th July, 1843, drawn on the cashier of the Quebec Bank, and No. 392, payable sixty days after date, which bill, draft, or cheque, when paid, will be in full payment, satisfaction and discharge of the claim and demand of the said assured, under the aforesaid policy of assurance, for the loss, damage, and destruction of the property thereby assured, at and in consequence of the fire or conflagration aforesaid, at Boucherville aforesaid, and of and [291] therefrom, and of and from every other or further claim, pretension, or demand, touching the aforesaid assurance, or the conflagration aforesaid, the said Rev. Thomas Pepin and the said Louis Favreau, acting as aforesaid, do hereby acquit, release, and discharge, and promise to hold acquitted, released, and discharged, the said Quebec Fire Assurance Company for ever: and inasmuch as the said parties hereto are of opinion and do maintain that the proprietor or proprietors of, and all concerned or interested in, the before-mentioned steam-boat or vessel called the *St. Louis*, as having occasioned the conflagration aforesaid, are liable for all the costs, losses, and damages that have been thereby occasioned, he the said Thomas Pepin and Louis Favreau, acting as aforesaid, in consideration of the premises as aforesaid, doth hereby assign, transfer, and make over unto the said Quebec Fire Assurance Company, accepting hereof by the said John H. Maitland, and to their assigns, all right, title, interest, property, claim, and demand whatsoever, of every nature and description, to the aforesaid amount or sum of £3045 15s., and no more, which they or the parish of Boucherville aforesaid ever had, now hath, or can or may have, or be supposed to have or possess, against the said proprietor or proprietors and others concerned of, in, and to, the said steam-boat or vessel called

the *St. Louis*, whereof is proprietor, or part proprietor, the said Augustin St. Louis, for loss of the aforesaid church and other property, described in the aforesaid policy of assurance, and thereby assured, and for all damages, costs, and expenses unto them created, and by them sustained by reason and upon account of the said conflagration or otherwise however, not exceeding however the said amount or sum of £3045 15s."

[292] In October term, 1843, the Quebec Assurance Company commenced their action against the proprietors of the steam-ship *St. Louis* in the Court of Queen's Bench for the district of Montreal, in that part of the Province of Canada called Lower Canada; and by their declaration they set forth, that on 27th February, 1841, in consideration that Thomas Pepin, *curé* of the parish of Boucherville, in the district of Montreal, and acting for and on the behalf of the *fabrique* of that parish, had paid to the Plaintiffs the premium of £16 10s. currency, the Plaintiffs did, by a policy of assurance of that date, made, executed, and delivered, assure the *fabrique* of Boucherville from loss or damage by fire for one year, from 28th of February in the year aforesaid, and after setting forth the amount and particulars of the policy of assurance, and the due renewal thereof, proceeded to state; that at the time of the committing of the grievance by the Defendants as after-mentioned, to wit, on the 20th of June then last, the aforesaid assurance and policy continued in full force, and the property thereby assured continued to be and was the property of the *fabrique*; and that at the same time the Defendants were possessed, as proprietors or owners, of a steam-boat called the *St. Louis*, navigating and plying for hire upon the river St. Lawrence, between the port of Montreal and the village of Boucherville aforesaid, and other places situated on the banks of the river, and that the Defendants had the care, direction, and management of the steam-boat; yet the Defendants, not regarding their duty in that behalf, whilst the steam-boat was so in the said river, at and near the said village of Boucherville, and moored to a wharf or quay thereat, to wit, on the said 20th day of June then last, took so little and such bad care of their steam-boat, and of [293] the fire or fires on board thereof, that by and through their and their servants' gross negligence, mismanagement and want of ordinary precaution, in and upon the steam-boat, and in or about the fire or fires on board thereof, sparks and flames of fire from the said fire or fires were by the Defendants and their servants permitted to and did escape from the steam-boat, and did set fire to divers sheds, dwelling-houses, and other buildings in the village of Boucherville, and, amongst others, to the church and sacristy; and that the church and sacristy, with the belfry or steeple, and the bells, the organ, the pictures and their curtains, the linen and ornaments, and the moveables or furniture and plate, all assured by the Plaintiffs from loss or damage by fire as aforesaid, were wholly burnt down, consumed, and destroyed by the fire originating in and from the steam-boat, and by or through the gross negligence, mismanagement, and want of ordinary precaution of the Defendants and their servants, in and on board of the steam-boat, and in and about the fire or fires on board thereof as aforesaid; and thereupon, in accordance with the undertaking and covenant of the Plaintiffs in the policy, they became liable to pay to the *fabrique* of Boucherville all such damage or loss as had happened by the fire to the property thereinbefore and in the policy mentioned, not exceeding the aggregate amount of the sum of £3300 currency, of all which the *fabrique* notified the Plaintiffs; and the Plaintiffs further stated and set forth the particulars of the damage sustained, and that the several sums amounted altogether to the sum of £4230 12s. 8d. currency: and that thereupon the Plaintiffs were, on the 4th day of August then last, obliged to pay, and did necessarily and in fulfilment of their undertaking and covenant [294] pay, to the *fabrique* of Boucherville, accepting thereof by Thomas Pepin, *curé*, and Louis Favreau, *marguillier-en-charge* of the parish, the sum of £3045 15s. currency: to wit, by a bill or draught signed by the treasurer, and countersigned by the president of the Plaintiffs, for the sum of money, drawn upon the cashier of the Quebec Bank, and payable sixty days after date, and which bill or draught was paid and satisfied at maturity, and before the institution of the action for the damage or loss sustained by the *fabrique* of Boucherville by the fire aforesaid; and that thereupon, and in consideration of the payment aforesaid, and other the premises aforesaid, the *fabrique* of Boucherville, acting by Thomas Pepin, *curé*, and Louis Favreau, *marguillier-en-charge*,

did, by *Acte* passed before Griffin and his colleague, public notaries, on the day and year last aforesaid, assign, transfer, and make over to the Plaintiffs, accepting thereof by John H. Maitland, of Montreal, Esq., their agent in that behalf, all right, title, interest, property, claim, and demand whatsoever, of every nature and description, to the amount or extent of the aforesaid sum of £3045 15s. currency, which the said *fabrique* of Boucherville, or Thomas Pepin, *curé*, and Louis Favreau, *marguillier-en-charge* as aforesaid, ever had, or could, or might have against the proprietors of the steam-boat *St. Louis*, to wit, the Defendants, for or by reason of the destruction by fire as aforesaid of the church, sacristy, and other the property assured against accidents by fire by the Plaintiffs, in and by the aforesaid policy, and of all damages, costs, and expenses in the premises; of all which the Defendants had notice: wherefore the Plaintiffs said, that by means of the premises aforesaid they had sustained damage by and [295] through the gross negligence, mismanagement, and want of proper precaution of the Defendants and their servants as aforesaid, to the amount of £3045 15s. currency, yet that Defendants refused to pay the same, to the damage of the Plaintiffs of £3045 15s. currency; and, therefore, the Plaintiffs brought their suit, and prayed that by the judgment of the Court the Defendants might be adjudged jointly and severally to pay to the Plaintiffs the sum of £3045 15s. currency, with interest and costs of suit.

The Defendants separately pleaded the general issue, and not guilty; and issue being joined, various witnesses were examined on each side, both on interrogatories and orally; and various exhibits, consisting of the documents pleaded, as well as proofs of the Plaintiff's title to sue, were produced and duly proved. From the evidence it appeared, that the fire originated as alleged in the declaration, and was occasioned by the neglect of the owners of the steam-boat *St. Louis*, in not having furnished the chimney or funnel of their vessel with a wire guard to prevent the escape of sparks or ignited pieces of the light wood that was used for fuel on board the vessel.

The case was heard in the Court of Queen's Bench, and on the 26th of January, 1846, that Court gave judgment to the following effect:— "The Court, after having heard the parties by their advocates, examined the proceedings and proof, and deliberated on the whole, declaring proved and confessed the facts contained in the interrogatories, on facts and articles proposed to the Defendants in this cause, the Defendants having made default in appearing and answering the interrogatories, which were duly signified to them, and considering that the Quebec Fire In-[296]-surance Company, as subrogated in the rights and actions of the parish of Boucherville, and its *œuvre* and fabric, can recover such indemnity, not exceeding the sum of £3045 15s., currency, in which the Defendants may be indebted as damages for the loss sustained by the parish and fabric, in the burning of the church of the parish, of the sacristy and other dependencies, as well as the things in them, which were destroyed on this occasion, in case the Defendants were the cause of the fire, which happened on the 20th of June, 1843, and that the parish and fabric had an action against them for indemnity. And considering that it is established by the proof, that it is by the fault and negligence of the Defendants, the proprietors navigating the steam-boat called the '*St. Louis*,' and their servants, that the burning of the church, its dependencies, and its contents, took place, and that the parish and fabric have an action against the Defendants for the amount of damages, which they suffered by the fire at the time of the burning, which exceed the sum of £3045 15s., as alleged, that consequently the action of the Assurance Company is well founded, condemns the Defendants jointly and wholly to pay the Assurance Company, the Plaintiffs in this cause, the sum of £3045 15s. actual currency, being the amount which the Plaintiffs, as insurers of the property burnt, have paid, as they were bound, to the *curé* and churchwardens of the parish, and for which they have a right to be indemnified by the Defendants, with interest on it, to be reckoned from the 29th of September, 1843, the day of the demand of justice, and costs of suit."

The Respondents separately appealed from this judgment to the Court of Appeals for Lower Canada.

[297] The appeal having been heard, the Court took time to consider and deliberate, and afterwards, on the 10th of March, 1848, delivered judgment in favour of the Respondents, to the following effect:—

"The Court of Appeals of our Lady the Queen now here, having seen and examined, as well the record and proceedings in this cause, and the judgment therein given, from which the present appeal of John Molson and of Augustin St. Louis have been instituted, as the matters by John Molson and Augustin St. Louis for error and reasons of appeal assigned, and the same being fully understood, and the parties having been heard by their counsel respectively, and mature deliberation on the whole being had, considering, that the declaration of the Respondents in the Court below, as the same is worded, imports a demand of damages by the Respondents in their own right as insurers, and not as assignees, of the *fabrique* of the parish of Boucherville, the party insured; and considering, that the Respondents, by reason of the allegations in their declaration, had not and have not in their own right, as insurers as aforesaid, any legal cause of action against the Appellants: considering also, that if the declaration could be construed as importing a demand of damages by the Respondents, as assignees of the *fabrique* of the parish, the declaration doth not contain the requisite substantive allegations to sustain an action in the case for damages by the Respondents, as assignees as aforesaid, and doth not allege or show that damage to any amount was done or occasioned by the Appellants to the *fabrique* which might or could be made the subject of an assignment by and from the *fabrique* to the Respondents, nor that the right to such damage, and the recovery thereof in course of law, was afterwards [298] by the *fabrique* legally assigned to the Respondents, whereby the Respondents could and might demand the damage as having become vested with the same under such assignment, and in right of the *fabrique*, but, on the contrary, the damage demanded by the declaration is expressly said as being damage done to the Respondents as insurers as aforesaid: and considering that by the declaration it doth not appear that the assignment therein mentioned was made by persons legally competent to make the same, and that the said assignment, as it is in the said declaration alleged, was made of a part only of the damages which the *fabrique* claimed a right to recover, have, and receive from the Appellants, by reason of the injury and loss therein mentioned; and considering, therefore, that the declaration doth not set forth or show a legal cause of action against the Appellants; considering also, that no subrogation of the Respondents in the rights of the *fabrique* in what respects the damage in question in this cause was alleged or proved in the Court below, by or on the part of the Respondents, as supposed by the judgment of the Court below; and considering, therefore, that the action of the Respondents in the Court below was not maintainable by the Respondents, either in their own supposed right as insurers as aforesaid, or in a derivative right, supposed to be conveyed to them by or through the party injured: and considering, lastly, that no legal cause of action hath been established or proved by or on the part of the Respondents or the Appellants in the Court below; it is now adjudged, that the judgment of the Court of Queen's Bench for the district of Montreal, in this cause rendered on the 26th of January, 1846, be, and the same is hereby reversed, annulled, and made void: And the Court [299] now here proceeding to render such judgment in the premises as by the Court below ought to have been rendered, it is further adjudged that the action of the Quebec Fire Insurance Company (the Respondents in the Court below) be, and the same is hereby dismissed; and it is further adjudged, that John Molson and Augustin St. Louis, respectively, recover their costs from and against the Quebec Fire Insurance Company, as well in the Court below as in this Court."

From this judgment the Appellants appealed to Her Majesty in Council, contending that the same was erroneous, and relying upon the following reasons:

1. Because the *Acte* of the 4th August, 1843, mentioned in the declaration, constituted a valid subrogation of the Appellants, in the rights of the *fabrique* of Boucherville, against the Respondents, to the extent of the £3045 15s. currency, in the *Acte* mentioned.

2. Because the declaration of the Appellants, as the same is worded, imports a demand of damages by the Appellants, as lawfully subrogated in the rights of the *fabrique*, and contains the requisite allegations to sustain the action of the Appellants.

3. Because the evidence in the cause proved that the loss sustained by the *fabrique* was caused by the fault and negligence of the Respondents: and that the Respondents,

at the date of the *Acte*, had become liable in damages to the *fabrique* for the injury done.

4. Because the circumstances stated in the declaration gave the Appellants a valid cause of action against the Respondents to the amount of £3045 15s.; and because all the facts put in issue by the Respondents' pleas were substantially proved.

The Respondents submitted that the judgment of [300] the Court of Appeals ought to be sustained and confirmed, for the following reasons:

1. Because the Appellants did not, either in their own right or under and by virtue of the pretended cession transport, establish any legal cause of action against the Respondents, nor did the declaration sufficiently allege any such legal cause of action.

2. Because the notarial instrument could not by law operate as, and did not purport to be, a subrogation of the Appellants in the place of the *fabrique* of Boucherville, nor was such instrument a valid cession transport made by parties competent to make the same.

3. Because assuming that the notarial instrument could operate as a cession transport, the Appellants were not entitled to recover in the action, inasmuch as the instrument purported to be a cession transport of £3045 15s. currency, being part only of the damages sustained by the *fabrique* of Boucherville.

4. Because the Appellants are not by the Act of Incorporation authorized to take the cession transport, alleged to have been made to them by the notarial instrument.

Mr. Wood, Q.C., and Mr. A. Gordon, for the Appellants.—The question is two-fold; of fact and of law. There can be no doubt upon the evidence, that the fire which destroyed the church of Boucherville, with the property belonging to it, was occasioned by sparks from the chimney of the Respondents' steam-boat *St. Louis*. It was the negligence of the owners in not putting a wire guard or grating over the funnel to prevent the escape of sparks and ignited pieces of wood. It [301] is in evidence that the fuel used on board was light American wood, which, from its nature, would in the draft of the chimney rise readily while in a state of ignition, and, if allowed to escape, must in all probability produce the very mischief which happened. Such negligence is clearly actionable, and renders the owners of the steam-boat liable for the damage sustained. Cases similar have occurred here, and the liability of the party who is the cause of the mischief, if negligence be proved, is never doubted. *Tubervil v. Stamp* (1 Salk. 13; 1 Ld. Raym. 264; Comb. 459). *Aldridge v. The Great Western Railway Company* (4 Scott, N.R. 156; S.C. 2 Nicholl. Hare and Carrow, 852). It was proved that before the steam-boat arrived at the wharf, all was safe in the hanger or shed belonging to Madame Weillbremer, which was about a hundred yards from the shore; that no fire had been lighted in the hanger that day; that there were only two servants on the premises, neither of whom caused or saw any smoke till within ten minutes after the arrival of the steam-vessel, when they saw smoke and sparks and fire issue from the chimney of the vessel; that some of the flakes of fire from the funnel chimney fell on the roof of the hanger whilst one of the witnesses was upon it; and the building having ignited, the fire spread to the neighbouring buildings, and finally entirely destroyed the church. There can be no question as to the facts; they are proved by abundance of evidence; and the real question in the case is the question of law. Now, first, it is said, that the declaration does not sufficiently allege the legal cause of action; but that we submit is not so; all that is necessary for us to do is to show such a case as [302] would entitle us, if proved, to relief, that is, compensation. We allege damage arising from negligence, and the case averred shows a fire by the negligence of the Defendants, by which the damage to us was occasioned. We plead the policy of insurance, which makes us liable to the *fabrique* of the church, a payment of such liability, and our consequential damage thereon, and the notarial *Acte* passed by Pepin and Favreau. This is sufficient. But the main objection urged against our right to claim, is our alleged want of title under the notarial instrument, which the Respondents say was, as the Court of Appeals hold it, merely a "cession ou transport" of the debt, and not a subrogation of the rights of the *fabrique* of the church. Now we apprehend this conclusion to be erroneous. It is not easy to understand the objection as stated in the Respondents' reasons; for they seem, first, to deny the nature of the instrument as an act of subrogation, and then to infer that it is bad as a cession or transport, which it was held to be by the Court of Appeals, because not

made by the competent parties. But it will be plain on examining the document, and the law on the subject, that our title was clearly and legally one of subrogation. Now, first, any person paying the debt of another, for which debt he is also liable, and is not merely a stranger has a right to require subrogation. Looking at the Act of Incorporation, we maintain that without question it was competent for the Fire Assurance Company to take an assignment of the debt by way of subrogation. Toullier, "*Droit Civil Français*," vol. ii. tit. 4, pl. 153. The *fabrique* of the church would have had a clear right of action for the damage sustained by the Respondents' negligence; the Appellants paid the amount by cheque as stated in the De-[303]-claration, and obtained a receipt for the amount from the only parties competent to give a legal discharge, viz. by Pepin and Favreau, who executed the *Acte* of subrogation. Now the parties competent to give a discharge for the debt, which the *Acte* passed here is, were competent to complete the *Acte* of subrogation. They may not be competent to effect a "*cession ou transport*," or sale and assignment, but that is quite distinct from a subrogation of a debt. There are four kinds of subrogation enumerated by Pothier in his "*Coutume d'Orleans*," tit. xx. s. 5, pl. 66-69: First, by operation of law; Secondly, by requisition with the creditor; Thirdly, by contract between the creditor and a stranger who pays the debt, which in effect is a mere sale of the debt; and, Fourthly, by contract between the debtor and another who pays the debt for him. Ours is the second case put by Pothier, namely, subrogation by requisition, and Pothier lays it down, that this must be by some *Acte* before a Notary, as indicating the intention of the party making the payment, and so far it differs from mere operation of law; but the party paying the debt, and being under a legal obligation to pay it, has a right to require to be subrogated, and ought to do so upon making the payment, and taking his "quittance" or discharge, a point of importance as showing that the party to the act need only be that party who can give the discharge. Pothier, "*On Contracts*," Pt. i. ch. 1, s. 1, Art. vi. pl. 87. Pt. ii. c. 3, Art. viii. s. 5, pl. 280. Pt. iii. ch. 1, Art. i. pl. 464.

The distinction of the different kinds of subrogation is by no author so clearly pointed out as by Pothier, but it is recognised by Merlin, "*Rép. de juris*," vol. 32, pp. 28-45, tit. "*Subrogation de Personne*." Now that an [304] Insurance Company after paying for the damage done has a right to be subrogated, as against the party causing the damage, is laid down in every French Text-Book on Terrestrial Assurance. Quenault, "*Traité des Assurances Terrestres*," chap. xii. p. 246, No. 321, p. 248, No. 325, p. 249, No. 326, p. 251, No. 329, (Ed. Paris, 1828). Alauzel, "*Traité Général des Assurances*," vol. ii. chap. xxviii. s. 3, p. 384-8-9, and 405, (Ed. Paris, 1843). Persil, "*Traité des Assurances Terrestres*," chap. xiii. p. 280, 284, and 288. Nos. 200 and 201 and 203, (Ed. Paris, 1835). Toullier, "*Droit Civil Français*," vol. iv. p. iii. tit. 3, No. 116-17-18-19 and 120. "*Des Contrats, etc.*" (Ed. Bruss., 1830). Pardessus, "*Cours de Droit Commercial*," Pt. iii. tit. viii. ch. 4, pl. 595, (Ed. Paris, 1841). Our own law has recognised the same principle, *Randal v. Cochran* (1 Ves. Sen. 98). But then it is alleged, that the parties by whom we have been subrogated were not competent to effect a valid subrogation, they being only the *curé* and *marguillier-en-charge*, instead of *curé* and whole body of the *marguilliers*. Now admitting as we may for the purpose of the argument, that the *curé* and whole body of the *marguilliers* must concur in any act affecting to convey the goods of the church, as appears to be laid down by Jousse in his "*Traité du Gouvernement Spirituel et Temporel des Paroisses*," (Ed. Paris, 1773,) p. 124, *et seq.*, yet the same author states, p. 157, that the *marguillier du comptable*, who is the same as the *marguillier-en-charge*, is the person whose duty it is to get in debts, and to sue for them if necessary, and that his receipt is a sufficient discharge. Now Pothier says in one of the pas-[305]-sages already cited, that when a party has a right to be subrogated by requisition he must do it when taking his "quittance." It is clear, therefore, that the concurrence of the party who gives the "quittance" is all that is necessary. Jousse, p. 348, sets out certain articles drawn up for a parish in Paris, which he says govern all the parishes throughout the country, and which we assume to be the law applicable to the parish of Boucherville. The *fabrique* of the church is there spoken of as the body of the church, and the *marguillier-en-charge* is, as regards this case, like an assignee of a Bankrupt who may maintain an action at law before the execution of the assignment. The fallacy of the Court below has been treating the *Acte* in question as a sale, by which the goods of the church were alien-

ated. But there has been neither alienation nor assignment of the *fabrique* of the church, or the goods appertaining thereto, but payment without suit, of a debt, and subrogation of the right of action, which must necessarily be for the church's benefit, and within the power of the *marguillier-en-charge*. The agent of the *fabrique* who can give a receipt must be taken to be also an agent competent to discharge the obligation of obeying a requisition to be subrogated on the part of the person who makes the payment. Then the instrument or *Acte* was both in form and substance a valid subrogation. There is no magic in words, it was not necessary to use the word subrogated in order to constitute the *Acte* a subrogation. Had the *Acte* been executed in France, those words importing cession or sale would, if the nature of the case required it, be held to be a subrogation. Toullier, "*Droit Civil Français*," lib. iv. tit. iii. pl. 117. But here the instrument is in English, and the debt [306] is not assigned, but the right of action. What is that but subrogation? It is curious that in the objections taken to the competency of the *curé* and *marguillier-en-charge* by the Respondents' Counsel on the trial, they object to them because they were "*subrogés*" the Appellants. The notion of a sale was, in fact, an afterthought. But now having placed the Appellants' case in what we contend is its right view, we will notice some special objections independent of the leading fallacy of the Respondents' case, viz. as to their contention that this was a sale and not a subrogation. First, then, they say there cannot be a partial subrogation; as the debtor might thus be harassed by several actions. But the authorities plainly show that there may be partial subrogation of portions of the debt. Pothier, "*Coutume d'Orléans*," tit. xx. s. 5, pl. 87. Toullier, "*Droit Civil Français*," lib. iii. tit. iii. pl. 120, No. 1. And as to multiplicity of actions, the debtor has a right to require all the subrogated parties to join if he think fit; but if he do not, the action of one may be sustained. Our law is analogous to this. *Addison v. Overend* (6 Term. Rep. 766). *Sedgworth v. Overend* (7 Term. Rep. 279). But then, it is objected that there can be no subrogation after payment, and that it cannot be made *ex intervallo*. We may admit this, but our *Acte* shows it to be in consideration of a payment made "at and before" the execution of the deed, by a cheque. This must be taken to mean at the very moment before execution. It is true the cheque is made payable six months after date. But it is shown by the evidence, that the terms of the policy made a loss payable by cheque to be given after proof of the loss and at six [307] months. The evidence further shows that such cheque was sent from Quebec to the Agent at Montreal who executed the *Acte* on behalf of the Company; and though one witness says the loss was paid in July, it is obvious by his evidence that he is referring only to the date, and not to the delivery of the cheque. The Notarial Act is evidence against all the world as to matters within the sphere of the Notary's duty, such as to the payment of the consideration which he has to attest. For these reasons we insist, that this was a valid subrogation of the debt, and that the judgment of the Court of Queen's Bench was right, and ought to be affirmed, and that the judgment of the Court of Appeals must be reversed.

Mr. Turner, Q.C., and Mr. Bowyer, for the Respondents.—It is not necessary to enter upon the distinction between a transfer or cession, as this was, and a subrogation, for we apprehend that the evidence is insufficient to prove the damage to have been done to the *fabrique* by our steam-boat. It is proved by several witnesses that another fire was raging at the time the *fabrique* of the church of Boucherville took fire, and it is nowhere sufficiently proved that the fire originated with us, or was the result of our negligence: admitting however that in case of negligence and damage occasioned thereby having been proved, we might be liable to the *fabrique* according to the law laid down by Toullier, "*Droit Civil Français*," vol. 2, tit. 4, pl. 153, as cited on the other side; we say, first, that no such negligence is proved against us; and secondly, if proved, the Appellants have no claim against us, since they do not represent the *fabrique* of the church. Pothier, [308] in the "*Coutume d'Orléans*," introduction to tit. 20, s. 5, defines subrogation, designating it "*fiction de droit*," whereby the party subrogated is put in the place of a creditor: the article speaks expressly of a creditor; and in Art. 1, sec. 2, p. 759, he says, a surety or third-holder of mortgaged goods has a right to say, discharge me or subrogate me, and he then gives a definition of subrogation by requisition, and who is entitled to it, as co-obligors, sureties, third-holders of mortgage property, and he puts the case of a debtor of A. ordered by A. to pay B., whereby the original debt

is extinguished, though the debtor offers and gives security to B. for the original debt which B. notwithstanding pays A. In Art. 77, he says subrogation must be granted or at least required at the time of payment; and then further, in Art. 89, he says different persons may be subrogated at different times for different parts of the same debt: but all must come in concurrently. Merlin, though he quotes Pothier, tit. "*Subrogation de Personne*," as relied on by the other side, yet in sec. ii. and viii. vol. 31, p. 46, he only shows that offers of payment are valid to entitle a debtor to subrogation where such debtor has already an interest; here there is no such interest. The Art. vi. pl. 87, from Pothier, "*On Obligation*," relied on by the Appellants as an authority from the position taken by them, viz. that any person having an interest in the debt may have a subrogation, does not bear such a construction: the true meaning of the section is, that where a creditor is refused payment, a party paying on behalf of the debtor may demand subrogation: that does not apply here. The Insurance Office had no right to subrogation, and the transfer of the debt to them was a mere cession. There is a material distinction between a "*cession ou* [309] *transport*" and a subrogation: the former is a mere sale, Pothier, "*Traité du Contr. de Vente*," 552-554; and he further defines in his treatise "*Des Arrêts et des Executions*," vol. 2, p. 1737, No 66, the nature of subrogation, which he says is a fiction of law, whereby the creditor is held to cede his rights, actions, hypothèques and privileges to him from whom he receives what is due from him. Merlin, "*Rép. de juris*," vol. 16, p. 455-6, points out the same distinction between subrogation and cession transfer. All the authorities regard cases where there is one debt and one right, as of a man paying a debt in which same debt he becomes subrogated. But, in the case here, there are distinct rights, an *ex contractu* debt and an *ex [delicto]* right. The Code Civil, Art. 4, says, the Judge may require that to be done which ought to be done: this shows that the old law of France, the *Coutume de Paris*, did not provide for such a case, and the authority cited from Alauzel does not show that any such law existed. Thus, suppose a case of personal tort: Can a man, bound to support his father, but disabled by an injury done to him, maintain an action by subrogation against the party who disables him from the duty he is bound to perform? Clearly not. Pothier, "*Traité des Obligations*," p. ii. c. 4, s. 1, No. 280-283, treats of particular kinds of obligations with reference to the objects of them, and shows clearly that such an obligation as that just put could not be subrogated, though it might possibly be the subject of cession or transfer. Here the *Acte* which is claimed to be a subrogation, is, on the face of it, but a transfer: it merely assigns the right, and answers exactly to Pothier's definition of "*Cession*," "*Traité du Contrat de Vente*," No. 552. "*Le transport cession contient une vente de la dette qui est transportée*." If it be a sub-[310]-rogation as contradistinguished from a cession or transfer, then there can be no transfer without subrogation, which even the other side do not contend. There is nothing in the face of the instrument in question to show that it is a subrogation: the word itself does not appear in the *Acte*; but even if it had, we submit it would not make the transaction a subrogation; for when, as in this case, a transfer is made by the act of the creditor without the debtor, it is a cession and not a subrogation. * Renusson, "*Traité de la Subrogation*," p. 7, chap. ii. *Sommaire* 13. Guyot, *Rép. de Juris. Voc. "Subrogation"*, p. 412. By the terms of the requisition, the party here who has made the assurance is paying his own debt, not the debt of another, which would entitle him to subrogate: for the draft given in payment by the creditor was anterior in date to the *Acte* of cession or transfer, the payment being on the 19th of July, the *Acte* on the 4th of August. But we insist that by the law prevailing in Lower Canada, no claim, right, or other property in the *fabrique* of the church could be validly ceded or transferred or in any way assigned or alienated by the *curé* and one only of the *marguilliers-en-charge*. This is established by numerous authorities. Durant de Malliane, "*Dict. de Droit Canon*," *Voc. "Aliénation"*, p. 133; Héricourt, "*Lois Eccles.*," chap. iv. p. 243; *Sommaire* xxxvii., and the authority relied on by the other side, Jousse, "*Traité des Paroisses*," p. 124-5-6-7 and 190, all show that for the validity of a cession transport, or other alienation of any such claim, right, or other property of a *fabrique*, the concurrence of all the *marguilliers-en-charge* with the *curé*, after deliberation and authorization taken in the general assembly of the parish, or at least in the assembly of Bureau, [311] or of the *marguilliers*, is absolutely necessary. Jousse (p. 174)

treats them in the nature of a Corporation, and shows their proper legal character, which requires, that all acts and proceedings respecting the *fabrique* of the church should be instituted and carried on "*Par les curé et marguilliers de telle ou telle œuvre et fabrique en nom collectif.*" In p. 163 he says, though they receive by the hands of one, yet it becomes vested in all, one being agent for the rest; and he previously (p. 157) shows, that the *marguilliers en exercice* has defined functions strictly limited to mere administration; and he subsequently shows that the same rules apply to the *curé*, p. 179-181. Durant de Malliane, "*Dict. de Droit Canon,*" *Voc. "Aliénation,"* p. 133. There is besides another objection, which makes this transaction a nullity as regards the subrogation. The transport is not agreed to after deliberation which the general law of France requires, Jousse, pp. 117-124-127. No such assent is either alleged or proved, but by the law as stated by Jousse, no loan or alienation can be made without such concurrence. The acts which the *marguillier* is capable of doing alone are enumerated by Jousse, p. 126-7, but the mortgaging the *fabrique* is not among them. Merlin, "*Rép. de juris,*" *Voc. "Marguillier."* Alauzel, vol. ii. p. 409-11, holds that a person who has been indemnified cannot recover against a wrong-doer: that doctrine is recognised and established by Denizart, *Voc. "Incendie."* Here the cheque was dated the 19th July, 1843, payable 60 days after date. The bill was paid before the 4th of August, when the supposed subrogation was made, but the instrument states that when paid it will be a discharge: but the cheque, we apprehend, was a conditional payment relating back as other conditional payments. [312] Pothier, "*Traité des Obligations,*" No. 220-1. Then lastly the debt is indivisible: Toullier, "*Droit Civil Français,*" lib. iii. tit. iii. cap. iv. No. 750, vol. vi. p. 777; Molineir, *Op. Omn.*, tom. iv. ch. 341-2; "*Dividui et Individui,*" Par. ii. No. 6, 7, are ample authorities for the proof of this. Upon the whole, therefore, we submit, that even if the notarial instrument in question could operate as a cession transport, the Appellants were not entitled to recover in the action, inasmuch as the instrument purported to be a cession transport of £3045. 15s. currency, being part only of the damages sustained by the *fabrique*; and moreover the Appellants were not authorized by the Act of Incorporation to take any such cession transport as that purported to be made to them by the *Acte* or Deed in question. We submit, therefore, that the judgment of the Court of Appeals ought to be sustained and confirmed, and this appeal dismissed, with costs.

Mr. Wood, in reply, was desired by their Lordships to apply himself only to the law of the case, respecting which he commented on the authorities quoted by the Respondents' Counsel, and relied on those he had already cited.

Mr. Baron Parke (Feb. 22, 1851).—This case comes before their Lordships on an appeal from the judgment of the Court of Appeals in Lower Canada, reversing a judgment of the Court of Queen's Bench at Montreal.

Their Lordships regret very much that they have not been furnished with a detailed statement of the reasons which induced the Court of Appeals to pronounce their judgment; such a statement would have [313] been of the greatest assistance to them. They have now to form their opinion on this case, with no other aid than that which they derive from the reasons assigned on the face of the judgment itself, together with the arguments contained in the elaborate *factum* of the Appellants, prepared by their Counsel in the Court of Appeals, and the various authorities with which they have been amply supplied by the industry of the gentlemen who so ably argued the case a few days ago. After the best consideration they have been able to bestow, their Lordships are of opinion, that they ought to advise Her Majesty to reverse the judgment of the Court of Appeals, and to affirm that of the Court of Queen's Bench.

The declaration, which is drawn after the English form, states the Plaintiffs' case [the learned Judge here stated the substance of the declaration and pleas]. The Court of Queen's Bench, after reading the depositions of some witnesses, and the examination of others in open Court, on both sides, pronounced judgment for the Plaintiffs for the amount claimed. Against this judgment there was an appeal to the Court of Appeals, which reversed it on reasons shortly assigned on the face of the judgment itself.

On the argument before us, it was contended that the judgment of the Court of Queen's Bench was right.

First. On the merits, because the weight of evidence was in favour of the Plaintiffs: that the negligence of the Defendant, St. Louis, and for whom the other Defendant, as owner, was responsible, caused the destruction of the church by fire.

Secondly. That the Plaintiffs had a just right to sue for the loss. And

[314] Thirdly. That the declaration was sufficient in point of form.

In the course of the argument their Lordships intimated their opinion, that the judgment of the Court below was satisfactory to them upon the merits. Though it was made one of the grounds of appeal to the Superior Court, that the case was not proved against the Defendants, that Court does not appear to have pronounced a different opinion, nor do we think that we ought to do so.

There is very strong evidence that the sparks proceeding from the funnel of the steam-boat set fire to the hanger or shed belonging to Madame Weillbrenner, and though there is some doubt whether that took place after the steam-boat was moored at the quay, as alleged in the declaration, we think that averment was not material to be proved, and might be rejected, and that the fire is satisfactorily shown to have been communicated by the sparks from the steam-boat at some time. There is no question that, if the fire so originated, the Defendants were responsible, for it is clear that there was no grille on the top of the funnel, and that measure of precaution ought certainly to have been taken, if the light and combustible wood, which is described in the evidence, was used for fuel on board the boat.

If then the *curé* and *fabrique* had brought their action, they could, in our judgment, have recovered against the Defendants.

The question is, whether the Plaintiffs can recover in their right, and on a declaration framed as this is.

The objections to their recovery, as they appear on the judgment of the Court of Appeals, are these:—

[315] First. That the declaration as framed, imported a demand, in the right of the Plaintiffs, as assurees, in which character they had no right of action.

Second. That if it imported a right as assignees of the *fabrique*, the title to sue in that character was not sufficiently alleged, nor did it appear to be made by parties competent to convey: and, lastly, that no subrogation of the Plaintiffs was alleged, or proved on the trial.

In the opinion of their Lordships, the declaration, though not drawn in a very correct form, is substantially good. It discloses a derivative title in the Plaintiffs under the *fabrique*, and claims against the Defendants a definite portion of the damages, which the *fabrique* was entitled to against them, and shows that those damages were sustained by the neglect of the Defendants. The Plaintiffs do not sue in their own right, and the allegation that they have sustained damages by reason of the neglect of the Defendants is surplusage, and totally immaterial. The conclusion, that the non-payment is to the amount of their damages, is sufficient. The first reason for the reversal of the judgment, therefore, fails.

The other objections are more important.

If the title under which the Plaintiffs sue is to be considered merely as an assignment, or cession transport, to them, there are difficulties in the way of the Plaintiffs' recovery, which cannot be surmounted.

The *curé* and *marguilliers* together could not by the French law convey. The consent of the Bureau would be necessary, and a title derived under the *curé* and one *marguillier* would be clearly bad, if indeed the Plaintiffs in their corporate character had a power to acquire such a description of right.

[316] But the Plaintiffs do not so shape their claim, either on the face of the declaration or in proof. They insist that they had a right to be subrogated; that they were duly subrogated, and that an act of subrogation by one who had a power to give a discharge, was valid, though an assignment by him would not be, and that, although subrogated as to part only of the damages in question, they had a right to recover that part in the present action.

We are of opinion that the Plaintiffs are right in all these propositions.

The learned Counsel for the Plaintiffs admit that they did not fall within the description of persons who are subrogated by operation of law, without requisition to or convention with the creditors, nor strictly to the class of co-obligors or sureties,

to whom Pothier "*Contume d'Orléans*," tit. xv., sec. 5 (p. 846), ascribes the right of requiring the creditor, when they pay the debt, for which they are jointly bound or responsible to him, either to subrogate or discharge them. But the learned Counsel contended that an assuree, by a policy against either maritime or terrestrial risks, is clearly within the equity of the rules, and has a similar right to require a subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assurees have that right: they are, Alauzel "*On Assurance*," p. 384, sec. 477; Pardessus "*Cours de Droit Commercial*," 595; Quinault, p. 248; Toullier, tit. 4, sec. 175; Emerigon (English trans., 1850), ch. xii. sec. 14, p. 329-336; and Pothier "*On Assurance*," p. 248, who lays it down, that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the com-[317]-mon benefit, ought to be subrogated to the rights of the assured, to the contribution, which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them; and we do not think that any of these are shown to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada.

Assuming then that it is the old law of France, that an assuree may, on payment, require to be subrogated, two objections remain to be answered.

First. It is said that the act upon which the Plaintiffs rely as a subrogation, was, in form, a cession transport, and could not operate as a subrogation; and, secondly, if it was, that it was not made soon enough, because the Plaintiffs had already paid the amount of the loss absolutely, and so the debt was extinguished, after which a subrogation comes too late, and was void.

The first of these objections was answered, and we think satisfactorily, by the authority of Toullier, tit. 3, art. 117, and art. 128, from which last article it appears, that if the transaction be a subrogation, it is immaterial whether the creditor uses the term subrogation or cession in the instrument itself. To the second objection there is a twofold answer. First, that the payment of the amount of the loss, which, in this case, by virtue of the contract, is indemnity, is not such a payment as extinguishes the debt, as it does in the case of a surety paying the debt of his principal, and, therefore, there might be a subrogation afterwards. Secondly, that the payment did not, in fact, take place before the instrument of subrogation or transfer was executed.

[318] We must give credit to the notarial act of the 4th of August, 1843, as stating the truth, in the absence of evidence to the contrary, that the draft at 60 days, drawn on the 19th of July, 1843, for the claim on the Assurance Company, was handed over in his presence to the *curé* and *marguillier-en-charge*, who executed that instrument, and consequently the transfer took place contemporaneously with the payment. And there was no evidence to the contrary, as the supposed payment of the loss, on the 19th of July, by the draft of that date, was not regularly proved; for, on the further examination of one of the witnesses, who was adduced to prove that fact, he stated he knew it only, because it was placed to the debit of the Plaintiffs with the Quebec Bank.

The next remaining objection is, that the *curé* and one *marguillier* alone could not make a valid subrogation. That they could not cede or assign by way of sale any of the rights of the church, is beyond dispute. The *curé* and all the *marguilliers* must join, and have the consent of the Bureau, to effect a valid transfer of that nature, the principle of the law requiring their sanction for the preservation of the property of the church. But that the *marguillier-en-charge* may give a legal discharge for a debt due to the *fabrique*, actually paid, may be collected from Jousse, "*On the Duties of Marguilliers*," p. 157; and if the money cannot be received except under the equitable obligation of subrogating the assurees (as we have shown that it cannot), we think it follows, that there must be incidentally a power in one, on the request of the Company, to execute the proper instrument of subrogation.

One point alone remains to be disposed of, viz., whether the Plaintiffs who sue as being subrogated to [319] a part of the claim for damages, viz., so much as they were bound to pay and paid on the policy, can sue without joining the *fabrique*, as co-plaintiffs?

It seems to be reasonable that the Defendants, the *quasi* debtors, should not be liable to a double action by reason of the adoption of the equitable principle, that

the assurers have a right to be subrogated. The Defendants, therefore, must have a remedy to prevent that injustice." In Toullier, "*Droit Civile*," tit. 3, art. 120, it is said, that the debtor has a right to require all to be united. But it appears to us to be clear that this defence is not available under either the plea of "Not guilty," or the denial of the truth of all the matters alleged.

Their Lordships, therefore, are of opinion, that they must advise Her Majesty to reverse the judgment of the Court of Appeals, and to affirm that of the Court of Queen's Bench.

[See *Dickenson v. Jardine*, 1868, L.R. 3 C.P. 644; *The Mary Thomas* (1894), P. 108.]

[320] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

CHARLES GREVILLE,—*Appellant*; EDWARD TYLEE,—*Respondent* *

[Feb. 6, 7, and 8, 1851].

By the Statute of Wills, (1 Vict., c. 26, s. 21,) obliterations, interlineations, or other alterations in a Will, after execution, are void, if not affirmed in the margin, or otherwise, by the signature of the Testator, and the attestation of witnesses [7 Moo. P.C. 327].

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the Statute, nor does any presumption arise against a Will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the Will, and that erasure has been superinduced by other writing. In such circumstances, the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence, that the words were inserted before execution, and that they had the sanction of the Testator [7 Moo. P.C. 327, 328].

In the absence of proof, that certain words in a Will, written with a different pen and in a different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such Will, consisting of the inserted words, which constituted a reversionary disposition, pronounced against.

The case of *Cooper v. Bockett*, (4 Moore's P.C. Cases, 419,) considered and approved [7 Moo. P.C. 328].

Where a Will is prepared and written by a medical man in attendance on a Testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the Testatrix's bounty, to the exclusion of her near relations, a Court of Justice, regarding the subsisting relation of a medical man and patient, will view his conduct with the utmost jealousy [7 Moo. P.C. 329, 351].

The rule in pleading "*Qui ponit fatetur*," must be received with some modification. It must be rigidly enforced with respect to every averment made by a party alleging within his own personal knowledge, but the same rule must be applied, less stringently and in some instances rejected, when the party states facts not within his personal knowledge [7 Moo. P.C. 330].

Emma Blaguire, widow, the Testatrix in the cause, by her Will dated the 29th of January, 1847, (but in fact executed on the 30th of that month,) [321] appointed the Respondent, Edward Tylee, and another person, (since deceased,) her executors. The Will, after bequeathing certain specific legacies, proceeded thus:—"And I give the remainder of my property to," the word "to" was struck out with a pen; and

* Present: Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. Thomas Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

then followed these words:—"in the Long Annuities & elsewhere, to Charles Greville, M.D., Bath." From an inspection of the Will it appeared, that this residuary clause was inserted below the sixth line from the top of the first side or page of the Will, partly on an erasure, and partly as an interlineation. The name and description, "Charles Greville, M.D., Bath," was in the Testatrix's handwriting. The rest of the Will, and the interlineations, being in the handwriting of the Appellant, who was the medical adviser of the deceased. The Will was executed by the Testatrix when dangerously ill. The Testatrix died on the 4th of February, 1847.

The executors admitted the validity of the Will generally, but contended, that the words constituting the residuary clause, under which the Appellant was largely benefitted, (the greater part of the Testatrix's property being invested in the Long Annuities,) were not entitled to probate. This clause formed no part of the instructions given by the Testatrix for her Will.

[322] The question upon the appeal was with respect to these words of disposition of the Testatrix's property, whether they were inserted in the Will at the time of her executing it, or afterwards.

The proceedings in the Prerogative Court originated by a decree, issued at the suit of the executors, calling upon the Appellant to propound the above words and names in the residuary clause, or to show cause why probate of the Will, without those words and names, should not be granted to them. The Appellant brought in an allegation and propounded the words:—"In the Long Annuities & elsewhere, to Charles Greville, M.D., Bath," as the residuary legatee named in the Will, as a substantive part thereof. The executors then brought in an allegation, praying that the Court would pronounce against the force and validity of the residuary clause, and decree probate of the Will to be granted to them without such words and names.

Witnesses were examined on both sides, upon these allegations: the nature and effect of their testimony is stated and commented upon in the judgment.

On the 9th of August, 1849, the Judge of the Prerogative Court (Sir Herbert Jenner Fust), by his final interlocutory decree, pronounced against the force and validity of the words and names, "in the Long Annuities & elsewhere, to Charles Greville, M.D., Bath," inserted below the sixth line, from the top of the first side or page of the Will, and decreed the word "to," appearing struck out in the seventh line from the top of the first side of the Will, to be reinstated, and decreed probate of the Will without the words, "in the Long Annuities & elsewhere, to Charles Greville, M.D., Bath," to be granted to the Respon-[323]-dent, the surviving executor, and condemned the Appellant in costs.

Against this decree the present appeal was brought.

The appeal was argued by Mr. Rolt, Q.C., and Dr. Addams, for the Appellant; and Mr. Turner, Q.C., and Dr. Haggard, for the Respondent.

The question submitted by the appeal turned principally upon the evidence of the attesting witnesses, whether the words propounded in the allegation by the Appellant, were inserted at the time of execution or at a subsequent period. The cases of *Knight v. Clements* (8 Adol. and Ell. 215), *Clifford v. Parker* (2 Man. and Gr. 909), *Cooper v. Bockett* (4 Moore's P.C. Cases, 419), and the Statute, 1 Vict., c. 26, s. 21, were cited upon this point.

As to the validity of the bequest to the Appellant, the Testatrix being dangerously ill at the time of the alleged execution, and influenced by the Appellant, her medical attendant and the maker of the Will, who was largely benefitted by it, *Segrave v. Kinsan* (1 Beat. 157), *Bulkley v. Wilford* (2 Clk. and Fin. 102), *Barnesly v. Powell* (1 Ves. Sen. 119, 283), *Allen v. Macpherson* (5 Bea. 469; 1 Phillips. 133; 1 H.L. Cases, 191), *Barry v. Butlin* (2 Moore's P.C. Cases, 480), and "*Code Civil*," Liv. III., tit. 2, s. 909, were referred to.

[324] The case stood over for judgment, which was afterwards delivered by

The Right Hon. Dr. Lushington (24th June, 1851).—This is an appeal from the Prerogative Court of Canterbury. The Testatrix is Emma Blaguire, widow, who died on the 4th of February, 1847. The Will, respecting a part of which the present suit arose, is dated the 29th of January, 1847. The question between the parties is, as to whether certain words should be admitted to probate or not? The parties are: Dr. Greville propounding the words, the Executors opposing. The

disputed words are, "in the Long Annuities and elsewhere, to Charles Greville, M.D., Bath." The Court below has, by its decree in August, 1849, rejected these words, without which the residuary clause is inoperative. Dr. Greville has appealed.

Though the deceased died on the 4th of February, 1847, no proceedings were had by either party till the 11th of July, 1847, when the executors called upon Dr. Greville to propound these words, if he thought fit, otherwise to show cause why probate should not be granted without them.

It was competent to either party to have instituted proceedings for the purpose of having this question decided immediately after the death of the Testatrix. No reason appears why this was not done; the consequence is, that in a case where much may depend upon the accuracy of witnesses speaking to circumstances in detail, the first of the witnesses was not examined till December, 1847, ten months after the death of the Testatrix and the transaction respecting which [325] they were to give evidence. If this evidence be not given with the precision it might have been, if taken at an earlier period; if either party suffer from this course, it must be remembered this evil is attributable to their own laches.

In order to understand clearly the proceedings and evidence in this suit, it may be well to look first at the paper itself; to consider its present appearance, and the legal results arising from its state and condition.

It is admitted that the Will is in the handwriting of Dr. Greville, except the words "Charles Greville, M.D., Bath," at the close of the residuary clause, which it is admitted are in the handwriting of the Testatrix.

Dr. Greville has examined Mr. Netherclift as to the state of this paper, and he, being a lithographic artist of experience, is competent to perceive more accurately than a common observer, what the state and condition is. Mr. Netherclift states, "That the said writer appears to have written the said Will with a quill pen, from the beginning to the word 'to,' now struck through with ink." That the word "to" is struck through, is apparent. He then deposes to his belief that the remainder of the first page of the Will, and from the name "Mary Tylee," on the second side, down to the name of "Mrs. Burgess," was written with a quill pen, but that the amounts and figures, and the whole of the rest of the Will (except the abbreviation and words "& elsewhere to"), appear to have been written with a steel or metal pen. He says, the writer appears to have adopted a steel pen in the course of writing the second page, and to have written the words "Long Annuities to" with such pen. This word "to" appears to have been erased. He concludes his evidence in chief, by saying, "With regard to the abbreviations and words ' & elsewhere to ' the same appear to have been written after the insertion of the words 'Charles Greville,' and to have been so written as an after consideration; they appear to me to have been written with a quill pen, and paler ink, than the aforesaid words, 'in the Long Annuities.'"

We are not now comparing this evidence with Dr. Greville's allegation; we are only looking to this evidence as a description of the state of the Will; such description of it as any of us would give, if we could view it with the same accuracy and power of discrimination as Mr. Netherclift.

The result, according to this evidence, is, that the body of the Will, speaking generally, was written with a quill pen; the words "in the Long Annuities," subsequently, with a metal pen; the words "& elsewhere to" subsequently, to the words "Charles Greville," with a quill pen.

Now, if this be so, the first consequence which might probably follow is, that as the words "in the Long Annuities" and the words "& elsewhere to" were written with different pens and different ink, they were not part of one and the same continuous act, or done at the same time. Secondly, that as the words "& elsewhere to" were written after the words "Charles Greville," the writing that name by the Testatrix gives no sanction or authority to them. Whatever may be the effect of this evidence, Dr. Greville cannot repudiate it, for he has produced Mr. Netherclift as his witness, and that, too, when Mr. Netherclift had previously inspected the paper in the registry, and made *fac similes* thereof: indeed, Mr. Tylee had previously shown the Will to him. On the third interrogatory, [327] Mr. Netherclift deposes, as in truth he had before deposed, that the word "to" had been erased, and

a part of the " & elsewhere " written thereon, and further, that the erasure had been done with a knife.

Bearing these circumstances in mind, we will now consider what effect is to be attributed to them with reference to the Statute of Wills, 1 Vict., c. 26, and the 21st section of that Statute. That section relates to obliteration, interlineation, or other alteration in the Will after execution: all such are void, if not affirmed in the margin, or otherwise, by the signature of the Testator, and attestation of witnesses.

It will be recollected that these words of the Statute apply only to acts done after the execution of the Will. But how is this to be ascertained, whether such acts appearing on the face of the Will were done before or after the execution? On whom is the *onus probandi* thrown, and under what circumstances?

It is not a mere difference of ink or handwriting, which would constitute any of the acts done according to the true meaning of the Statute. The mere circumstance of the amount or name of the legatee, inserted in a different handwriting and in different ink, would not alone constitute an obliteration, interlineation, or other alteration. Blanks may be supplied, and in a different ink, because the Will may very probably be brought with blanks to the Testator, and then filled up: no presumption could arise in such a case against the Will having been executed as it appears.

But the case is different when there is an erasure apparent on the face of the Will, and when that erasure has been superinduced by other writing. In such a case there is an obliteration and something more, [328] which constitutes an alteration, and then the question arises, whether this was done before the execution of the Will or not? We apprehend it to be now settled, that whoever alleges such alteration to have been done before the execution of the Will, is bound to take upon himself the *onus probandi*, *Cooper v. Bockett* (4 Moore's P.C. Cases, 419), followed and approved of by Lord Cranworth, in *Simmons v. Rudall* (1 Sim., N.S. 137).

It has been argued that this rule applies only to the words erased, and the words superinduced, and that it does not apply to the preceding words of the sentence, viz., the words " in the Long Annuities;" and it is true, that if this case was to be decided with reference to the Statute only, the mere fact of the words " in the Long Annuities " being in different ink, would not constitute an obliteration, interlineation, or alteration, within the meaning of the 21st section, and, consequently, the *onus probandi*, with reference to the Statute, would not be thrown upon the party propounding; but there is another question in this case, which would have arisen if the Statute never had passed; namely, to what words and what bequest the Testatrix intended to give effect, by inserting the words " Charles Greville, M.D., Bath;" of what did she know and approve of, when she executed the Will. To try this question properly, we think that the case cannot be so divided; it must necessarily be taken as a whole: and, consequently, finding an alteration made after the signature of the Testatrix, and that the words preceding, " in the Long Annuities," were written with a different pen and at a different time from the body of the Will, we must inquire whether they had the approval and [329] authentication of the Testatrix with reference to all the facts.

With regard to the fulfilment of the requisites of the Statute, the first proof is the evidence of the attesting witnesses; but the fact that the words in question were in the instrument prior to the execution, may be proved by any other legal evidence.

Hitherto we have spoken chiefly of the requisites of the Statute, but there are other principles which ought never to be lost sight of, in this or any other similar case. Dr. Greville, who insists upon the validity of this residuary clause, and claims to be entitled to about £4000 out of the £5000 of which the deceased died possessed, is the writer of the Will; he was the physician of the deceased, at that time in attendance upon her, who (though her capacity is not denied) was, at the period of making this Will, suffering under a complication of disorders, which terminated her life within six days. After its date we think that the principles applicable to the case of a person "*qui se scripsit haeredem*," apply here, and that according to the doctrine laid down in *Barry v. Butlin*, (2 Moore's P.C. Cases, 480,) under circumstances like these, the *onus* of proving that the deceased knew the act she was doing, must fall upon the party benefited; he must prove that the Testatrix

knew and understood the act to which validity is to be ascribed; whether it be the whole residuary clause, or only the first member, viz., "in the Long Annuities."

It may be, that sometimes the application of the principles which must govern in all cases when the writer of the Will is the person benefited, and when also the relation of physician and patient subsists, may bear hard in an individual instance; but however that [330] may be, they are principles which we are bound to observe for the protection of all, against fraud and the exercise of undue influence.

We next proceed to examine the allegation given in by Dr. Greville; but before we apply ourselves to the consideration of its contents, it may be well to state some of the rules applicable to allegations generally, but especially in this case. One of these leading rules is, "*Qui ponit fatetur*," or in other words, that whoever avers a fact as true, cannot afterwards deny it; it must be taken as true against the person who alleges it: but this rule must be taken with some modification. It must be rigidly enforced with respect to every averment made by the party alleging within his own personal knowledge, but the same rule must be applied less stringently, and in some instances rejected, when the party states facts not within his personal knowledge, as to which he has not the means of acquiring correct information. Again, it is not incumbent on a party to prove his whole allegation, but only so much as is essential to support this case; but the facts essential to the case must be proved, and the Court cannot, because a part is proved, assume the rest, provided that rest be essential: what is or is not essential, depends upon each case.

We now come to Dr. Greville's allegation. The first article states the acquaintance of Dr. Greville with the Testatrix for more than ten years, her regard and affection for him, her desire to live in the same house with him, his medical attendance, and her gratitude. Without detailing the evidence produced to prove this article, we will assume it to be proved.

The second article pleads, that the Testatrix kept up [331] but little intercourse with her relations; that she took no interest in their welfare; said they were well off, and that she did not mean to leave them any of her property; that she sometimes said she would leave it to those who were kind to her; at other times, that she would leave it wholly, or in part, to Dr. Greville; that she expressed herself to that or the like effect, to the witnesses Jane Knight and Emily Knight, shortly before her death.

We must see the evidence on this article, and consider its probable effect on the main question in the cause.

Upon this second article, Mr. Watts, a chemist at Bath, deposes, "the deceased spoke to me of 'her brother' and her 'relations'; she never said anything to me against her brother, but used a remark to me, that he was well off, and that he did not want anything, but of her other relations she spoke as if she hated them. I have heard her say of them that they did not care for her, and that they should not have her money. She repeatedly gave me to understand, that she meant Dr. Greville, at her death, to have all she possessed; I forget her words, but she spoke so often and so decidedly to me to that effect, that I advised Dr. Greville to take care, and see that she made her Will. Some declarations, though not so strong, were made to the witness, Maria Bedgood, by the Testatrix.

Emily Knight, who saw the deceased during the latter part of her life (in 1846), deposes to similar declarations made by the Testatrix, as to her relations; that "she should leave her property to those who were most kind to her, and also to Dr. Greville." The witness understood her to say, that, "after the legacies were [332] paid to the legatees, she meant Dr. Greville should have the rest of her property, because he had been most kind to her, and her greatest friend." Mrs. Knight, the mother of this witness, deposes nearly to the same effect.

In addition to this evidence, the script No. 4, and which is in these words: "Bath, April 22, 1842.—Sir, Please, to pay at my death all the money you have in your hands of mine to Charles Greville, Widower, of the parish of Walcot, City of Bath, County Somerset. Emily Blaguire. (Addressed) John Fawkener, Esq., Solicitor, 8, Gray's Inn Square," may be referred to; from which it appears, that so early as April, 1842, the Testatrix intended to confer a benefit upon Dr. Greville at her death; she here directs her solicitor, Mr. Fawkener, to give all the money he had in his hands of hers, at her death, to Dr. Greville.

Without at present referring to the evidence given by Mrs. Barnes, who is produced by the executors, the result of the evidence adduced by Dr. Greville is, that the Testatrix entertained a very great regard and affection for him, that she made declarations of her intention not to benefit her relations, but, after giving some legacies, to bequeath to him the whole or greater part of her property.

The sixth, seventh and eighth articles of the allegation given in on behalf of Dr. Greville, relate to what is called the *factum* of the Will. It is necessary, however, to premise, that the Testatrix had been residing, since the autumn of 1846, at the house of Miss Mechi, near Notting Hill, and that her illness becoming very serious, she sent for Dr. Greville, from Bath, to attend her; that he arrived on the 28th of January, and on [333] the 30th accompanied her back to Bath. The Will in question, though dated January 29th, was executed on the 30th.

As the next question for inquiry is, whether it be proved that the words in the residuary clause, "in the Long Annuities and elsewhere to" were inserted in the Will prior to the execution, it will not be necessary, in this branch of the inquiry, to go into a very minute detail.

The sixth article pleads, that Mrs. Barnes, on the 29th (that is, the 30th) of January, gave to Dr. Greville the script No. 1, and requested him, as from the Testatrix, to write out or prepare a Will for her, pursuant thereto, and which he proceeded to do partly from the script and partly from the dictation of Mrs. Barnes, both by reading to him the script, which he had some difficulty in deciphering, and otherwise. That in writing the Will, he was in part verbally instructed by the Testatrix, who was in an adjoining room, and to whom he referred for that purpose, to wit, as to her executors, whom she named, as to some specific legacies, and as to the blank opposite his own name, which she desired should be so left.

On this article, Miss Mechi has been examined: the first part of her evidence relates to what occurred on the day preceding the execution of the Will; it is comparatively of little importance, so we proceed to her statement of what occurred on the next day. After detailing what was done by Miss Fawkener (now Mrs. Barnes) and Dr. Greville, in the absence of the Testatrix, she, the Testatrix, said, when she was dressed, "Tell Dr. Greville he may come in now; I told him so, and he came into the front parlour, without Mrs. Barnes, and remained with the deceased for a minute or [334] two. During that minute or two the deceased wrote a name on the paper which Dr. Greville brought with him into the front parlour; that was all that passed. I remained present during the time; nothing was then said to or by the deceased, about her executors or about any legacy, or about any blank opposite to Dr. Greville's name, in her Will. I am quite certain that not one word then passed between the deceased and Dr. Greville about anything of the kind." This witness afterwards states, that Dr. Greville did not see the deceased again, till half an hour after, when the Will was executed.

It is perfectly obvious, that Miss Mechi, instead of proving by her evidence the main facts pleaded in the sixth article, negatives them. Baldwin, a girl at the age of thirteen, when examined, is designed to this article, but her evidence is of no weight. The article, so far as the evidence of the witnesses produced on behalf of Dr. Greville extends, is, as to the principal averments contained in it, unproved.

The seventh article of this allegation contains averments of the greatest importance to the decision of this cause. It does not admit of abbreviation. It is as follows:—"That the Will of the said Testatrix having been so in part written out by the said Charles Greville, as aforesaid, was by him taken to the said Testatrix, then in the next room, as aforesaid, and at which time the seventh line of the first side of the said Will terminated with (or rather consisted of) the word 'to' (now struck through), and without the two first legacies now appearing on the second side of the same. That the said Testatrix then with her own hand wrote the names, initials, and word herein (with others) propounded, to wit, 'Charles Greville, M.D., Bath,' now appearing [335] on the first side of the said Will, the said Charles Greville having first, at her suggestion, in consequence of it occurring to her, or of her remarking, that she had property in the Long Annuities, struck through the word 'to,' theretofore constituting the seventh line of the first side of the said Will, as aforesaid, and adding the words 'in the Long Annuities to,' the four first words being four of the words herein propounded; the said Testatrix, in or whilst so

writing the said names, initials, and word, saying or declaring that the insertion of his, the said Charles Greville's, name, as a specific legatee (intended) had so been by her directions, in order to veil or conceal her intention of making him her residuary legatee, or to that very effect. Also that at such time, by the direction of her, the Testatrix, the said Charles Greville put in or inserted the two first of the (specific) legacies, now on the second side of the said Will; and in consequence of a further remark of the said Testatrix, that she had other property than that in the Long Annuities, at her suggestion partly erased the word 'to' then standing after and in a line with the words 'Long Annuities,' and adding thereto the abbreviation and word 'and elsewhere,' being the fifth and sixth words herein propounded, such being done after the said Testatrix had written the aforesaid names, initials and word, 'Charles Greville, M.D., Bath,' the said Charles Greville, after the same had been so written by the said Testatrix, himself writing the word 'to' now appearing in a line with the names Charles Greville just under the seventh line of the said Will. And this was and is true, public and notorious, and the party Proponent alleges and propounds as before."

Miss Mechi is examined upon this article, and upon [336] the eighth, in conjunction with it. It is by no means convenient that the examiner should, of his own authority, take upon himself so to unite the articles: we must of necessity, in order to ascertain the truth of the case, and do justice, separate the evidence, and determine how each part of it applies to each article; the strength of this observation will be very apparent when we come to scrutinize the evidence.

The sixth article applies to facts antecedent to those pleaded in the seventh, to a prior interview with the Testatrix, and to instructions received from her, prior to the facts pleaded in the seventh.

We must now direct our attention to the evidence of Miss Mechi.

The sixth and seventh articles speak of two separate interviews. Miss Mechi speaks of one only, and that one, not the transaction pleaded in the sixth, but the transaction pleaded in the seventh article; and, in truth, her evidence on the sixth article applies to the seventh only. Miss Mechi does prove, that at this interview the Testatrix did, as she calls it, sign the paper. Sign the paper in the usual meaning of the term she did not, but she wrote upon it, according to the evidence of Miss Mechi, and the only words she could have written are, "Charles Greville, M.D., Bath." Notwithstanding the use of the ambiguous expression "sign," we have no doubt that the Testatrix did on this occasion write these words, "Charles Greville, M.D., Bath;" but here all proof ends. All the rest of this seventh article is left wholly unproved by the testimony of this witness: the state and condition of the paper, the alterations said to have been made, are all without a shadow of proof from the evidence of Miss Mechi. True it is, that an interview [337] between Dr. Greville and the Testatrix is proved, and that the deceased wrote on the paper, but nothing more. No other witness is examined upon this seventh article.

The eighth article pleads, that after the insertion of the words propounded, viz., "in the Long Annuities and elsewhere to Charles Greville, M.D., Bath," the Will, after having been read over to her by Charles Greville, was duly executed by the Testatrix. If this article be satisfactorily proved, the words propounded must be pronounced for. The Testatrix was of sound mind; and if the Will as it now stands, with her own signature after the residuary clause, was read over to her, and she executed it, then the ordinary presumption of law is, that she intended to give effect to what was therein written, and the exigencies of the Statute are satisfied; but in a case like the present, considering the will to be in the state represented by Mr. Netherclift, their Lordships must be satisfied by extrinsic evidence that the words in question were in the Will at the time of execution, and were known to her to be there.

Miss Mechi says, the Testatrix signed the Will in the presence of Mrs. Clark and her servant, and so did Mrs. Clark; but her servant being unable to write, Mrs. Pugh was sent for; the witness says, that "there were some legacies, two, I think, added to the Will;" that was, while Mrs. Clark was in the room and before Mrs. Pugh came. According to the plea of Dr. Greville, this had been done previously as pleaded in the seventh article. Miss Mechi cannot be certain whether this was before or after the deceased signed the Will. After Mrs. Pugh's arrival,

the Testatrix declared the paper to be her Will. Mrs. Pugh signed it, and then Mrs. Clark. Miss Mechi states, that the Will [338] was not read over to or by the deceased in her presence. Whether the words propounded were in the Will or not, this witness gives no evidence, but she deposes to the fact of the words, "Charles Greville, M.D., Bath," being there.

The result of the evidence of Miss Mechi, is, that she proves the act of execution and no more; she does not prove reading over, knowledge of contents, or that all the words propounded were in the Will.

Mrs. Clark, one of the attesting witnesses, says, Dr. Greville "read over to the deceased, from the Will, the names of the persons to whom she had given legacies in the Will, and the deceased told him of two other legacies to be put into the Will (this confirms Miss Mechi), and I saw him put them into the Will at the top of the second page;" she then proves the execution. Upon the thirteenth interrogatory, she is examined to a very important part of the case, the reading over and the existence at the time of the execution, of the words propounded, but she cannot swear to the reading over of the whole; indeed she thinks that all of it certainly was not read over in her presence; nor can she speak to the words propounded.

Mrs. Pugh proves the execution, but not the reading over, or the existence of the words in question.

Then what has been proved by the witnesses in support of the plea?—the execution of the paper, and that it contained the words "Charles Greville, M.D., Bath;" but it is not proved by any affirmative evidence, that the words propounded were inserted prior to the execution.

What the law may be upon this state of facts we will postpone considering, until we have referred to [339] the evidence produced on the part of the executors; we mean the evidence applying to the making of the Will, and the words propounded. On this part of the case, the executors have examined Mrs. Barnes and Miss Mechi.

With respect to the evidence of Mrs. Barnes, however important it may be, with a view to other questions raised in this case, it will not be found to have any stringent bearing upon the points we have been particularly discussing, namely, the execution of the Will, and the insertion of the words propounded prior to the execution.

Mrs. Barnes, after detailing many particulars as to the writing testamentary papers, and as to Dr. Greville undertaking to make the Will on the 30th of January, on her declining, states, that being with Dr. Greville, in the back room, and having detailed to him the list of names and legacies in script No. 1, and read the script C, Dr. Greville said, when she came to the part, as to the division of the trinkets, "Oh! that is very indefinite, I had better go in and ask her;" that he did so, and remained with her two or three minutes, when he returned, and said the trinkets were not to be mentioned, that she would give them to her brother to be distributed to her friends, or dispose of them in her lifetime. This witness never saw the Will at all, so as to see its contents; she was not present at the execution: so far as she knew anything of the Will, there was no residuary clause, excepting that contained in script C, which she swears she dictated to Dr. Greville, and believes he wrote it down. The first notice she had of the residue being left to Dr. Greville was from himself, some short time after the execution of the Will.

[340] It is clear that her evidence does not in any degree prove knowledge of the contents by the Testatrix, or that the words propounded were inserted prior to the execution. The declaration of Dr. Greville can hardly be received as evidence to prove the fact, though it is entitled to consideration, to show that he did not wish to conceal what he had asserted had been done.

Miss Mechi has been examined on this allegation also. There is little new to be found in her evidence. In her examination on the eleventh article, she swears, that when the deceased signed her name on the Will (she must mean write Dr. Greville's name, though probably the witness thought it was her own), no conversation took place as to the trinkets; that she is sure.

There are circumstances pleaded and proved on the part of the executors, which it is proper to notice, partly, indeed, for the purpose of endeavouring to discover what were the intentions of the deceased.

It is pleaded in the seventh article of the allegation given in on the part of the executors, that on or about the 27th of January, Mrs. Barnes, by the instructions of the deceased, wrote the script marked C; that about the same time, in consequence of similar instructions, she wrote the script marked No. 1.

In the tenth article, it is pleaded, that when Mrs. Barnes was with Dr. Greville, and he was writing the Will in the back room, she read to him the substance of the script C, and that he appeared to write the same down.

The facts pleaded in the eleventh article are very important: it is alleged, that in reference to that part of script C which directed the trinkets to be divided amongst her young friends, Dr. Greville said, the term [341] young friends was indefinite, and took the Will into the room where the deceased was, to consult her about it; that he returned, and brought back an answer from the deceased, that she did not wish them to be mentioned in the Will: that she would dispose of them in her lifetime, or send them to her brother to give away.

Script C is produced: it does mention the trinkets, it does name the executors, and it does dispose of the residue.

We will first consider the proof of those averments and then the inferences to be drawn.

Mrs. Barnes is the witness to whom we must refer. It is true that her evidence does show a disposition not favourable to Dr. Greville, and where matter of opinion was alone concerned it must be our duty to watch such evidence with vigilance; but we see no reason to distrust her veracity when she is deposing to facts within her own knowledge. Her evidence on the seventh article is to the following effect:—that two or three days before January 30th, she wrote, from the dictation of the deceased, the paper marked C, word by word; that the deceased signed it at once, and took possession of it; that it referred to a list of legatees previously written: it was meant to answer instead of a Will, in case she should die without making a Will; it was addressed to Richard White, Esquire, the brother of the deceased, by the deceased herself. The witness then speaks as to the script No. 1. She says, she wrote it about a week before the Testatrix left Notting Hill. A nought is put down in the list opposite to Dr. Greville's name, because the deceased wished the question, as to what he was to have, to be left open. In a former list of names written by Mrs. Barnes, when the Testatrix was at her father's house, £100 had been [342] written down as the legacy for Dr. Greville. The deceased had the former list of names when she dictated the script No. 1: she said £100 was not sufficient. Mrs. Barnes said, shall I put in £300 or £500? You had better put something definite. She replied, no, that would be too much; I will leave it open. Papers C and No. 1 were to be given to her brother, Mr. White, as containing her Will, if she did not make another, and the Testatrix expressed her confidence that he would carry her wishes into effect.

According to the evidence of Mrs. Barnes, nothing was done to complete the Will till the 30th; what passed in the intermediate time is not of much importance.

Saturday, the 30th, is the day of the execution of the Will; and on the eighth article, Mrs. Barnes deposes to the transactions of that day; first, that the deceased gave her the papers C and No. 1, and desired her to make her Will; that she declined, and that Dr. Greville took the papers, and walked with them into the next room to make the Will. On the ninth article, Mrs. Barnes states, that the deceased desired her to follow Dr. Greville, saying, "Now mind he only writes what you dictate to him." If Mrs. Barnes be correct in all the evidence that she has given upon this article, it would certainly follow, that the Testatrix had a distrust of Dr. Greville; but supposing the fact to be so, we do not think that her suspicions alone could form any just ground for imputation against Dr. Greville; and we advert to the fact, not on that account, but as an important part of Mrs. Barnes' narrative, and accounting for the conduct which she swears she pursued: she states that, according to what the Testatrix had said, she followed [343] Dr. Greville into the back room; that she took both the scripts, C and No. 1, and dictated to him the names in No. 1; that when she came to Dr. Greville's name, he said, "Oh! I wont write down my own name at all." She said, "You must; I formerly put £100 for you; the deceased said it was not sufficient." He said, "I should think not: for she has never paid me for my attendance or trouble."

Mrs. Barnes's evidence on the tenth article is very important. She says, that after having dictated the names from list No. 1, she dictated the very words of paper C, in regard to the appointment of executors, and the disposition of the residue. She thought that Dr. Greville had written it all down.

On the eleventh article Mrs. Barnes states, that she read the script C, to Dr. Greville: that when she came to the part relating to the trinkets, Dr. Greville said, it was indefinite, and went to ask the deceased, and returned with an answer that they were not to be mentioned in the Will.

In setting forth the evidence of Mrs. Barnes, we have confined ourselves to that part of it which contains the statement of facts, as to making the Will, abstaining from noticing any observations or descriptions to be found in the evidence, and which might be construed to reflect upon Dr. Greville. We think that Mrs. Barnes may be trusted as to the statement of facts, and looking at the imputation made against her, in the argument at the bar, of bias against Dr. Greville, we abstain from noticing anything which would reasonably be the effect of such bias.

The facts are very important; first, they prove that the Testatrix, three or four days before making the [344] Will, had no intention to give the residue to Dr. Greville, but intended a different disposition; second, that she did intend to confer upon him a legacy, but deemed £300 or £500 too much; third, that, on the very morning the Will was executed, she gave, as instructions for making it, scripts No. 1 and C, in conformity with what has been above stated.

But Dr. Greville's case is, that there was no script C at all. He does not notice it in his pleading; he ignores its existence altogether, so far as his own knowledge extends. However this may be, we cannot doubt the fact, that the Testatrix gave Mrs. Barnes script C, as part instructions for her Will, and according to Dr. Greville's own statement he did not notice or adopt it. If so, it necessarily follows, that a Will was prepared for the deceased not in conformity with her instructions; with instructions given on the very day of execution, signed by the Testatrix herself, three or four days before, to operate as a Will if she did not make another.

Upon this evidence two questions seem to us to arise:

First. Has Dr. Greville proved that the words in dispute, or any part of them, were in the Will at the time when the Testatrix executed it?

Secondly. Has he proved that those words were known and intended by the Testatrix to form part of the Will at that time?

Look first at the case as stated by Dr. Greville himself in his allegation. He is speaking to facts within his own knowledge; in truth, in a great degree, of his own acts, of matters in which he has the deepest interest, which took place within a twelvemonth previous to the time at which he gives in the allegation, [345] and with respect to which, therefore, there is no excuse for any inaccuracy.

Now his statement is, that he originally wrote out the Will with his own name appearing amongst those of the other pecuniary legatees; but with no sum of money or other bequest set against it, and with a residuary clause in these words: — "I give the remainder of my property to," with a blank for the names of the residuary legatee or legatees, and that he took the paper in this state to the Testatrix who was in the adjoining room.

According to the paper so prepared, it would seem that Dr. Greville was intended to be a pecuniary legatee, and that the Testatrix had not decided, or at least had not communicated to Dr. Greville, who was to be her residuary legatee.

It is very difficult to suppose that at this time Dr. Greville could imagine that his was the name to be introduced into the residuary clause; yet if such intention had not been previously declared by the Testatrix, when was it expressed? It would seem, from the allegation (article seven), that it was only expressed at the time when the Testatrix inserted Dr. Greville's name.

But Miss Mechi, the only witness to what passed at this time, most distinctly contradicts any such expression of intention. In her deposition to the seventh and eighth articles, she states, as to Dr. Greville at this interview: "He did not sit down, he merely put the paper before the deceased, and put the pen in her hand, and asked her to sign the paper, and she did so accordingly, and then Dr. Greville walked out of the room again directly; that was all that passed." She then says, that he pointed out the place where the Testatrix was to sign, repeating the [346] words, "Just here," more than once. In her answer to the eighth interrogatory,

she gives the same account of the transaction, and adds, that the Testatrix "immediately signed something in the place pointed out, without making any observation, and immediately that she had done so, Dr. Greville left the parlour and returned into the little back room, where Miss Fawkener was, taking the said Will with him."

It is clear, therefore, that no intention of making Dr. Greville residuary legatee was expressed at this time. The silence of Dr. Greville, as to any previous communication of such intention of the nature of the paper which he prepared, shows that none such had been previously expressed to him.

But if such intention existed at the time, the mode of carrying it into effect was perfectly obvious. Nothing was necessary to be done but to add the name of Dr. Greville, after the words already written, "I give the remainder of my property to;" and Dr. Greville, according to the evidence of Miss Mechi, was very particular in pointing out the exact spot where his name was to be written, and would naturally have taken care that it followed immediately after the word "to," and without any interval.

Instead, however, of this simple and obvious course being pursued, we find the name of Dr. Greville written at a considerable distance from the termination of the residuary clause, as it originally stood, and two alterations made in that clause. These alterations are proved to have been written with a different pen and different ink from each other, and one of them upon an erasure. The presumption, therefore, is, that they were made at different times.

Now, these two alterations are most important. We [347] will consider them in their order, and the inferences which result from the paper itself, coupled with the evidence, and afterwards consider Dr. Greville's explanation. First, the word "to" following the words "remainder of my property," is struck out, and the words, "in the Long Annuities," are added, so that the gift is cut down from a gift of the whole residue, to a gift of the Long Annuities which the Testatrix might possess. When this was done, does not appear; the period of introducing these words was not that at which Dr. Greville's name was inserted, according to the evidence of Miss Mechi; nor does Dr. Greville even suggest any intention to make such limited bequest to him.

Yet thus the Will certainly stood for some period, how long does not appear; and as to its restrictive operation, nobody could entertain a doubt. Supposing the paper in its present state to be the genuine Will of the deceased, she again altered her intentions in the short interval which elapsed between the insertion of the words last referred to and the execution of the instrument; and having previously determined not to give the general residue to Dr. Greville, was now determined to give it to him, and to restore the clause to its original effect: and for this purpose she caused the word "to" following the words, "Long Annuities," not to be struck through with a pen, as the former word "to" had been, but to be carefully erased with a knife, and the words "& elsewhere to" to be added. Now, when could this have been done? Not on the occasion when the words "in the Long Annuities" were introduced; not at the time when Miss Mechi speaks to the introduction of Dr. Greville's [348] name; not at the time of the execution of this Will, for nothing of the kind is alleged by Dr. Greville to have then taken place, and the witnesses present at the time, who speak to the insertion at that period of two additional legacies to other persons, say nothing of this.

Now, what is Dr. Greville's account of this extraordinary state of things? He says, that the Testatrix intended to give him the residue, but desired that his name should remain in the list of pecuniary legatees; that he altered the bequest, from a bequest of the remainder of her property, to a bequest of the remainder of her property in the Long Annuities, at her suggestion, in consequence of her remarking that she had property in the Long Annuities.

Now, is it to be believed that any person of common sense, however inattentive to, or regardless of, his own interest, could have done this?—the effect of the alteration would not have escaped him: but he gives himself a part instead of the whole of the property, not because the Testatrix intended that he should take only a part, but because she mentioned the Long Annuities, as belonging to her. He then says, that at the same interview, after his name had been inserted by the Testatrix, he

introduced the words, " & elsewhere to," in consequence of her suggesting that she had other property besides the Long Annuities: this latter alteration being made, according to Dr. Greville's allegation, after the two additional legacies found in the Will had been inserted.

Now, we must say that this account appears to us quite incredible; and it is contradicted both by the appearance of the paper, the evidence of Miss Mechi, [349] and the evidence of the persons present, when the two additional legacies referred to were introduced; and it is utterly unsupported by any evidence whatever.

Is it possible, in this state of things, to say that probate should have been granted to the residuary clause as it stands?

But it is then said, at all events the deceased intended to give Dr. Greville the Long Annuities: those words were inserted before the execution of this instrument, and the Court cannot withhold from Dr. Greville that part of which he has proved the bequest, because he has failed in proof of the remainder, nor can it refuse to give effect to the genuine portion of the clause, even if it should hold that an addition had been fraudulently made to it by Dr. Greville.

We agree to these as general propositions, but Dr. Greville's case must be judged according to his own allegation of the facts, which are all within his own knowledge, and the evidence by which he has supported it. He has called his opponents to meet a case, not of specific bequest, but of general residue; he never set up any case of an intention to give a part as distinct from the residue. The whole clause, according to his statement, was inserted at the same interview and for the same purpose, and we have already stated our clear opinion, that this case is not only not proved, but is clearly disproved, by the evidence.

But if he had alleged an intention to give the Long Annuities, and a subsequent intention to enlarge the gift by extending it to the residue, in such a state of the record what evidence should we have had *dehors* of the Will, that the Testatrix knew that the instru-[350]-ment contained any such bequest of the Long Annuities? Proof which, for the reasons already assigned, we hold to be, in this case, necessary.

We are aware, of course, if it was the intention of the Testatrix to give him the Long Annuities, the natural mode of doing it would have been for her to write those words opposite to Dr. Greville's name, in the blank left in the list of legatees, and to fill up with some other name the blank in the residuary clause. It would be a singular way of making a gift of the Long Annuities, for the Testatrix to give the remainder of her property in them, having previously made no bequest out of them, and at the same time to leave her general residue undisposed of; her attention at the time being called to the residue.

How, then, are we to be satisfied by any extrinsic evidence, that the Will, at the time of its execution, was, with the knowledge of the Testatrix, in the state in which, according to this hypothesis it must have been, when there is no evidence of it, nor as we think much probability in its favour, and against the positive allegation of Dr. Greville, the facts being within his own knowledge?

It is quite true, that the insertion of Dr. Greville's name in the Will shows that the Testatrix meant to give him something; but how does it prove that she meant to give him the Long Annuities, or the remainder of the Long Annuities, which means a part after something has been taken away, unless the subject of the gift had been shown to have been in the Will when the name was inserted?

If we were to allow ourselves to conjecture what the Testatrix intended, we might think it not impro-[351]-bable that her intentions were that which Miss Mechi says she had often expressed, viz., that the Long Annuities, which were her savings, should go amongst her friends, as distinguished from her relations, and it is possible that she may have meant, that after payment of her pecuniary legacies, perhaps of debts and funeral charges, the remainder of her Long Annuities should be given to Dr. Greville; but this is mere conjecture.

All that appears to us to be clear upon legal evidence, is, that the Testatrix intended Dr. Greville to be an object of her bounty, and inserted his name for that purpose, but that the Will did not contain at the time of its execution the bequest in favour of Dr. Greville, for which he contends, and that there is no evidence to satisfy us of what it did contain.

The result is, that the judgment complained of must be affirmed, with costs.

There can be little doubt that Dr. Greville has failed to derive from the Testatrix's Will benefits which, of some kind, and of some amount, she really intended him to take. But he has nobody but himself to blame. If a physician, after a long attendance on a patient, thinks fit, when she is almost upon her death-bed, to prepare and procure the execution of a Will, by which he becomes the principal object of her bounty, to the exclusion of her near relations, and to do this without the intervention of any solicitor, or other person competent to give her advice, and to guard her against undue influence, the interests of the public require that his conduct should be regarded by Courts of Justice with the utmost jealousy: in circumstances such as here appear, clear evidence should be required both as [352] to the bequest in his favour being continued in the Will at the time of its execution, and as to the Testatrix's knowledge that it was so.

[Mews' Dig. tit. WILL. I. TESTAMENTARY CAPACITY, h. *Undue Influence and Fraud*: II. TESTAMENTARY INSTRUMENTS, n. *Alteration, Addition, and omission*; IX. CONSTRUCTION, c. *Erasures and Interlineation*. See *Gann v. Gregory*, 1854, 3 De G. M. and G. 780; *Doe v. Palmer*, 1851, 16 Q.B. 747; *Williams v. Ashton*, 1860, 1 J. and H. 115; *Christmas v. Whinyates*, 1863, 3 Sw. and T. 81; *In bonis Sykes*, 1873, 3 P. and D. 26.]

ON APPEAL FROM THE HOUSE OF KEYS IN THE ISLE OF MAN.

JOHN STEVENSON MOORE.—*Appellant*; JOHN CLUCAS. *Respondent**
[Dec. 17, 1850; Feb. 17, 1851].

Although there is not so much strictness required in pleadings in the Courts in the Isle of Man as in England, yet where a declaration in an action for deceit contains specific averments of fraud, such averments must be established by proof, to entitle the Plaintiff to recover [7 Moo. P.C. 363].

When the question is one of fact only, and has been tried by a jury in the Court below, this Court will not reverse a judgment upon such finding, unless they are satisfied that the judgment is clearly wrong [7 Moo. P.C. 364].

This was an action brought by the Respondent against the Appellant, in the Common-law Court for the southern district of the Isle of Man, to recover damages for the loss he had sustained by the Appellant's deceit, in selling him cattle affected with a fatal and contagious disease, as sound and in good health.

The declaration stated, that previous to and in the month of August, 1847, the Defendant was possessed of certain cattle, which cattle were, previous to and in [353] the month of August, infected with a contagious and fatal disease. That the Defendant, knowing the cattle to be infected with such disease, and with a view to deceive and impose upon the Plaintiff and other persons, did, in the month of August, 1847, publicly advertise and give notice of his intention to sell the cattle by public auction on the 24th of the month of August, 1847, and did cause it to be believed by the Plaintiff and the public in general that such cattle to be sold as aforesaid were sound and in good health. That the Plaintiff attended the auction on the 24th of August, 1847, and the Defendant did then and there falsely and deceitfully induce the Plaintiff and others who attended such auction, to believe that the cattle so to be sold by the Defendant were sound and in good health, he the Defendant well knowing that such cattle had been, and still were, labouring under and affected with a contagious and fatal disease, and that the Plaintiff did, in consequence of such the inducement of the Defendant, then and there buy from the Defendant three head of cattle, consisting of a bull, a cow, and a heifer; the Plaintiff, by such the false and deceitful inducement of the Defendant as aforesaid, believing such bull, cow, and heifer to be sound and in good health, whereas, in truth and in fact, the

* Present: Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right. Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

bull and cow were then affected with a contagious and fatal disease, of which the Defendant was well aware, and in consequence thereof the contagious disease was communicated by the bull and cow to the other cattle of the Plaintiff, and such disease had spread amongst such cattle to a great extent, and divers of such cattle of the value of £15 each, and eight heifers of the value of £5 each, had of such contagious disease died, and [354] divers of such cattle had been labouring under such disease, and that the Plaintiff had been put to great expense in effecting their cure: that they were so reduced as to be unfit for sale, and that the Plaintiff's cattle generally had become unsaleable. By means of all which the illegal actings and doings of the Defendant, the Plaintiff charged that he was damaged in the sum of £300 sterling, for recovery whereof the Plaintiff brought suit and prayed judgment according to the due course of the Common-law.

The Defendant pleaded and put in issue the allegations contained in the declaration, upon which issue was joined, and upon the petition of the Plaintiff a special jury was ordered to try the issue.

The action was tried by special jury on the 4th of July, 1848, at a Common-law Court holden at Castle Rushen.

It appeared from the evidence, that the Appellant kept a large stock of cattle on his farm, at Lhergydhoo, in the Isle of Man. That in April or May, 1847, some of the cattle on this farm became affected with a disease which then prevailed among the cattle on the island, and some of the cattle died. Where the disease appeared, it attacked the throat, lungs, heart, and liver, was often fatal, and was frequently communicated from one animal to another. That on the 11th of August, 1847, the Appellant caused an advertisement to be inserted in the *Manx Herald* newspaper, announcing a sale by auction. The stock to be sold was described in the advertisement, as follows:—"The stock consists of 6 capital farm horses; 10 excellent milch cows; 1 superior three-year old short-horned bull, got by a son of Gainsford, bred at Carlisle, and [355] imported to this island last October; 1 two-year old bull, grandson of Betterall; 1 one-year old short-horned bull; 21 heifers and bullocks, from 1 to 3 years old; 7 calves; 6 sheep; 26 lambs; 1 two-year old filly; 2 two-year old colts." The Respondent attended the auction, and purchased a bull, a cow, and a heifer, which he caused to be removed to his estate at Ballakilly. The Appellant was present at the sale. The conditions of sale were declared at the commencement of the auction. There was a great deal of conflicting evidence as to what took place at the sale. The auctioneer, who was a witness for the Appellant, stated in his evidence that, at the commencement of the sale, immediately after the conditions were read, the Appellant went to the auctioneer and said that the cows had had the disease, but he considered they had then recovered from it, and that the young cattle had never had it, and that he repeated openly and loudly, as the statement of the Appellant, that the milching cattle had had the disease, but were now clear of it, but the young cattle had never had it. Two other witnesses for the Appellant deposed that he himself addressed this statement openly and loudly to the persons assembled, but at a later period of the auction, and just before the sale of the cows. Another witness for the Appellant deposed, that the Appellant, at the commencement of the auction, stated to the persons assembled that there had been a disease among the cows, that he had lost some, that he hoped they were now in a way of getting clear of it, but that the young cattle were free from disease; whereupon the auctioneer asked the persons present if they heard this statement, and he himself repeated it. Two wit-[356]-nesses for the Respondent, who had been present at the commencement of the sale, and heard the conditions read, swore that nothing at all was said about disease; both these witnesses were purchasers at the sale of the cows. A third witness for the Respondent swore, that he also was present at the commencement of the auction, and heard nothing said about disease; and believed that, if anything of that kind had been said by the Appellant, or by the auctioneer, unless in a very low tone, he must have heard it. A fourth witness for the Respondent stated that he was present at the commencement of the auction, was within five yards of the auctioneer, and was attentive to him when the conditions were declared, and that he heard nothing stated respecting disease. This witness was also present during the whole of the sale. Another witness for the Respondent, who was present at the commencement of the sale, and, as he believed, heard the conditions read, did not hear anything about the cattle having been

diseased. And a witness for the Appellant, who also was present when the sale commenced, and purchased cattle there, could not swear that anything was said about disease in the cattle. There was no evidence that the cattle were diseased at the time of the sale; or of the Defendant's knowledge of such disease. Two days after the Respondent had taken home his purchased cattle, the cow became unwell, and continued very ill for some weeks; she recovered and was turned out of the cow-house into a field, and another cow put into the place in the cow-house which she had occupied. This cow immediately became ill, and afterwards the cow in an adjoining stall, and gradually a sickness, which appeared to be the [357] same in all the cases, spread amongst the Respondent's other cattle; twenty-two took the disease, some were severely affected, others more slightly; all these recovered. Ten more cattle, namely, two cows and eight heifers, took the disease and died of it, one of the cows being in calf, and the other having then lately calved. Of the twenty-two that recovered, four were in calf and lost their calves, twelve were milch cows, and two were fat cattle; the milch cows lost their milk, and the fat cattle were reduced. The symptoms in all the sick cattle were alike and similar in all material respects to those which appeared in the cattle at Lhergydhoo. There was no disease among the Respondent's cattle when the cattle purchased at the sale came to his premises. Four days after the auction, the Respondent lent the bull to a neighbour, named Clugstone, and his cattle, which until that time had been healthy, soon afterwards became affected with a sickness, like that under which the cattle at Ballakilly were labouring, and four of them died. Another neighbour sent a cow to the bull when at Clugstone's, and shortly afterwards this cow, with others of his cattle, became ill of a like disease, and two died. The cattle on this witness's premises had had no disease before the cow returned from Clugstone's.

Upon this evidence the jury found for the Defendant, and dismissed the action, each party paying his own costs.

The Plaintiff appealed from this verdict to the House of Keys.

The House of Keys, on the 20th of April, 1849, after reading the depositions of the witnesses, gave [358] judgment, and thereby ordered and adjudged the verdict to be reversed, and that the Plaintiff should recover from the Defendant the sum of £110, with the costs incurred in the Court below.

Against this judgment the Defendant appealed to Her Majesty in Council, submitting that such judgment was erroneous, and ought to be reversed for the following reasons:—

1st. That the House of Keys had no power to reverse the verdict, and give damages to the Plaintiff, then Appellant.

2nd. That even if they had such power, the House of Keys ought not, upon the evidence given in the cause, to have reversed the verdict and given such judgment for the then Appellant.

3rd. That the jury who tried the cause in the Common-law Court, and heard the witnesses examined, were more competent to form an opinion upon the evidence than the House of Keys, who merely read the depositions of the witnesses. That even if the House of Keys had the power to reverse the verdict and assess the damages, they ought not to have done so, unless it was quite clear that the jury had come to an erroneous conclusion upon the evidence. Whereas so far from its appearing that the jury came to an erroneous conclusion, their verdict was fully warranted by the evidence.

On behalf of the Respondent it was contended that the judgment appealed from ought to be affirmed for the following reasons:—

1st. Because the Respondent was justly entitled to the damages awarded in respect of the loss he had sustained by the sickness and death of very many of [359] his cattle, which sickness was communicated to them by the cattle sold to the Respondent at the Appellant's auction; the Appellant having, at the auction, fraudulently deceived the Respondent and others, who there became purchasers, as to the true condition of his cattle.

2nd. Because the judgment of the House of Keys was supported by the evidence, whereas the verdict of the jury in the Common-law Court was contrary to the evidence.

Mr. Peacock, Q.C., and Mr. Eade, for the Appellant.—It is manifest that this

judgment cannot be supported. It is an action for deceit, and the declaration alleges, as the foundation for such action, fraud. Now, the fraud alleged in the declaration is, that the Defendant knowing the cattle to be affected with disease, did falsely and deceitfully induce the Plaintiff to buy the bull, cow, and heifer, whereas the bull and cow were then affected with a contagious and fatal disease. The Plaintiff entirely failed to prove this allegation. There was no evidence given at the trial that the bull and cow had a contagious and fatal disease, nor was there evidence that before and at the time of the sale the Defendant knew that the bull and cow had a fatal and contagious disease. The charge of fraud, therefore, entirely falls to the ground. All that the evidence establishes, is, the cow had some disease, but there is no proof that she had the disease at the time of sale, or that she communicated it to the cattle of the Plaintiff. There is then no proof to establish such averment, and the verdict of the special jury of the [360] Common-law Court was right in finding upon such evidence for the Defendant. The House of Keys improperly interfered with the privilege of the jury in weighing the credit of the witnesses. The jury had the best means of judging the value of such testimony. A Court of Appeal would not have reversed such a verdict upon a question of fact. *Baboo Uluuck Sing v. Beny Persad* (2 Knapp's P.C. 265).—[The Court stopped the counsel for the Appellant, and called upon the Respondent's counsel to support the judgment appealed from.]

Mr. Adolphus for the Respondent.—Pleadings in the Isle of Man are not to be construed with the strictness of English pleadings. Johnson (Jurisprudence of the Isle of Man, p. 67), a writer of authority on the Manx law, says, "The nicety and exactness of special pleading, which is so essential in England, is here disregarded: the forms of the Court require the declaration to be merely a plain simple statement of the Plaintiff's case, and either party may offer such testimony as the Court may deem relevant to the matter in question." It is a foreign Court (4 Inst. 284), and pleading being a matter of procedure, this Court will recognise their practice. That disposes of the Appellant's objection. There ought not to be too much strictness in requiring proof of the actual averments. It is sufficient if the substance of the declaration be proved. Now the evidence shows that the cattle had the disease at the time of the sale, and that the Defendant knew of the existence of such [361] disease.—[Mr. Baron Parke: What evidence is there of a fraudulent concealment by the Defendant of the fact that the cattle were diseased, or to show that he had knowledge of such disease?—The evidence of the auctioneer proves that there was at the sale a fraudulent concealment by the Appellant of the true state of his cattle, and that the Respondent and other persons, who made purchases at the sale, were thereby deceived. The representations made when the conditions of sale were declared were untrue, and rendered him liable. *Taylor v. Ashton* (11 Mee and Wel. 401) is in point. That was an action on the case for deceit, and the Court held that if a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, it is not necessary to show that the Defendant knew the representation to be untrue. The evidence establishes that the Plaintiff's cattle were not diseased at the time of the sale, and that the cow communicated the disease to the Plaintiff's cattle.—[Mr. Baron Parke: According to the declaration, you must show that the Appellant knew of the existence of the disease there alleged, not of some disease; and to establish fraud, you must show that he knew of the disease being in his cattle at the time of the sale. There is some evidence of the cow being ill, and of the bull, but no evidence of their being diseased at the time of the sale.]—They do not require such strict proof in the Courts of the Isle of Man as in England.—[Lord Langdale: A Plaintiff cannot allege one description of fraud and prove another of a totally different kind. [362] as you attempt to do, by making out a case of misrepresentation.]—The case of *Baboo Uluuck Sing v. Beny Persad* (2 Knapp's P.C. Cases, 265), relied upon by the Appellant, is a strong authority in our favour, as it shows that this Court will not reverse a finding of the Court below upon a pure question of fact.—[Mr. Baron Parke: The Appellant must show that the judgment is wrong. We never reverse unless we are satisfied that the judgment is clearly wrong, *Khoorshed-jee Manik-jee v. Mehrwan-jee Khoorshed-jee* (1 Moore's Ind. Ap. Cases, 442).]—The objections now urged to

the form of the declaration and the insufficiency of the proofs, were never taken in the Courts below, and, therefore, cannot now be entertained, *Frankland v. McGusty* (1 Knapp's P.C. Cases, 274).

Mr. Baron Parke.—Their Lordships are of opinion that the judgment of the House of Keys ought to be reversed, and the decision of the Common-law Court dismissing the action affirmed. The declaration contains averments of fraud; it alleges that the Defendant, being possessed of certain cattle which were infected with a contagious and fatal disease, after advertising to that effect, caused them to be sold by public auction, and did then and there falsely and deceitfully induce the Plaintiff and others who attended such auction to believe that the cattle so to be sold by the Defendant were sound and in good health, he the Defendant well knowing that such cattle had been and still were labouring under and affected with a contagious and [363] fatal disease; it then goes on to say that he bought three heads of cattle, consisting of a bull, a cow, and heifer, believing such bull, cow, and heifer to be sound and in good health, whereas they were affected with a contagious and fatal disease, of which the Defendant was well aware, and in consequence thereof the contagious disease was communicated by the bull and cow to the other cattle of the Plaintiff. None of these allegations are proved to be true, excepting the averment, that the Defendant advertised such sale by auction, and it may be conceded that such advertisement contains *prima facie* evidence that the cattle were sound. But there is no proof that the cattle were affected with a contagious and fatal disease at the time of the sale, or that he knew that they were labouring under a contagious and fatal disease. In fact, there was no satisfactory proof that the cow ever had the disease, still less that the disease was communicated by her to the Plaintiff's cattle. Then as to the bull, there is no satisfactory proof of its having any disease at all. It is urged, that we ought not to be too strict in requiring proof of actual averments, if the substance of the declaration was proved, as the practice of the Courts in the Island is less strict upon the pleadings than in this Country; that argument might be entitled to some weight, if the averments were proved. But is there any fraud proved against the Defendant? It is alleged that he knew of a contagious and fatal disease in the cattle sold, which he concealed from the Plaintiff; but there is no proof that he knew of any contagious and fatal disease. Again, it is urged, that although the Defendant did not know that the particular cattle was diseased at the time of the sale, yet the disease [364] might have been communicated by the cattle sold, but there is no proof to satisfy us that the cow or bull was diseased. Even if the material allegations were proved, it was entirely a question for the jury, who, we are of opinion, are better able to judge of the conduct of the witnesses, and the weight to be attached to their evidence. Upon the whole, we are of opinion, that the House of Keys was wrong, and that the judgment must be reversed.

[Mews' Dig. tit. COLONY; III. APPEALS TO THE PRIVY COUNCIL: 5. *Principles on which Privy Council Acts*. See *Ramchurn Mullick v. Luchmeechund Radakissen*, 1854, 9 Moo. P.C. 66.]

[365] ON APPEAL FROM THE COURT OF CHANCERY AT JAMAICA.

CHARLES STUART STRACHAN.—*Appellant*: JAMES DOUGALL and others,—
Respondents * [Feb. 18, 1851].

Heard *ex parte*.

Award upon a submission to arbitration, respecting freehold estates and interest in land in Jamaica. Some of the parties to be bound by the reference,

* Present: Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

being married women interested in the real estate, it was held by the Judicial Committee, (reversing the decree of the Court below,) that such award was invalid, by reason of the coverture of the parties whose interests could not be bound by such a reference.

Plea setting up such award in bar to a Bill for an account overruled.

The Appellant, in this case, filed a Bill in the Court of Chancery in Jamaica, against the Respondents, James Dougall and Mary his wife, the sole acting Executrix and Trustee under the Will and codicils of Charles Strachan, deceased; and also against the other Respondents, James Smith McNishie and Elizabeth [366] his wife, formerly Elizabeth Strachan, George Halsall and Jane Ogilvy his wife, formerly Jane Ogilvy Strachan, and Ann Dodd, all of whom were interested under the Will and codicils of the Testator. The Plaintiff sought by the Bill to have an account taken of the real and personal estate of the Testator, and to have his rights and interests under the Testator's Will and codicils ascertained and established.

The Bill set forth the Will and codicils of the Testator, by which he devised and bequeathed his real and personal estate to the Appellant and others; and alleged, that John Vernon and Mary Dougall (then Mary Strachan) proved the Testator's Will and codicils, and entered upon and possessed themselves of the real and personal estate of the Testator, and received the rents and profits thereof; that before Vernon had accounted, he became insolvent, and took the benefit of the Insolvent Act of Jamaica, and ceased to act or interfere in the Testator's affairs, and that Mary Strachan alone was in possession of the rents and profits of the estate until her marriage with the Respondent, Dougall, when he entered into possession with her of the same; the Bill further stated the marriages between Elizabeth Strachan and John McNishie, and Jane Ogilvy Strachan and Halsall, and the applications to Dougall and wife by the Plaintiff for his share of the property, but without success, and prayed for an account, and that the shares of the parties respectively entitled might be ascertained and distributed.

The Respondents, Dougall and his wife, put in a plea and answer to the Bill; and for a plea in bar to the Plaintiff's claim stated, that articles of agreement were made in 1814, between the Defendants, Dougall and Mary his wife of the first part, Ann [367] Dodd of the second part, Smith McNishie and Elizabeth his wife of the third part, Halsall and Jane Ogilvy his wife of the fourth part, and the Appellant of the fifth part, for a reference to arbitration of the questions, claims, and disputes arising between them, under the Testator's Will; that the arbitrators to whom the matter was referred made their award in July of that year, whereby they awarded the disposal, distribution and division of the Testator's real and personal estate among the parties entitled thereto, in certain proportions. That the arbitrators found certain sums charged upon the produce of the estate to be due from the Testator's estate to Ann Dodd and Mary Dougall, and directed a valuation of the stock to be made by persons named by them; and they further found that Vernon was indebted to the estate, and awarded a sum to be paid by him in liquidation of the amount. That such agreement for a reference to arbitration embraced the dealings and transactions of the Defendants, Dougall and Mary his wife, as such Executrix, with the estate of the Testator, and that the accounts, dealings, and transactions of these Defendants, relating to the real and personal estate of the Testator, were all fully and fairly brought before the arbitrators, who made their award thereon, and that opportunities were given to the Appellant to state and prove his claim as devisee and legatee before the arbitrators.

This plea was heard before his Honor the Vice-Chancellor, Edward Panton, Esquire, on the 21st and 22nd of January, 1846, and by an order dated the 3rd of March in that year, the Vice-Chancellor decreed, that the plea was sufficient, and ordered the same to stand.

The Defendants, Halsall and Jane Ogilvy his wife, and Dodd, put in a joint and several answer. Dodd, by [368] her answer, alleged, that the Testator was indebted to her in two promissory notes, upon which, after deducting certain payments made in respect thereof, a considerable sum of money was still due and owing to her, and that she had never received any of the pecuniary or other bequests given to her

by the Testator's Will. Halsall and his wife, by their answer, also alleged, that they had never received any portion of the specific or other legacy bequeathed to Jane Ogilvy Halsall; nor had they received any pecuniary or other advantage whatever in respect of their claims under the Will of the Testator; nor had any portion of the lands devised to her been delivered up to them. Halsall and his wife, and Dodd, by their joint answer, admitted that an award had been made by or on behalf of certain parties in the Bill named; but they said that such award was made without any notice to them of the intention of the arbitrators to proceed therein; nor was any opportunity afforded to them to produce their accounts or to disprove the accounts of their opponents, except as to Halsall, who did meet the arbitrators, and protest against the Executor's accounts as fictitious and fraudulent. The other Defendants, McNishie and wife, also put in a joint answer to the Bill, in which they denied that they had received any portion of the devise and bequest to Elizabeth McNishie, or that they had received any pecuniary or other advantage in respect of their claims under the Testator's Will.

The cause was heard on the 12th of September, 1848, on the Bill and answers, and his Honor ordered that the Appellant's Bill should be dismissed with costs. This Order was entered up on the 1st of March, 1849.

Against this decretal order, as well as the order [369] allowing the plea of Dougall and wife, of the 3rd of March, 1846, the present appeal was brought. The Respondents did not appear, and the case came on for hearing, *ex parte*.

Mr. Russell, Q.C., and Mr. Rennalls, in support of the appeal.—First. The Court ought not to have allowed the plea. It alleges, that the articles of agreement for a reference were made in the month of June, 1844. Now, the plea upon the face of it shows, that, at that time, the Respondents, Mary Dougall, Jane Ogilvy Halsall, and Elizabeth McNishie, were under the disability of coverture, and that it was proposed by the intended reference to submit to arbitration the right and title to the freehold estates and interests in land belonging to those Respondents, who were married women. Being married women, it was not competent for either of them to bind their respective interests by such articles, *Emery v. Wase* (5 Ves. 846; and 8 Ves. 505), *Davis v. Page* (9 Ves. 350; see also upon this point, Bac. Abr., tit. "Arb." C. Com. Dig., tit. "Arb." D. 2): consequently, the submission to arbitration had no validity or effect whatever, as to any of the parties; and the award and other proceedings of the arbitrators were entirely void as against the Appellant. But the award itself is bad, as it is not conclusive and final. The arbitrators have directed acts to be done after the making of the award, and for the performance of such acts have attempted to delegate their authority to strangers, not indicated by name, but to be nominated without any notice or voice being given to the Appellant in their selection: that is sufficient to render the award void, as [370] the parties to the reference did not give any authority to the arbitrators to delegate powers to do acts affecting their interests. *Tomlin v. The Mayor of Fordwich* (5 Add. and Ell. 147) is conclusive upon this point. The arbitrators have also taken upon themselves to find that Vernon, who was no party to the reference, was indebted to the Testator's estate in a certain sum of money, and have directed him to pay such sum towards satisfaction of certain claims of two of the Respondents.

Secondly. The plea is bad in point of form, and ought to have been overruled. But even if sufficient, it was not proved by the evidence in the cause. On the contrary, the Respondents, Dougall and wife, in their plea and answer, allege that the articles of agreement for a reference were made and executed by Dougall and wife of the first part, Ann Dodd of the second part, McNishie and wife of the third part, Halsall and wife of the fourth part, and the Appellant of the fifth part. Now, we submit that the Respondents, Dougall and wife, were bound to prove that the articles were executed by all the parties interested, so that all parties should have been bound by the reference. *Antram v. Chace* (15 East, 209), *Biddell v. Dowse* (6 Bar. and Cr. 255), *Ferrer v. Oven* (7 Bar. and Cr. 427), *Brazier v. Jones* (8 Bar. and Cr. 124). This they have failed to do, and, consequently, there is no proof of the consideration existing, in respect whereof the Appellant is alleged to have entered into the submission. Again, the proceedings of the arbitrators were irregular in examining witnesses in the absence of the Appellant, and without notice. *Bedington v. Southall* (1 Price, 232).

[371] The Right Hon. T. Pemberton Leigh. This appeal comes before us *ex parte* from two orders made by the Court of Chancery in the island of Jamaica, bearing date respectively the 21st and 22nd days of January, 1846, and the 12th of September, 1848, in a suit instituted by the Appellant against the Respondents, for an account of the real and personal estate in Jamaica, of a Testator named Charles Strachan. It is unsatisfactory to deal with cases *ex parte*, without the Respondents appearing to support the decree appealed from; but as the Respondents have not appeared in this appeal, we have no alternative but to dispose of the case in their absence. The question raised by the Appellant, is, that the award set up in the plea of the Respondents, Dougall and wife, (who are in possession of the property in dispute,) as a bar to the Plaintiff's bill, is invalid; and this he urges upon various grounds, the principle being, that some of the parties to the submission being married women, were incompetent to enter into such an agreement, as it related to freehold estate and interest in land, and that, although the other parties were competent to concur in such agreement, yet, that the fact of some of the parties being under the disability of coverture, an award so made was not binding upon him. We think, that this objection is fatal, and that an award founded on such agreement was invalid, and that the order of the Court allowing the plea ought not to have been made, and must be reversed; and also the subsequent proceedings and decree of the Court of the 12th of September, 1848, and entered in the Court on the 1st of March, 1849; the costs paid by the Appellant under such order and decree [372] must be repaid to him, but no costs of the plea are to be allowed to either party, or upon the proceedings subsequent to such plea.

The report of the Judicial Committee was approved by Her Majesty; and by an Order in Council, it was ordered "that the said order of the Court of Chancery of Jamaica, entered up in the Court on the 3rd of March, 1846, and likewise the said decree of the said Court, entered up on the 1st of March, 1849, be, and the same are hereby reversed, and that any costs paid by the Appellant under the said order and decree respectively, be repaid to the said Appellant, and that the plea be overruled, and the cause do proceed in the ordinary course; and Her Majesty was further pleased to order that no costs of the plea be allowed, and no costs to either party of the proceedings subsequent to the plea, and that the case be remitted to the Court of Chancery in Jamaica, with these directions. Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief of the island of Jamaica, for the time being, and all other persons whom it may concern, are to take notice, and govern themselves accordingly."

[Mews' Dig. tit. ARBITRATION: I. THE SUBMISSION; 1. *Who may refer and who are Parties.* See the Married Women's Property Acts, 1882 (45 and 46 Vict., c. 75), s. 1 (2) and 1893 (56 and 57 Vict., c. 63), s. 1.]

[373] ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

THOMAS CHARLES LOUGHNAN and Others.—*Appellants*: HAJI JOOSUB BHULLADINA and Another,—*Respondents* * [Feb. 18, 1851].

THE "HYDROOS."

The Bombay Charter (December, 1823), establishes the Admiralty Jurisdiction of the Supreme Court, "as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents and dependencies annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty in that part of Great Britain called England."

* Present: Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

Held, upon a construction of such Charter, that the rules and practice of the High Court of Admiralty in England, prevail and govern the proceedings in the Supreme Court at Bombay, in maritime causes [7 Moo. P.C. 379, 380].

In a salvage cause, the Supreme Court, by its sentence pronounced in March, 1849, dismissed the claim of the salvors. In the month of April following, the Promovents moved for a rule *nisi*, to show cause why the Defendants should not pay their costs. This rule the Court refused. In August, in the same year, the Promovents applied for and the Supreme Court granted leave to appeal to England from the principal sentence of March, 1849. No objection was taken to the competency of the appeal in Bombay by the Respondents, nor was any protest against the right of appeal entered in England, but the Respondents at the hearing objected to the reception of the same, contending, that the appeal was perempted by the proceedings had in the month of April.

Held, that such objection was fatal, that the application for costs after the decision in the cause, had the effect of absolutely perempting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in April, be done to restore the appeal from the principal sentence [7 Moo. P.C. 380].

Costs of appeal, under the circumstances, refused [7 Moo. P.C. 381].

This was a question respecting the Appellants' right to appeal from a sentence of the Supreme Court at [374] Bombay, in its Admiralty jurisdiction, in a cause of salvage: whether the appeal was not perempted by the act of the Appellants.

This objection was taken at the hearing of the appeal, and arose under the following circumstances:—

The cause was promoted in the Supreme Court at Bombay, by the Appellants, for salvage services rendered by them to the ship *Hydroos* and her cargo, the property of the Respondents. The cause came on for hearing on the 14th of March, 1849, when the Court dismissed the Act on petition for salvage. On the 5th of April following, a motion was made by Counsel for the Promovents for a rule *nisi*, calling upon the Defendants to show cause why they should not pay the Promovents for their costs in the cause. This motion was heard and refused by the Court. On the 6th of August following, the Appellants presented a petition for leave to appeal to Her Majesty in Council from the principal sentence, dated the 14th of March, 1849, which the Court granted. The Respondents put in an absolute appearance, and no objection was taken at Bombay to the competency of the appeal.

The Respondents raised, in their printed case, for the first time, an objection to the competency of the appeal, contending, that the right of the Appellants to appeal from the decision of the Supreme Court, dismissing their claim for salvage, had been absolutely and altogether perempted, when they filed their petition for leave to appeal, which was the first step on their part, indicative of their intention to appeal; and the Respondents prayed, that the order of the Supreme Court, allowing the appeal, might be reversed, and the appeal dismissed with costs, by reason that such leave to appeal could not legally be given, and, [375] therefore, ought not to have been given by the Supreme Court at Bombay, at the time and under the circumstances at and under which it was given; and that such appeal was a nullity in law.

The appeal being opened upon the merits, Dr. Addams, and Mr. Aspland, for the Respondents, were heard in support of this objection.

Upon the question of peremption of the appeal, they cited *The Ship Clifton* (3 Knapp's P.C. Cases, 375), *The Queen v. Joze Alres Dias* (6 Moore's P.C. Cases, 102), *Lloyd v. Poole* (3 Hagg. Ecc. Rep. 477), *Greg v. Greg* (2 Add. 276), Voet., vol. ii. lib. xlix. tit. "De appellationibus et relationibus," sec. 1, and insisted, that the objection to the appeal was in time, even if made at the hearing, *Rochfort v. Battersby* (2 H.L. Cases, 388).

The Queen's Advocate (Sir John Dodson), Mr. Lloyd, Q.C., and Mr. Forsyth, for the Appellants, relied upon the acquiescence of the Appellants in the appeal granted by the Supreme Court, under the powers vested in that Court by the Bombay Charter (23rd Dec., 1823; see *post* [7 Moo. P.C.], p. 378, for extracts of this Charter); they also referred to the Statute, 3rd and 4th Will. IV., c. 41, s. 20, and urged the

inconvenience of the course pursued by the Respondents in objecting to the appeal at the hearing, and not under protest.

The Right Hon. Dr. Lushington.—The present question arises upon an objection taken [376] on behalf of the owners of the property, against which the salvors claim; on the ground, that the asserted salvors ought not to be permitted, under the circumstances of the case, to proceed with their appeal against the sentence of the Admiralty Court at Bombay, by which sentence it was pronounced that they were not entitled to salvage.

The facts of the case are shortly these: the principal sentence was pronounced on the 14th of March, 1849, and on the 5th of April, as appears from the papers, the following proceeding took place:—"Mr. Advocate-General being of Counsel for Promovents, moved for a rule to show cause why the Respondents should not pay to the Promovents their costs of the proceedings in the above matter; whereupon, and on hearing Mr. Howard, also of Counsel for the Promovents, who followed on the same side, it was ordered, that the said motion be refused, and that each party do pay their own costs of the hearing in the above matter, and of all other proceedings therein."

Now, there cannot be any doubt, that if proceedings, such as are here mentioned, had taken place in the High Court of Admiralty in England, or in any Vice-Admiralty Court, or Admiralty Court governed by the same rules and regulations, any right of appeal, which existed in the claimants on the 14th of March, 1849, would have been entirely preempted and put an end to by those proceedings on the 5th of April. This is a rule which has always been adhered to with great strictness, and one of the cases which have been cited, the case of *The Ship Clifton* [3 Knapp, 375], proves with what severity the Court has been in the habit of applying this rule. We apprehend that the effect of preempting the appeal is entirely to take away the right of the [377] Appellants to appeal at all, and that nothing that is thereafter done can restore the Appellants to the condition in which they were before the time when the act of preemption took place.

This being so, according to the general course of proceedings in the High Court of Admiralty, and in all other Courts following the same rules of practice, the question which their Lordships have now to determine is, whether the same rules and the same mode of practice prevail in the Admiralty Court at Bombay, or, whether any and what alteration has been made in consequence of the Charter which has created that Court.

There are two parts of the Charter to which it will be necessary to advert; first, that part of the Charter which confers upon the Court at Bombay the power of deciding Admiralty causes; and, secondly, that part of the Charter which provides for appeals generally.

Now, that part of the Charter which establishes the Admiralty jurisdiction of the Court is in these words:—"We do hereby grant, ordain, establish, and appoint, that the Supreme Court of Judicature at Bombay shall be a Court of Admiralty," for certain territories and districts therein mentioned; and then it grants to that Court "full power and authority to take cognizance of, hear, examine, try and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance," and so on, "which, in any manner whatsoever, relate to freight, or money due for ships hired and let out, transport money, maritime usury, bottomry or respondentia, or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, [378] whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid." And then it states, that they shall take cognizance thereof, "as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies, annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England."

It appears, therefore, that by the authority of this Charter, founded upon the Act of Parliament (4 Geo. IV., c. 71, sec. 7), the Court of Bombay became a Court of Admiralty for the purposes therein stated, and that the mode of proceeding is strictly

enjoined to be, according to the course in use in the High Court of Admiralty in England. Unless, therefore, there is something in this Charter to the contrary, it would necessarily follow, that in what relates to the peremption of an appeal, the same cause which would operate to perempt an appeal here will perempt an appeal in the Court of Admiralty at Bombay.

This being so, the next step is to advert to that part of the Charter which gives power to appeal to the Queen in Council, and then to see whether, on the fair construction of that Charter, it can be construed as changing or altering the effect of that part of it, to which I have already adverted. It is in these words:—"And we do hereby direct, establish, and ordain, that if any person or persons shall find him, her, or themselves aggrieved, by any judgment [379] or determination of the Supreme Court of Judicature at Bombay, in any case whatsoever, it shall and may be lawful for him, her or them, to appeal to us, our heirs or successors, in our or their Privy Council, in such manner and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all judgments or determination made by the Supreme Court of Judicature at Bombay, in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal shall be prayed, by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall and is hereby empowered to award, that such determination or judgment shall be carried into execution, or that sufficient security shall be given;" and then it directs that security shall be given for costs, and for performance of the judgment.

It does not appear that in this, or any subsequent clause, there is any immediate reference to the Court of Admiralty, or to that part of the Charter which established the Court of Admiralty at Bombay: and, consequently, that part of the Charter which establishes the Court of Admiralty at Bombay, and directs the proceedings to be according to the rule of the High Court of Admiralty here, must prevail, unless we can find in any part of this Charter something that shall counteract that clause, and direct another mode of proceeding.

[380] Now it appears to us that it is quite impossible, with reference to those general words, to draw any other inference. It is not necessary to consider, whether the clause as to appeals may in any way affect the time within which the appeal shall be granted; because the proper question to be considered and determined now, is not a question as to the ordinary right to appeal, or the time and manner in which the appeal shall be asserted, or within what period it shall be asserted; it is simply this question, whether certain acts done in the Court of Admiralty of Bombay, are, or are not, a peremption of the right of appeal. We are of opinion, therefore, that the rule and practice of the High Court of Admiralty must necessarily prevail in governing the proceedings of the Court of Bombay, and that, consequently, this appeal has been altogether perempted.

Another difficulty arose in this case, to which it may be necessary slightly to advert; instead of appearing under protest, as is the ordinary course where the party who is cited to appear denies the right to appeal, an absolute appearance was given in this case; and the objection is now taken at the bar for the first time, though it is introduced in the case which the Respondents have presented. It appears to us, that though it is very inconvenient, and this course of proceeding has exposed the parties to considerable additional expense, yet that it cannot have the effect of preventing that which had taken place, namely, the peremption of the appeal, at a time long antecedent. And it may be well to observe here, with regard to the leave to appeal, given by the Court at Bombay, it is quite obvious that, acting as the High Court of Admiralty there, if the appeal had been once perempted, it [381] was beyond the power of the Court to make any order allowing the appeal to be prosecuted.

We think, therefore, that it is clearly shown that this appeal was entirely perempted by the proceedings of the 5th of April; that it is impracticable in any legal view of the case to revive the proceedings, when they are at once perempted, and that it would not be within the power of the Court of Admiralty to grant the appeal

under any circumstances of mistake or difficulty whatever. We think also, that the circumstance of the Respondents not appearing under protest, though attended with inconvenience to the parties, cannot by possibility affect their right in this case. For these reasons we are under the necessity of pronouncing in favour of the objection which has been taken, that the Appellants are not at liberty to proceed further in this appeal. It must, therefore, be dismissed; but, looking at all the circumstances of the case, their Lordships are of opinion, that no costs ought to be given (*a*).

[See notes to *Sherwill v. R.*, 1836, 2 Moo. P.C. 14; *Shire v. Shire*, 1845, 5 Moo. P.C. 81; *Casement v. Fulton*, 1845, 5 Moo. P.C. 130. As to Admiralty jurisdiction of High Court of Bombay, see letters patent of Dec. 28, 1865, arts. 32, 33 (Stat. R. and O. Rev. iv. 117).]

[382] ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

MUSHADEE MAHOMED CAZUM SHERAZEE. *Appellant*; MEERZA ALLY MAHOMED SHOOSTRY. and BEBEE MARIAM BEGUM.—*Respondents*.
[May 14, 1851].

A general demurrer, on the ground of the subject-matter of the suit being *res judicata*, allowed to a suit brought in the Supreme Court of Bombay, by a party claiming certain property, which appeared by the statement in the Bill to have been the subject of a previous suit in the same Court, in which the Plaintiff had intervened by petition, and obtained some order, the nature or effect of which was not stated, and did not appear upon the Record then before the Court.

This was an appeal from an order of the Supreme Court at Bombay, allowing a general demurrer by the Respondents to a bill filed by the Appellant against the Respondents.

The Bill stated, that Aga Mahomed Rahim Sherazee, of Bombay, merchant, being largely indebted to the Appellant upon an account stated and settled, and for other advances, amounting together to the sum of Rs. 324,500, by an indenture, dated the 30th of December, 1845, and made between Aga Mahomed Rahim Sherazee of the one part, and the Appellant of the other part, absolutely granted, bargained, sold, aliened and released to the Appellant, his heirs, executors, administrators and assigns, one undivided moiety or equal half part, of and in all that piece or parcel of land or ground upon which Aga Mahomed Rahim Sherazee had formed a dock for the building and [383] repairing of ships, called the "Mazagone Dock," in the island of Bombay, together with one undivided moiety in the houses, buildings and appurtenances to the same premises belonging or appertaining: to have and to hold the dock, hereditaments and premises unto and to the use of the Appellant, his heirs, executors, administrators and assigns. That the Appellant thereupon entered into possession of the dock and premises, and became jointly interested therein with Aga Mahomed Rahim Sherazee. The Bill further stated, that shortly after the conveyance to the Appellant, Aga Mahomed Rahim Sherazee conveyed unto Haje Goolam Hoossein Sherazee, his heirs, executors, administrators and assigns,

(a) In *Casement v. Fulton*, 5 Moore's P.C. Cases, 130, the question whether the rules of the Ecclesiastical Courts in Doctors' Commons, relating to peremption of appeals, applied to an Ecclesiastical cause in the Supreme Court at Calcutta, so as to deprive a party of the Charter right to appeal within six months from the date of the decree, was raised, but no decision was given upon that point.

As to the practice of objecting to the competency of an appeal, see *Shire v. Shire*, 5 Moore's P.C. Cases, 81.

* Present: The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

the remaining moiety of the dock, hereditaments and premises. The Bill further stated, that the Appellant and Hajee Goolam Hoosein Sherazee, being so jointly entitled to the dock, hereditaments and premises at Mazagone, entered into an agreement in writing, with the Peninsular and Oriental Steam Navigation Company, for a lease to the Company of the dock and premises; whereby it was stipulated and agreed, that the docks and premises should be completed by the Appellant and Hajee Goolam Hoosein Sherazee, or at their or one of their personal expense; and the channel leading to the docks cleared, and the docks kept in repair by them, or one of them, in like manner; and that it was stipulated by such agreement, that if the proprietors of the dock and premises failed to keep the same in repair, any amount of money disbursed by the Company for that purpose or otherwise, should be deducted from the rent to be paid for the dock and premises. That the Company entered into possession of the dock and premises, and [384] that large sums of money had been expended by the Appellant in the completion, perfecting and repairing the same. That the sums so laid out and expended by the Appellant amounted to Rs. 25,800 and upwards; and that no part thereof was defrayed by Hajee Goolam Hoosein Sherazee, who died in July, 1847. That by a decree, dated the 25th of November, 1846, made in a certain cause on the Equity side of the Supreme Court of Bombay, wherein the Respondents, as residuary legatees of one Mahomed Ally Khan, were Complainants, and Aga Mahomed Rahim Sherazee, as the personal representative of Aga Mahomed Shoostry, who was the executor of the last Will of Mahomed Ally Khan, was Defendant; it was ordered and decreed, among other things, that Aga Mahomed Rahim Sherazee should pay into the Supreme Court the sum of Rs. 11,74,459 and 65 reas. That at or previous to the time of the conveyance of the moiety of the dock and premises to the Appellant as aforesaid, the Appellant had no knowledge or information whatever of or concerning the proceedings or any of them in the last-mentioned suit, or of the fact that any other suit, action, or cause or proceeding whatever was pending, in any way affecting or relating, or which could affect or relate, to the dock, hereditaments and premises, or other the property, lands and goods theretofore of Aga Mahomed Rahim Sherazee. That the sheriff of Bombay, on the 18th of March, 1847, acting under certain writs of sequestration to him directed and issued out of the Supreme Court in the cause above-mentioned, entered upon, seized and sequestered the dock or docks, hereditaments and premises, and thenceforward held, and still at the date of the filing of the Bill of Complaint continued to hold, [385] the dock, hereditaments and premises in sequestration. The Bill then stated, that shortly after such sequestration, and on the 8th of April, 1847, the Appellant presented his petition (a) to the Supreme Court for the purpose of supporting and making out his right, title, claim, and interest in and to the docks, hereditaments and premises, in opposition to the claim made by the Sequestrator. That divers proceedings were taken, relative to the claim of the Appellant to the dock, hereditaments and premises, before the Supreme Court; but that the Appellant failed to make out to the satisfaction of the Court, that the consideration money for such moiety or undivided part of the dock and premises had been paid, and that the claim of the Appellant was, therefore, not allowed. That no proceedings whatever had been taken by any party claiming title or interest in respect of the moiety of the Appellant in the dock and premises, for the purpose of invalidating the conveyance to him, the Appellant, of such moiety, or by establishing a title in opposition to that of the Appellant, or in priority over his title. And that no decree or order of the Supreme Court had ever been made, declaring the invalidity of the Appellant's title, or for the delivering up of the conveyance and other evidences of title to any other person. [386] That the Peninsular and Oriental Navigation Company had paid into the Supreme Court

(a) It appears from a report of this case, *nom.* "Mushedy Kazim's claim," Perry's "Oriental Cases," p. 35, that the mode in which the Plaintiff intervened in that suit was by filing a petition and applying by affidavit to be allowed to go before the Master and to examine witnesses, *pro interesse suo*, when the Court, with the consent of the parties, examined the witnesses *viva voce*, and directed issues to try the right in question, and that after a trial, which lasted several days, the Court, on the 14th of November, 1848, decided against the validity of the Plaintiff's claim.

the sum of Rs. 28,219, as and by way of rent for the dock-yard, and that such sum had since been paid into the hands of the Sequestrator. And the Bill further stated, that the Appellant was entitled to have the moiety of the dock and premises delivered over to him out of the hands of the Sequestrator, and to have it declared that the same was freed, and discharged from all claim and interest of the Respondents or either of them, and to hold the same freed and discharged accordingly. And the Bill prayed, that the Appellant might be declared entitled to a moiety of the docks, etc.; and that the rents thereof, which had come into the hands of the Sequestrator, might be delivered up to him, and that in case he should be unable to make out a good and sufficient title to the whole of the moiety, he might be declared to have a good claim and charge on such moiety for such monies as he should be found to have paid therefor and expended thereon, and to have a lien on the sum of Rs. 28,219 paid into Court, and for general relief.

To this Bill the Defendants filed a general demurrer for want of equity.

The demurrer came on for argument before the Supreme Court, on the 14th of May, 1849, when the Court took time to consider the judgment.

On the 17th of May, 1849, the Chief Justice (Sir Erskine Perry), delivered the judgment of the Court, that the proceeding by the Bill was an attempt to reagitate a claim which had been previously disposed of by the Court, and was, therefore, *res judicata*, and ordered the demurrer to be allowed with costs.

[387] From this order the present appeal was brought.

Mr. Lloyd, Q.C., and Mr. Fulton, for the Appellant.—This demurrer was improperly allowed. The proceedings of the Court on the Appellant's petition, and the order dismissing the same, did not constitute a bar to the Appellant filing a bill in respect of the matters therein complained of, as it is not stated in the Bill that the whole claim for relief prayed for had been previously disallowed by a Court of competent jurisdiction. The Defendants are bound to show that the subject-matter of this Bill was the same as was adjudicated in the former suit, and that the right came in question before a Court of competent jurisdiction, and that the result was conclusive so as to bind the judgment of every other Court. *Behrens v. Sieveking* (2 Myl. and Cr. 602). That case, it is true, was upon a plea, but there is no difference in this respect between a plea and a demurrer. How is it shown that the matters alleged in the Bill are the same as in the petition? And how can it be said that it was *res judicata*, when the order made by the Court does not appear?—[Mr. Pemberton Leigh: Is not the fact of the former suit having been before the same Court, and part of the Records of the Court, important? Might not the Court look to those proceedings?—Those proceedings were not before the Court when the demurrer was argued, and the Court could not incorporate them with the Bill.—[Mr. Pemberton Leigh: As the Bill is framed, the Appellant claims, first, an absolute right by purchase to [388] one moiety, and then he claims a lien on the whole property for sums expended by him upon the premises. Now, if such a case as this was in the Courts here, would he not proceed by petition, as the Plaintiff did, and would not the Court refer the matter to the Master, upon whose report liberty would be given him to proceed at law by ejectment? Or if the matter was too complicated for adjudication upon the record, then the Court would give him leave to file a bill for the purpose of raising the question necessary to the investigation of his title. Now, as such a course, which would be obvious and proper, has not been pursued, would it not be assumed that the Court was satisfied upon the facts disclosed in the petition, and the evidence brought forward by the Appellant, that his claim was untenable? and, as he has neither excepted or appealed from that decision, could he bring a fresh bill for the same matter, without such bill being demurred to?—He might have brought an equitable ejectment: *Ansdeil v. Ansdeil* (4 Myl. and Cr. 449), *Ricardo v. Garcias* (12 Clk. and Fin. 368), *Pickford v. Hunter* (5 Sim. 122), *Hyde v. Edwards* (12 Beav. 160), Vin., Abr., tit. "Decree" were referred to.—[Sir John Lewis: Is not the case *Robson v. The Attorney-General* (10 Clk. and Fin. 471), in point?—The present Bill was a proper proceeding, and in conformity with the practice of the Supreme Court; and upon the facts stated therein, the Appellant was entitled to the relief prayed.

Mr. Turner, Q.C., and Mr. Leith, for the Respondents, were not called upon.

[389] The Right Hon. T. Pemberton Leigh.—This case has been argued with P.C. II.

very great ingenuity, and many points brought forward, but the whole question which we have to determine, is, whether upon this Bill it appears that the Plaintiff ought to be permitted to prosecute this suit; whether he has grounds upon the state of things presented on the record, for saying the suit ought to proceed.

Now the facts appear to be these:—In the year 1845, the present Appellant represents, that he purchased a moiety of the property, which is the subject of the present suit, from a person named Sherazee; that a conveyance was made of that moiety in consideration of a sum of money partly then owing, and partly paid as a further consideration for the purchase; that he entered into the possession of that moiety jointly with the proprietors of the other moiety, and that they together agreed to let it to the Steam Navigation Company at a rent, a part of the agreement being, that the lessors should keep the property in repair, and that if it was not sufficiently kept in repair, then the lessees should be at liberty to deduct the expenses of repair out of the rent; that in 1847, large sums had been expended by the Appellant on account of these repairs under this agreement, and that no part of those sums was contributed by the other tenant in common. He then states that a decree was made, on the 25th of November, 1846, against Sherazee, for the payment of a large sum of money in the suit which had been instituted, and that under proceedings in that suit the Sequestrator took possession of the estate as being the property of Sherazee. In this state of things, I apprehend, [390] according to the state of this record, the Plaintiff's course was perfectly plain, and there was only one course that he could take, as I understand the practice here. He had a legal title to one moiety of this estate, the whole of which had been seized by the Court as belonging to another person. The Appellant's Counsel said he might have proceeded, if he had chosen to incur the consequences of contempt, without any application to the Court by a proceeding in a Court of law. He did not adopt that course, which if he had would certainly not have been a very wise one. But he presented a petition which he states in the Bill was "for the purpose of supporting and making out his right, title, claim, and interest in and to the dock, hereditaments and premises, in opposition to the claim made by the Sequestrator." Now according to the case which he had made, the course to be taken was perfectly clear; if he had a legal title, he was to be at liberty to assert that title to the property which was in dispute; that is to say, the lien which he had upon the rents and profits. I apprehend that the usual course would be by an inquiry before the Master, or if it could not be so done, then it would be the subject of a suit, which the Court would give him liberty to institute, for the purpose of ascertaining and determining those rights. Now what the order was that was made upon that petition does not appear, and the Appellant has strongly pressed upon the Court that fact, by saying, how can it be said that the matter is *res judicata*, when from all that appears in these proceedings there was no decision at all? But does the Appellant state anything in his Bill that shows, supposing such Bill to be pending, that he is at liberty either by any order of the Court, or from any inherent equity [391] in himself, to institute this suit? If he has not told us what order was made, he must take the consequences: we must assume that it was an order which either entirely disallowed the claim, or allowed him to take some proceeding which he has not thought fit to adopt. In that state of things, how is it possible to say that this Bill is one that ought to have been maintained? It is said by the Court below that he is concluded, that that order, if erroneous, cannot now be appealed against. It may be necessary, if he has any ground of complaint against that order, to make some special application for the purpose of impeaching it, but whether such application would succeed or not, is not the question now before us: the only question that we can determine is, whether the present proceeding taken by the Appellant was a fit and proper proceeding, and one which the Court ought to have maintained. We think it is not; and, therefore, the order allowing the demurrer in the Court below must be affirmed, and with costs.

IN RE MUSHADEE MAHOMED CAZUM SHERAZEE * [April 21, 1852].

Leave given to appeal, under circumstances, though the time limited by the Bombay Charter had expired, and the decree of the Court below sanctioning the sale of real estate, the subject of the suit, had been partially acted on; the petitioner undertaking not to disturb the possession or title of the purchasers of any part of the property actually sold; to give security for costs, and to abide by any order which the Judicial Committee might think fit to make, touching the matters in dispute.

In consequence of the intimation contained in the above judgment, Mushadee Mahomed Cazum Sherazee presented a petition, praying for leave to appeal from the Order of the Supreme Court, dated the 14th of November, 1848, made in the suit mentioned in the Bill.

[392] The petition now came on for hearing.

Mr. Lloyd, Q.C., and Mr. Forsyth, in support of the petition, submitted that it was a case for the indulgence of the Court; that, although the time limited by the Bombay Charter for appealing had expired, yet that the delay arose from the petitioner having been advised to file a Bill instead of appealing against the Order of the Supreme Court.

Mr. Leith, *contra*, urged, that it was not such a case as justified the exercise of the discretionary power vested in the Court, as the Sequestrators had proceeded to sale, and had already sold portions of the estate, the subject of the suit, in which the petitioner had been admitted to intervene, and had been allowed to examine witnesses *pro interesse suo*, which portions were then in the possession of the purchasers, whose title would be affected by the admission of the appeal. He insisted, moreover, that an appeal would not lie from the Order dismissing the petition, as the sole question that could be raised upon appeal was the credibility of the witnesses, which the Court below had discredited. *Santacana v. Ardevol* (1 Knapp's P. C. Cases, 269). *In re Sherwin* (4 Moore's P. C. Cases, 311).

Lord Cranworth.—Their Lordships have considered what course they ought to take in this case, which is one of some embarrassment, because the parties in Bombay, after the adjudication upon the reference *pro interesse suo*, took a proceeding which has been determined, first, by a Court of competent jurisdiction, at Bombay, and afterwards by this Committee, to have been erroneous; [393] and having failed in that proceeding, the consequence has been, as we are told, that the property in question has been sold, and persons have acquired title under that sale, which they had a right to consider an effectual and valid title against all the world.

Now we are inclined to think that it may be reasonably said that the course which was taken by the parties, though erroneous, may have been taken *bona fide*, under the belief that it was the proper course. I cannot say I am myself perfectly satisfied that it was so: I should like, on that subject, to have had an affidavit explaining why it was, and showing it was altogether a mistake from the beginning. The difficulty we have had has arisen from this, that purchasers, third persons, innocent persons, have acquired a title, or certainly may have acquired a title, which may be affected by permitting the party now to appeal. At the same time, we think we see a course which may give the petitioner what he wants, and protect any purchaser. The order we shall make is this, and if the petitioner do not assent to it, his petition will be dismissed. "The petitioner consenting and undertaking that he will, under no circumstances, disturb or attempt to disturb the possession or title of the purchasers of any part of the property sequestered, and since sold, let him be at liberty, within six calendar months, to appeal against the order of the 14th of November, 1848, giving security for costs to the amount of £1500; this undertaking of the petitioner not to prejudice any right he may have against the purchase money of the said premises, or any part thereof; and also consenting and

* Present: Lord Cranworth, the Right Hon. Sir James Knight Bruce, the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

undertaking to abide by any order which the Judicial Committee may think fit to make, touching the matter in dispute, and the costs of the proceeding."

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*. As to appeal by special leave in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C., at p. 125. As to appeals from Bombay to Privy Council, see letters patent of 28th Dec. 1865, arts. 39-42 (Stat. R. and O. Rev. iv. 119), and Code of Civ. Proc. (Act XIV. of 1882), ss. 594, *et seq.*

[394] IN RE CLARIDGE'S PATENT * [May 15, 1851].

The importer of an invention from abroad is an inventor within the meaning of the Statute, 5 and 6 Will. IV. c. 83, and entitled to apply for an extension of the term.

But the Judicial Committee will look with jealousy into the merits of the invention imported.

Application for an extension, by the Trustees of a Joint Stock Company (the assignees of the patentee) refused; the invention imported having been in common use in France, and no great risk or expenditure incurred by the Patentee or his assignees in introducing it to the public.

In this case, Letters Patent were granted in 1837 to the patentee, Richard Tappin Claridge, for an invention of a mastic cement or composition, of albituminous limestone or natural composition, called "Asphalte," found in France, applicable for paving and road-making, for covering buildings and various other purposes for which cement, mastic, lead, zinc, or composition are usually applied. The petition for extension was presented by John Sherell and George Barrett Lennard, the trustees of a Joint Stock Company, incorporated by an Act of Parliament, called "Claridge's Patent Asphalte Company," who were the assignees of the patentee, which Act of Parliament had been obtained to enable the Company to carry on the business, and make valid the purchase of the patent from the patentee. The petitioner set forth, that the invention required a large capital for the construction of the necessary apparatus for the manufacture of the cement, or composition, and that the public had greatly benefited by the invention, but that the petitioners had sustained a loss by the transaction, and prayed for an extension for fourteen years, from and after the expiration of the term granted by the original patent.

It appeared from the evidence, that the invention [395] had been known for some time in France, and was in use in Paris, before Claridge introduced it into England; that he had imported over a large quantity of "Asphalte," in pursuance of an arrangement with the petitioners, and obtained a patent; and in 1847 assigned to the petitioners all his interest in the patent for £8000; that the Company had employed a large capital and expenditure to the extent of £23,000 and upwards, and that the resulting profits had not amounted to the losses sustained by the Company.

Sir Frederick Thesiger, Q.C., and Mr. Webster, in support of the petition, contended, that the invention was of great public utility, and that the Company had not been sufficiently remunerated for their outlay and exertions in working the patent and introducing it into public notice: the profits realised, as appeared in evidence, being not more than the interest on the capital.—[Sir John Jervis: To whom is the extension to be granted? This petition is by the trustees of a Joint Stock Company. The rule in granting Letters Patent is to limit the number of grantees to twelve.]—The petitioners are the assignees of and stand in the place of the patentee. The Statute authorises fresh Letters Patent to be granted on the recommendation of the Committee.—[Mr. Pemberton Leigh: No doubt extensions

* Present: The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

have been granted to assignees (see Russell's Pat., 2 Moore's P. C. Cases, 496; Hardy's Pat., 6 Moore's P. C. Cases, 441; and Bodmer's Pat., *ib.* 468), but it is too strong to say that the assignees are to be treated with the same indulgence as patentees.]

[396] The Attorney-General (Sir Alexander Cockburn), for the Crown, submitted, whether this was a case for the proper exercise of the statutory power of the Committee, inasmuch as it was not the case of an original inventor applying on the ground of having been inadequately remunerated. They are the assignees of an importer, who had himself been amply remunerated, and after all, the substance "Asphalte" is a well-known substance, and one of commerce in France, and the manufacture of it for the purposes patented well known in France, where it is in general use.

Sir John Jervis.—My Lords are of opinion, that, in the present case, there is no ground for complying with the prayer of the petition. There is no question that an importer of an invention from abroad, has, from a very early time, been held to be an inventor in this country, and that rule has been held to apply to the construction of the Statute under which the present application is made. Each case must be dealt with according to its own particular circumstances, and their Lordships have looked at this case as to the merits of Claridge as the inventor, according to the strict meaning of that word. He introduces, not a piece of complicated machinery, or a manufacture of difficulty or science, but something in general use at Paris. He does not take upon himself much responsibility or perseverance in the introduction, but enters into a bargain with a Company, that he shall bring £23,000 worth of "Asphalte," and so introduce it to the Com-[397]pany. It was giving permission to a Company to work the invention he has imported, he having thought that was enough, to entitle him to obtain a patent. He does obtain a patent, and forms a Joint Stock Company, and receives £8000 for the introduction of a well-known substance from a foreign land; as far as he is concerned, he has had adequate satisfaction for any merits he had in the introduction. It is said, that if he had not done so, the public would not have had the benefit of the introduction of the invention, and that it would have still remained abroad, but for the capital and exertions of the Company. It is not to be understood as my Lords' opinion, in refusing the application, that, under particular circumstances, assignees of a patent are not entitled to the favour and indulgence of the committee. But, again, that case, like others, must depend upon the particular circumstances presented to the consideration of the Committee. Still, how does it stand? This is a Joint Stock Company, to a certain extent interfering with what is the basis of the patent law, namely, to prevent the combination of a number of persons to crush any one individual. That, however, is not the ground on which my Lords proceed. They would inquire whether the Company, having entered into a commercial speculation, had managed it with a degree of prudence and consideration, such as the importer would have brought to bear upon it. We find, that upon adding to the expenses of this trade, from the year 1839 to the present time, they have expended in the purchase and management of this business about £23,000, excluding the amount they have paid in salaries and matters of that sort, which is, in fact, the amount which they say they have lost, calculating the interest upon their [398] capital; but even if that were so, we must take this case upon the basis of the original importer's merit, taking into consideration that those who now apply, entered into a commercial speculation with a full knowledge of all the circumstances, and with the expectation of a profit, which, if they have not got, is no reason to entitle them to call upon us to grant this application in the terms of the prayer; the application, therefore, must be refused.

[Mews' Dig. tit. PATENT, A. To WHOM GRANTED, F. Confirmation, etc., 2. Renewal and Extension, c. Foreign Invention. As to (i.) position of importer, see *Marsden v. Saville St. Co.*, 1878, 3 Ex. D. 203; and the Patents Act, 1883 (46 and 47 Vict., c. 57), ss. 25, 46; (ii.) position of assignees, see *In re Pitman's Patent*, 1871, L.R. 4 P.C. 84; 8 Moo. P.C. N.S. 293; *In the matter of Barff's and Bower's Patent*, 1895, 12 R.P.C. 383; and Patents Act, 1883, ss. 25, 46.]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THOMAS WALLACE and Others,—*Appellants*; JOHN FIELDEN and Others,—*Respondents* * [May 16, June 19, 1851].

THE "ORIENTAL."

The authority of the master of a ship to pledge by Bottomry for the purpose of raising money for the absolute necessities of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner; and such power to raise money by Bottomry is vested in the master, although the owner resides in the same country, provided there is no means of communication with the owner, and the exigency of the case requires it [7 Moo. P.C. 410].

A Bottomry bond was granted in New York by the master of a ship, to obtain money for necessary repairs; the owner whereof was residing at St. John's, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously acted as the general agent of the owner, and no intimation of the transaction was made by the master to the owner until after the execution of the bond.

Held upon appeal (reversing the sentence of the Admiralty Court) that the master having the means of communication with the owner, no such absolute necessity existed as to authorise him to pledge the ship without communication with the owner, and the bond declared void.

Semble. The agent of the owner may take a Bottomry bond as a security for advances made by him.

This was an appeal in a cause of Bottomry; the question being, whether a Bottomry bond granted at New York, in the United States, on the ship *Oriental*, her cargo and freight, by the master, for necessary repairs, was valid; the owners of the ship being at the time at St. John's, New Brunswick, within communication by means of the electric telegraph; and the obligee of the bond, the accredited agent, at New York, of the owner.

The facts of the case, so far as they affect this question, were as follows:—

The *Oriental*, of St. John's, New Brunswick, of which the Appellant, Thomas Wallace, was the owner, in December, 1848, arrived at New York, with a cargo of coal from Hull; she was consigned to Miln, a merchant there, who had acted as the general agent for Wallace, at New York, for about five years, who, when Wallace's vessels had gone to that port, which had frequently been the case, had the management of them there. Miln, on the vessel's arrival, sold the cargo of the *Oriental*, received the proceeds, paid all the ship's disbursements, and acted in all respects as agent for the vessel. He took the master's (Captain Hoyt's) draft for £200, on Messrs. Cannon, Miller, and Co., of Liverpool, Wallace's agents there, for the balance of ship's disbursements (over and above the amount of the proceeds of the cargo), and he advised Wallace, by letter, that he had done so. The vessel sailed in the February following, from New York, for Liverpool, and on the 24th of the same month, while in charge [400] of a pilot, she struck on the outer bar of the harbour of New York, and having sustained damage, was on the next day towed back to New York, and put into dock. The distance of New York from St. John's is about 600 miles. Between these cities there was a communication by electric telegraph; by which means messages could be sent from one of those places to the other in a day, sometimes in a few hours. The ordinary course of post was from four to six days. On the 23rd of February, Miln sent a message by the electric telegraph to Wallace, at St. John's, informing him that the ship had been ashore, that she had put back leaky, and was discharging. On the same day Wallace, by letter, acknowledged the receipt of the telegraphic dispatch, and added, "the telegraph is now in

* Present: The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Sir H. Jenner Fust, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

operation, and will be a great accommodation: I shall be glad to hear by it when necessary." Upon the same day Wallace also wrote to the master, and on the 26th, Miln again wrote to Wallace, in part as follows:—"Dear sir, I sent you a few lines on the 23rd inst., per telegraph, advising you of the unfortunate occurrence which happened to the *Oriental* on her getting out to sea, and just at the moment when the pilot was preparing to leave her. She is now in the Atlantic dock, and the surveyors having ordered her to be discharged, we commenced unloading on Saturday morning, and will have all the cargo out to-night, and will have her on the ways the following day, when another survey will be held on the vessel, and I will then report to you what injury she has sustained; and although she lay all night on the sand bar, the weather being moderate induces me to think that she is not seriously injured, as the leak has decreased since we began to lighten her. The [401] expenses will be considerable, but fortunately the cargo is valuable, and being on general average, it will not fall so severely as otherwise might have been the case. I shall use all exertion to have her ready for sea again; and if the repairs do not detain us, she may be loaded again by the end of this week. Our Insurance Companies are getting quite sick of British ships; and it is now very difficult to get them insured on any terms, the losses this season have been so heavy; but in the case of the *Oriental* no blame is attached to any one but the pilot; and it was certainly a great piece of carelessness on his part."

The repairs being completed, and the ship again ready for sea, Miln, on the 7th of March, wrote to Wallace, as follows:—"Dear sir, Since writing you on the 26th ult., I have received your esteemed favours of the 23rd and 28th, and am glad to find that you had insured a part of the *Oriental* at St. John's, which will nearly cover you. I would have wrote you sooner, but Captain Hoyt addressed you on the 2nd inst., with all the particulars of the damage done the ship, which I was glad to find was not so serious as we anticipated; the repairs have been completed, and she is now busy taking in cargo, and will be ready for sea on Saturday; the average expenses will be heavy, but the cargo is over 50,000 dollars, which will not make the per centage so severe: if I had known what was to happen, I would have sent on the *Oriental* to Savannah, and saved all this confounded trouble and delay; but the prospects at the south were so discouraging, that I thought we were acting for the best. I date all the trouble in this vessel to the inefficiency of the captain, who has neither head nor hands. The cargo of the *Oriental* was all in good order, [402] and the whole will go forward. I shall write you again in a few days, and remain, etc."

On the same day, Miln, for the first time, spoke to the master about a Bottomry bond, to which the master at first objected, but at length agreed, upon Miln's saying that he had written or would write to Wallace, and that Wallace would have very little to pay, as the cargo was so valuable, and that he would allow Wallace the difference of expense, so far as ship and freight were concerned. The master made no communication to his owner, as to the proposed Bottomry bond. Miln, on the same day, wrote to Messrs. Cannon, Miller, and Co., of Liverpool, the following letter:—"Dear sirs, I had the pleasure, on the 20th ult., and am now sorry to inform you that Captain Hoyt, on proceeding to sea with a pilot on board, and in tow of steam boat, got on shore on Flinn's Knoll, off Sandy Hook, where she lay all night, but fortunately got off next morning, but considerably strained and leaking, so that it was deemed prudent to return to the city; and on a survey, the wardens ordered her to be discharged and taken out of water, which has been done, and I am glad to say the injury is not so great as we were afraid of. She had lost her false keel, and several of the butts started, but she is now repaired and taking in her cargo, which suffered no damage, and will be ready for sea the end of this week. I am truly sorry for these misfortunes which have befallen our friend Wallace, but this is not so bad an affair as the *Kate Kearney*, which proves worse than a total loss to the underwriters. Fortunately both vessels were insured; freights at the south are going up and will be higher here. Cotton is also improving, as you will perceive from the enclosed circular.—[403] P.S. As the expenses here of landing and re-shipping the cargo will be considerable, and having no funds of the owners in hand, I think it will be prudent for all parties to take a Bottomry on ship and cargo for my advances, and I will therefore thank you to insure 3000

dollars on said Bottomry, to protect those interested. The ship is now in fine order, and her cargo, as also the vessel, has been insured here on as low terms as any British ship out of port. Captain Hoyt is also a favourite with our underwriters, and I could have done it here, but in case I should take Captain Hoyt's drafts on you for the amount, I thought it as well to have the insurance done on your side for your own security."

On the 9th and 10th of March, with the consent and authority of the master, advertisements were inserted in some of the newspapers at New York, in his name, for advances on Bottomry of the ship, cargo, and freight. On the 10th of March, Miln sent the following letter to Wallace (which Wallace received in the regular course of post, on the 15th of March, at St. John's):—"Dear sir, Since writing you on the 7th instant, I am without any of your favours, and have now to inform you that the *Oriental* is again loaded, and in the stream ready for sea, and I hope she will now have a speedy and safe passage. All the cargo has been re-shipped, as we found no damage, and the principal expenses fall on the cargo or general average; and having no authority from you to draw either on yourself or the agents in Liverpool, I have deemed it prudent to take a Bottomry on the cargo for the expenses, which I hope you will approve of, as I am willing to relinquish the proportion of premium that may fall to your share of the loss, and [404] the underwriters on the cargo have to bear their proportion of the Bottomry, which I have no idea of advancing for their account, without some remuneration, and if I did so they would not thank me. I shall make no indorsation on the register, or in any way hold the ship; and explain to Messrs. Cannon, Miller, and Co., that my sole reason for taking this Bottomry was on account of my having to advance the money for the underwriters, and had it been for your account I should not have done so. We are busy settling all the accounts, and I cannot to-day give you the correct statement of expenses, but will hand you particulars the moment she gets to sea. The ship is now in fine order, and the caulking and tarring her bottom will do her no injury."

The bond was dated the 12th of March, 1849. It was given on ship, cargo, and freight, for the sum of £1393 10s. 7d. sterling, but the actual advances amounted only to about £845, the residue being bottomry premium and commissions charged by Miln. The value of the vessel and freight was upwards of £6000.

On the 25th of April, 1849, the Respondents, John Fielden, James Fielden, Daniel Campbell, and William Cunliffe Pickersgill, of Liverpool, in the county of Lancaster, the legal holders of the Bottomry bond upon the *Oriental*, brought an action in the High Court of Admiralty, in England, in the sum of £1600, against the ship *Oriental*, her cargo and freight. An appearance having been given by the Appellants, the owners of the ship and the cargo laden on board the same; an Act of Petition was filed by the Respondents, and an answer thereto given in by the Appellants, setting forth in substance the above facts.

[405] On the 25th of March, 1850, the Judge of the Admiralty Court (the Right Hon. Dr. Lushington) gave judgment, pronouncing for the force and validity of the Bottomry bond (case reported *nom The Oriental*, 3 W. Rob. Adm. Rep. 243), holding, that the evidence established that it was not in the master's power to procure the necessary funds, otherwise than by the execution of a Bottomry bond, although the owner was in the same country, and that the fact of Miln being the agent, did not, in the circumstances, prevent him taking a Bottomry bond, and that, under the circumstances, he was not bound to have availed himself of the channel of communication afforded by the electric telegraph, before he took the bond.

From this sentence the present appeal was brought.

Mr. Greenwood, Q.C., and Dr. Twiss, for the Appellants.—The true question involved in this case was entirely lost sight of in the Court below, which is, whether there existed such actual necessity as to justify the master, upon his own authority, to hypothecate for repairs, when he had the means, without great prejudice or delay, of communicating with the owner. *Jones v. Simons* (2 Q.B. Rep. 425), *Stonehouse v. Gent* (2 Q.B. Rep. 431, note), *Arthur v. Barton* (6 Mee. and Wel. 138). The Court below seems to have sustained the bond upon two grounds; first, that although the owner was in the same country, he had authority to hypothecate; and, secondly, that the fact, *per se*, that Miln was the agent of the owner, did not prevent

him taking the bond. We do not dispute either of these [406] propositions. The latter position was first established by Lord Stowell, in the case of *The Hero* (2 Dodson, 139), where it was decided that an agent might take a Bottomry bond, by way of security for advances made by him, when the funds required are large. So it has been held, upon the authority of *La Esabel* (1 Dodson, 273), and *The Trident* (1 Dodson, 273), that no distinction exists between foreign and English countries as to the power of the master to borrow; yet the true test to sustain this bond was, the practicability of the master communicating with the owner, there existing in the first place such an unprovided necessity, as justified the master resorting to a Bottomry bond. This seems to have been lost sight of by the Court. The duty of the master was to have ascertained if he could raise money on the credit of the owner, and the party lending was also bound to make such inquiry. *Heathorn v. Darling* (1 Moore's P.C. Cases, 5). For, if the master could raise funds, he was not at liberty to resort to Bottomry; which is only to be resorted to when the master has no means of procuring money upon the credit of the owner. *Soares v. Rahn* (3 Moore's P.C. Cases, 1), *The Trident* (1 W. Rob. 29), *The Rhodamante* (1 Dodson, 201), *The Lochiel* (2 W. Rob. 34, 44), *Robinson v. Lyall* (7 Price, 592), *Arthur v. Barton* (6 Mee. and Wel. 138), *The Fortitude* (3 Sumner, 134). 2 Phillips "On Insurance," 297. Now, the facts show, that the owner was in credit with Miln, who would have advanced the money if he had not expected resorting to the underwriters on the cargo for the interest. We contend, therefore, that as the facts show no necessity, in the reasonable use of that word, [407] for resorting to Bottomry, the bond is void, on these grounds; we say, first, that the master had practical and convenient means of communicating with his owner, without extraordinary expense or delay, and he ought not to have borrowed on Bottomry without consulting his owner. Secondly, that Miln was the accredited agent of the owner, and he ought to have communicated with his principal before subjecting him to Bottomry interest, as he knew, or by reasonable inquiry might have known, that the master had not consulted his owner. Miln had the means of doing so; and he had no right to assume by forbearing to make inquiry of the master, that the master had consulted his owner, or that the owner had declined, or was unable to provide funds, or had sanctioned a loan on bottomry. At all events, even if the bond is valid, the rate of interest ought to be reduced, for the ship's owner would be ultimately liable for all the Bottomry and expenses falling upon the cargo, *Duncan v. Benson* (1 Exch. Rep. 537), although Miln, by mistake, thought otherwise; Miln having disclaimed all intention of charging Bottomry interest against the owner.

The Queen's Advocate (Sir John Dodson), and Dr. Bayford, for the Respondents.—This bond is good, as the money advanced on Bottomry was absolutely necessary to enable the master to repair and refit the vessel for sea, and as it could not be raised on the personal security of the master, or the owner of the ship, or the consignees of the cargo. There can be no question, that if a necessity exists, the master has authority vested in him to hypothecate the ship and cargo, though lying in a port of [408] the same country in which the owners resided. *La Esabel* (1 Dodson, 273). The proposition contended for by the Appellants, that Miln being the agent of the owner, the bond taken by him was therefore invalid, is too extensive, and cannot be sustained. Lord Stowell, in the case of *The Hero* (2 Dodson, 139), held, that the agent of the owner might, under circumstances, take a Bottomry bond by way of security for advances made by him. That case is a strong authority, as it recognises the principle, that the advance of money is no part of the contract which a party necessarily enters into when he becomes an agent. The circumstances justified the agent taking a bond for the large advances made by him.

Mr. Greenwood, in reply, was stopped.

Sir John Jervis.—We are of opinion, Mr. Greenwood, that we need not trouble you in this case; and that the judgment of the Court below should be reversed. By a perusal of the judgment of the learned Judge of the Court below, it appears that the case proceeded, in his judgment, upon a question of fact, whether Miln, being the general agent of the owner, could, under the circumstances, take the bond. He again repeats, in the course of his judgment, that the real question was, whether

he was prevented, by being the agent of the owner, from taking a Bottomry bond from the master. It seems to have escaped the attention of the learned Judge, and it does not appear, so far as we can judge, to have been much urged in the argument before him, that a preliminary question arises before that point [409] comes to be discussed, namely, whether there was any authority to give or take a bond.

The grounds on which their Lordships proceed to reverse the judgment are applicable, not to the circumstances of this particular case only, but to similar cases.

In this case they are of opinion, that there was no authority to give a Bottomry bond. The rule of law, or rather the fact on which the rule of law is founded, is well explained and laid down in several cases, and now perfectly understood, that the master has authority to raise money for the absolute necessities of the ship, if he can do so on the credit of the owners; if he cannot do so on the credit of the owners, and advances are absolutely necessary, then, if all the means fail, he has authority to pledge the ship by Bottomry, and to give maritime interest, which is, in effect, defeating the object of the adventure, and transferring to the lender of the money much of the profits of the voyage.

The question is, whether in this case, or in circumstances like it, the absolute necessity existed. It has been said, on behalf of the Respondents, that the necessity existed; and that an authority exists as a matter of law in all cases where a ship is, with reference to the owner, in a foreign port. I apprehend it is upon that fallacy, if I may so say, that the argument in this case has proceeded. Formerly, the rule of law was this, that whenever the owner of the ship and the master, at the time of the advance, were in ports foreign to each other, then there would, of necessity almost, be such a want of opportunity of communication as to clothe the master with authority to raise money on Bottomry; and the converse was supposed to hold, namely, that whenever the vessel and [410] the owner were in the same country, on the other hand, the opportunity of communication did exist, so that the master would not have authority to raise money on Bottomry. The authority to borrow on the credit of the owner and on Bottomry is the same, only, in the second case, there is this ingredient, the money cannot be raised without the pledge of the ship.

Now, the rule of law was broken in upon by the judgment of Lord Stowell, in the case of the *La Ysabel* (1 Dodson, 273), for, in that case, the ship and the owner were in the same country, but not in a country where there was the ability of communication, because, as Lord Stowell said, there was a disturbance at that time, and it was as impossible to communicate with the owner in Spain, though the ship was in Spain, as if she was in a foreign country; treating it not as a matter of law, but a test of the possibility of the power to communicate. Therefore, in the absence of the power to communicate, the agency held. Following that up, the converse has been held. In England, though the owner is in England, and the vessel too, yet, if the power of communication is not correspondent with the necessity, the authority to borrow money exists. According to *Arthur v. Barton* [6 M. and W. 138], *Jones v. Simon* [2 Q.B. 425], and *Stonehouse v. Gent* [2 Q.B. 431 n.], if there be no power of communication with the owner, correspondent with the necessity, the power to raise the money exists. If there was a great emergency, and the master could not raise the money on the credit of the owner, he must then raise it on the ship by Bottomry, whether she is in one country or another, taking it for granted, there was an absolute necessity and that there was no power of communication.

Now, if this be the real principle, and if this be the [411] proper distinction, what is the rule of law applicable to a foreign country? You have authority, but that is only because you have no means of communication.

We must, however, look at the circumstances of this case. There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence, which must be taken to be the proper mode or channel of communication, not to send money as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand, and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded

on the impossibility of a communication. Their Lordships are of opinion, that there was no authority in the master to raise money on Bottomry; therefore, he was not clothed with a right which could confer that property on Miln, who took the bond.

Therefore, without entering on the second question, on which the Court below framed its opinion, we are of opinion that the judgment should be reversed.

[Mews' Dig. tit. SHIPPING; A. N. BOTTOMRY; 2. *Validity*, b. *Authority of Master*. S.C., below, 3 Rob. W. 243. Discussed in *The Onward*, 1873, L.R. 4 Ad. and E. 54; and see *Kleinwort, Cohen and Co. v. Cassa Marittima of Genoa*, 1877, 2 A.C. 158.]

[412] ON APPEAL FROM THE SUPREME COURT AT TRINIDAD.

THE COLONIAL BANK,—*Appellants*: FRANCIS CAZABON,—*Respondent* *
[June 21, 1851].

According to the practice of the Supreme Court at Trinidad, since the passing of the Ordinance, No. 5, of 1845, as regards cognovits, confession is signed by the Defendant in the presence of his Solicitor, and attached to the proceedings in the cause, and on application to the sitting Judge by the Plaintiff's Solicitor and production of the confession, and on appearance and consent of the Defendant's Solicitor, final judgment is entered up by the Registrar.

A *cognovit actionem*, executed in 1846, was set aside by the Court at Trinidad, on the ground that the cognovit was not signed by the Defendant in the presence of the *Escribano* of the Court according to the Spanish laws of 1534 and 1560. Held on appeal, reversing the order setting aside the cognovit, that those laws did not apply to cognovits, and that the cognovit being executed according to the uniform practice of the Court since the introduction of the Ordinance of 1845, was a good and binding instrument.

The Appellants in this case, on the 26th of May, 1846, filed a declaration in the Supreme Civil Court in the Island of Trinidad, against the Respondent, a resident there, in an action of covenant. On the 20th of June, in the same year, the Defendant appeared in person, and by a cognovit under his hand confessed the action.

This cognovit was signed by the Defendant, in the presence of Henry Stone and James Etter, the attesting witnesses, and appended thereto was a declaration signed by Henry Louis Jobity, the solicitor named by the Defendant, and attending at his request; by whom the cognovit or confession of judgment was expressed to [413] have been read over and explained to the Defendant, previous to his execution thereof.

On the 22nd of June, 1846, final judgment was entered up in the action against the Defendant, by the Registrar of the Court, for the sum of £2718 12s. sterling, and notice thereof in writing, under the hand of the Plaintiff's solicitor, dated the 2nd of December, 1846, was personally served upon the Defendant's solicitor.

Default having been made by the Defendant in payment of the first instalment, payable according to a proviso in the cognovit, the Plaintiffs, on the 15th of April, 1848, issued a writ of extent against the lands, tenements, rents, and hereditaments of the Defendant, for levying the sum of £677 1s. 8d., the further sum of £81 5s., for two years' interest on that sum, from the 1st of March, 1846, to the 1st of March, 1848, and the further sum of £10 5s. 4d. for costs taxed and allowed, together with interest on the two several sums of £677 1s. 8d. and £10 5s. 4d., which writ was on the same day delivered to the marshal, to whom the execution thereof belonged.

The marshal issued his warrant for execution, and on the 5th of October, 1848,

* Present: The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

he made his return to the writ, and thereby certified that he had, in execution and by virtue thereof, levied upon certain messuages and lands, which were in the return set forth; and on the 6th of October, 1848, an order of the Supreme Court was made on the application of the Plaintiffs' solicitor, appointing the 22nd of January then next, for the sale of the properties.

On the 22nd of January, 1849, a *terceria* and claim [414] of preference was filed in the same Court, on behalf of the Registrar of the Court, in respect of a prior mortgage or charge on a portion of the property in his favour. And on the same day a part of the property levied upon, was duly put up to sale by the Registrar of the Court, and one parcel thereof was sold to Robert Johnstone.

Various proceedings were subsequently taken in the matter of the sale, and ultimately, on the 28th of April, 1849, the report of the Registrar was made in the cause, whereby Johnstone was allowed to be the purchaser of the lot so sold to him, and all the matters and things therein contained were ratified and confirmed by the Court.

On the 3rd of July, 1849, counsel for the Defendant applied for a summons to show cause why the cognovit of the 20th of June, 1846, and all subsequent proceedings, should not be set aside for irregularity, upon the grounds, that the cognovit should have been interpreted to the Defendant in the French language, he being a foreigner by birth, and that being the only language which he understood, and that the cognovit was not so interpreted by such interpreter; that the cognovit was irregular and void, not having been attested according to the form of the Ordinance in such case made and provided, inasmuch as the cognovit was not witnessed by any solicitor or advocate attending at the request of the Defendant, but was witnessed by two persons named Stone and Etter, who were not the solicitors of the Defendant, and, because no solicitor or advocate attending on the part of the Defendant had subscribed his name as a witness to the due execution thereof, and thereby declared himself [415] to be the solicitor or advocate of the Defendant, and stated that he subscribed as such solicitor or advocate, according to the form required by the Ordinance; and further to show cause, why the several sums of money received by the Plaintiffs should not be refunded to the Defendant. This application was supported by two affidavits of the Defendant, in one of which he deposed, that the confession was irregular, inasmuch as the same was not executed in the presence of the Escribano or Registrar of the Court; and in the other of which he set forth, that certain dealings and transactions had taken place between the Colonial Bank and one Scipion de Barreo and himself; that the Bank, threatening to enforce payment of certain notes when due, he, the Defendant, was prevailed upon and induced to execute the deed of covenant, on which the action was founded; that the Bank, having commenced the present action at law upon the deed, he was further prevailed upon and induced by the importunities of the Bank and Scipion de Barreo, to execute the cognovit; that the cognovit was not properly explained to him, or if properly explained to him, that he did not understand the import of it; that he was of the age of seventy-eight years, and an ignorant man, and unacquainted with mercantile dealings, and that he understood the English language very imperfectly, and not sufficiently to transact any business in it; that he was a foreigner by birth, being a native of the Island of Martinique; that the cognovit was not attested by an interpreter of the French language, and that it was irregular and void, not having been attested according to the Ordinance in such case provided.

[416] This application was heard on the 3rd of July, 1849, before Mr. Justice Bowen, and on the 5th of July was refused by him.

On the 23rd of July, the Defendant renewed the application by moving the Court for a rule to show cause why the cognovit and all the subsequent proceedings should not be set aside for irregularity, both on the grounds urged in the former application, and because the Defendant had not executed the cognovit in the presence of the Escribano or Registrar of the Supreme Court, and attested by him, and because the Defendant had appeared in person, without first delivering to the Registrar a statement in writing of his domicile. This application was supported by the affidavits used on the former occasion.

A rule to show cause was granted substantially in the terms of the application.

On the 17th of August, Jobity filed an affidavit on the part of the Plaintiffs, in

which he stated, amongst other things, that he was a solicitor and sworn interpreter of the English and French languages; that he met the Defendant at the chambers of Charles William Warner, barrister-at-law, on the 20th of June, 1846; that the cognovit was handed to the Defendant, and that the Defendant accepted him as his solicitor in that cause; that he read and interpreted, in the French language, the cognovit to the Defendant; that he explained the nature of the cognovit to the Defendant, and inquired of him if he understood it, to which the Defendant replied that he did; that the Defendant then signed the cognovit in the presence of himself and James Etter, then a clerk of Warner; that he the deponent immediately afterwards, and in the [417] presence of the Defendant, wrote at the foot of the cognovit the attestation.

An affidavit was also made and filed on the same day, in the same cause, by Stone, who deposed that he was asked to officiate as solicitor to the Defendant, in the matter of the cognovit, but declined, as not being sufficiently well acquainted with French to interpret the instrument to him; that he heard Jobity read over and explain and interpret the cognovit to the Defendant; that he saw the Defendant sign his name, and he wrote his name as an attesting witness.

On the 23rd of August, 1849, the Plaintiffs showed cause against the rule obtained by the Defendant, before the Chief Justice of the Supreme Civil Court, and Mr. Justice Bowen, who then constituted the Court; and after argument, it was ordered that the *cognovit actionem*, or confession of record, dated the 20th of June, 1846, and all subsequent proceedings thereon, should be set aside without costs.

Mr. Justice Bowen dissented, and the order was made on the opinion of the Chief Justice alone.

The Appellant appealed from this order making the rule absolute: submitting that the same ought to be reversed and altered for the following reasons:—

1st. Because the judgment was in all respects a valid and regular judgment, and was binding on the Defendant.

2nd. Because it was not competent to the Defendant to object to the judgment in the manner in which the objection was raised.

3rd. Because, if there had been any irregularity in the judgment, it would still have been matter of discretion in the Court whether to disturb it, and in the [418] circumstances of this case, it would have been improper to do so.

The Respondent did not appear. The appeal now came on to be heard *ex parte*.

Mr. Crowder, Q.C., and Mr. Wigram, Q.C., for the Appellant.—The objections suggested in the rule obtained by the Defendant are without any substance or colour. First, as to the objection that the cognovit should have been interpreted to the Defendant in the French language, and that the cognovit was not attested by an interpreter. There is no law in force at Trinidad that makes this imperative. The affidavits, however, show that the cognovit was, in fact, interpreted by Jobity, who attested that fact on the deed itself. Second—It is objected, that the cognovit is void, as it was not attested according to the form of the Ordinance in that case made and provided. The Ordinance referred to (No. 5, of 1845, sec. 98 (a)) applies [419] only to warrants of attorney, not to cognovits. Moreover, the affidavits

(a) Ordinance, No. 5, of 1845, for the better administration of justice in the island of Trinidad, and for extending the benefit of Trial by Jury in certain civil cases, and for assimilating the mode of proceeding in civil actions to that of the Courts of Common Law at Westminster.

Section 98 is in these terms:—

“Provided always, and be it enacted, that no warrant of attorney to confess judgment in any action or suit shall be of any force, unless there shall be present some solicitor or advocate expressly named by the party executing such warrant, and attending at such request to inform him of the nature and effect of such warrant, before the same is executed, which solicitor or advocate shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be solicitor or advocate of the person executing the same, and states that he subscribes as such solicitor or advocate, and any warrant of attorney to confess judgment, not executed in manner aforesaid, shall not be rendered valid, by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same.”

show that the requisitions of that Ordinance, if applicable, were complied with. The third objection is, that the Defendant appeared in person, and did not deliver to the Escribano, or Registrar of the Court, a statement in writing containing the description of some house or dwelling in the town or port of Spain, or the suburbs, as and for the domicile of the Defendant, in and for the purpose of the cause. This objection was founded upon the 7th rule of the Court, dated 3rd of September, 1832, and it is manifest that such rule was made for the protection of the opposite party, and that a party violating it could not be allowed himself to found an objection on his own default. The remaining objection is, that the cognovit was not signed by the Defendant in the presence of the Escribano or Registrar of the Court. This, it is believed, was the only objection on which the order was made absolute. The Chief Justice having resigned his office almost immediately after the making of the order, and before the appeal was allowed, the Appellants have been unable to obtain any copy of his judgment; nor have the grounds or reasons thereof been returned, pursuant to the order of this Court. The judgment appears to have been founded on two old Spanish laws of the years 1534 and 1560, in the *Novissima Recopilacion de Leyes de Espana*, Libro XI. Titulo XXVIII. Ley IV. and V. The former (Law IV.) respects "*Conocimientos*" and declarations, which carry prompt executions; the latter (Law V.) is regarding "*Conocimientos*" recognised before any [420] commissioned functionaries, which are not to be executed without previous review and order by a Judge (a). [421] Now, it is plain that the word "*conoci-*

(a) These laws as printed in the "*Novissima Recopilacion de Leyes de Espana*," Libro XI. Titulo XXVIII. Ley IV. and Ley V. are as follows:—

"Ley IV.—Don Carlos I. y Da Juana, en Madrid, ano 1534, cap. 131, y en Valladolid, ano 548, pet. 56.

"*Conocimientos reconocidos, y confesiones que traen aparejada execucion.*

"Porque somos informados, que á causa de no se executar los conocimientos reconocidos por las partes, y las confesiones que se facen en juicio, como los otros contratos otorgados ante nuestros Escribanos que traen aparejada execucion, se siguen muchas costas y gastos: y muchas personas, por dilatar la paga, apelan de las sentencias que contra ellos se dan: por ende ordenamos y mandamos que de aqui adelante los conocimientos reconocidos por las partes ante el Juez que manda executar, o las confesiones claras fechas ante Juez competente, trayan aparejada execucion; y que las miestras Justicias las executen conforme á la ley de Toledo suso dicha, que fabla sobre la execucion de los contratos guarentigios (Ley 5, tit. 21, lib. 4, R.).

"Ley V.—D. Felipe II., en Toledo, á 25 de Octúbre, de 1560.

"Los conocimientos reconocidos ante los Ministros comisionados no se executen, sin preceder vista y mandamiento de Juez.

"Porque en las Córtes que celebramos en la villa de Valladolid el ano pasado de 1548, por un capitulo dellas, mandamos, que los conocimientos de los conocimientos se ficiesen ante los Jueces, so ciertas penas contra los que ficiesen execuciones, no se haciendo ante ellos el reconocimiento: y porque habiendo las partes reconocido los tales conocimientos ante los Escribanos de sus Audiencias y Alguaciles, las tales Justicias no los mandaban executar, por no se haber fecho ante ellos los reconocimientos: y porque trae inconveniente el cumplimiento del dicho capitulo, ordinamos y mandamos, que agora y de quí adelante los reconocimientos de los conocimientos, que conforme al dicho capitulo se han de facer ante los Jueces y Justicias, asimismo haya lugar de se facer y fagan ante el Alguacil: o' oficial Escribano á quien el Juez le comotiere que reconozca; con tanto que el Alguacil no execute el conocimiento reconocido, fasta que traído ante el Juez y por él visto, lo mande executar; y si lo executare contra el tenor de lo suso dicho, incurra en pena de lo que montaren los derechos de la execucion, con el doble para la Cámara, el que lo contrario hiciere; y mandamos, que el dicho capitulo se entienda conforme á lo en esta ley contenido (Ley 6, tit. 21, lib. 4, R.)."

The following translation of the above was appended to the papers:—

"Law IV.—Don Carlos and Donna Juana, at Madrid, 1534, and at Valladolid, 1548, recognised '*conocimientos*,' and declarations which carry prompt execution.

"Forasmuch as we are informed, that by reason of the non-execution of '*cono-*

miento" (see Newman and Baret's Span. Dict., *vide* "Conocimiento") included notes of hand or an ordinary acknowledgment; but, between parties themselves, the judgment [422] in question is a judgment of the Court itself, entered up after an action had been brought, pursuant to the Ordinance, No. 5, of 1845, which Ordinance was passed expressly to assimilate the mode of proceeding in civil actions in Trinidad to that of the Courts of Common Law at Westminster; and we submit, that such laws have no application to and do not reach the case of a judgment on cognovit. From the time of the Ordinance of 1845, the practice followed with respect to judgments by cognovit has been uniformly that which was followed in this case. This appears from the official certificate of the Registrar himself, as returned to the Court and appended to the proceedings here (*a*). We submit, therefore, that these [423] laws, even if they applied to the case in question, would afford no ground for setting the judgment aside; that it is plain, that by the Spanish law an acknowledgment out of Court, in the presence of two witnesses, is of equal force

cimientos,' recognised by the parties, and of declarations made in judicature, in the same manner as other contracts executed before our notaries, which carry prompt execution; considerable costs and charges are incurred, and many persons, for the purpose of delaying payment, appeal from the sentences which are pronounced against them: We therefore order and command that henceforward '*conocimientos*,' recognised by the parties before the Judge who orders execution thereof, or plain declarations made before a competent Judge, shall have prompt execution, and that our Justices shall execute the same in conformity with the law of Toledo above-mentioned, which relates to the execution of contracts of guarantee.

"Law V.—Don Philipp II. at Toledo, the 25th of October, 1560.

" '*Conocimientos*,' recognised before any commissioned functionaries, are not to be executed without previous review and order by a Judge.

"Whereas, in the Cortes, which we convoked at the city of Valladolid, in the past year, 1548, by a chapter thereof, we ordered that the recognition of '*conocimientos*' should be made before the Judges, under certain penalties, against those who should levy executions when the recognition was not made before them: and whereas, on the parties having recognised such '*conocimientos*' before the notaries and officers of their audiences, the said Justices did not order the same to be executed, inasmuch as the recognition had not been made before them: and whereas the fulfilment of the said chapter gives rise to inconvenience: We order and command, that now and henceforward, the recognitions of '*conocimientos*,' which, in conformity with the said chapter, have to be made before the Judges and Justices, may and shall lawfully be made before the officer or official notary, whom the Judge may commission for such recognition: but, nevertheless, the officer shall not execute the '*conocimiento*' so recognised, until it has been laid before the Judge and reviewed by him, and the latter shall have ordered the execution thereof, and if he execute the same contrary to the tenor of the above, the party so acting contrary shall incur the penalty of the amount of the execution dues, and of double that amount to the Exchequer, and we direct that the said chapter shall be understood in conformity with the tenor of this law."

(*a*) This certificate was as follows:—"I the undersigned, Thornton Warner, Registrar of the Supreme Civil Court, do hereby certify, that I have been Escribano of the Court of First Instance of Civil Jurisdiction, now the Supreme Civil Court, from the month of March in the year 1838 to the 1st day of October, 1845, and Registrar of the said Supreme Civil Court from the last-mentioned time to this present date. That since the said first day of October, 1845, the day on which the Ordinance, No. 5, for the year 1845, entitled 'An Ordinance for the better administration of justice, and for extending the benefit of Trial by Jury to certain civil cases, and for assimilating the mode of proceeding in civil actions to that of the Courts of Common Law at Westminster,' came into operation in this island, the practice of the Court with regard to confessions or cognovits was and still is, that the confession was signed by the Defendant in the presence of his solicitor, and was then attached to the proceedings in the cause, and on an application made to a sitting Judge by the Plaintiff's solicitor, and on the production of the confession, and on the appearance and consent of the solicitor for the Defendant, final judgment was entered up by the Registrar as the order of the Judge, pursuant to the

with an acknowledgment before the Escribano; but, if the objection were a valid one, it could only have been raised by appeal, brought within a limited time; and the Defendant was by his delay and acquiescence precluded from raising such an objection on which he relied. They referred to *Crosfield v. Stanley* (1 B. and Ad. 87).

Sir John Jervis.—Their Lordships are of opinion, that the Order of the Court below, setting aside the cognovit, must be reversed.

[424] This appeal comes on *ex parte*, and a majority, although a bare majority, of the Court below having made the Order, setting aside the cognovit, this Court is bound to take each point, which is capable of arising, upon the facts and statements, and to see whether either can be supported without reference to the statement in the case, that there was one point only, upon which the Chief Justice differed from Mr. Justice Bowen.

Now, there are four points, as we understand, open, upon these proceedings; one is, that Cazabon was induced by fraud to give the cognovit. That is met directly upon the facts by his own attorney, and there seems also to be no doubt upon the matter, that this point would not be available upon the evidence, as a matter of fact, to set aside the execution of this instrument.

The second point is a matter of form, which would be open, and the party would be entitled to take advantage of it, even though he had appeared, and had done several acts subsequently. A pure irregularity might be waived by laches, but the rule of Court here is, that if there be a non-compliance with a statute, the instrument is void, and being void, cannot be subsequently set up by a subsequent recognition. The point, therefore, is, whether it be or be not a void instrument for want of an attestation in the terms of the Ordinance?

Section 98 of Ordinance, No. 5, of 1845, provides, that no warrant of attorney shall be of force unless accompanied by certain formalities. Now, in terms, that Ordinance does not apply to cognovits, according to the decisions of the Court in that country, but still it is possible so to apply it, and it appears the practice of the Court has been founded upon certain parts of this Ordinance, with reference to cognovits, and that being so, we must judge, not by the technical words of the Ordinance, but by the practice, and the practice as certified by the officer of the Court, and confirmed by the production of the precedents set forth, is precisely in conformity with the execution of this instrument. Ever since the passing of the Ordinance, the form of cognovits has been uniformly in the form of the instrument in this case; the practice, therefore, seems to have been as certified by the officer of the Court, and the Chief Justice agreed with Mr. Justice Bowen, that this objection was not an available one.

The next and third objection is, that the proceedings are irregular, because the Defendant, appearing in person, did not leave a note of his domicile, according to the rule of Court. Now, that regulation is for the benefit of the party, and is for the purpose of taking care that he shall be served with the papers in the cause. If he appear in person, and has not a dwelling or domicile in the town, he is to leave a note of some recognised place of domicile, and the service of all papers may be by personal delivery to the party, or by leaving them at such domicile. In this case he appears in person, and does not comply with this regulation, probably because he confesses the judgment, and, we think, that the place of domicile being for his own benefit, he waives it, by appearing, and it forms no ground of irregularity as regards the instrument.

The fourth and last objection seems to be that which pressed upon the mind of terms of the confession, but no notice was ever taken in the entry of the judgment, that the Defendant's solicitor had appeared. And I certify that this practice was pursued in a certain action of record in the Supreme Civil Court, No. 204, and entitled '*In the matter of the Colonial Bank v. Francois Cazabon.*' And I further certify that in sixty-one causes entered in the said Supreme Civil Court since the month of October, 1845, judgments have been entered up on confession, drawn out and attested in a similar manner in every respect as the above-mentioned case of the '*Colonial Bank v. Francois Cazabon.*'

"THORNTON WARNER,

"Registrar of the Supreme Civil Court, Trinidad."

"Trinidad, 4th of January, 1850."

the Chief Justice, and it is, that this instrument being executed according to the practice, as certified by the officer, was in violation of [426] the provisions of certain laws of Spain, applicable to this colony. Now, for the meaning of these laws, we have been referred to the laws themselves, and on looking at them, it does not appear, even if a cognovit be an instrument within the meaning of the word "*cognovientes*," and even if it be not executed within the operation of this law, by the uniform practice which has prevailed for many years; it does not appear that these laws will make the instrument void for non-compliance with them, because the provision substituting a Judge for the officer of the Court, says, that such instruments frequently have not been carried into prompt execution, and great costs have been incurred; therefore, that all instruments of this sort shall henceforward be recognised before a competent Judge, and shall go on promptly. It does not say, "it shall not go on at all;" it does not say, "it shall be void." Even if it be an instrument coming within the terms of the Ordinance, requiring recognition before a Judge, or before the Registrar, that regulation does not, in terms, make it a void instrument for non-compliance with it; and we think it would be a binding instrument, even if it were not shown by the practice of the Court not to have been within the contemplation of the Ordinance, which view is justified by the terms of the Ordinance itself.

It seems to us, therefore, that this being the ground on which the Chief Justice pronounced the judgment, he took an erroneous view of the application of the law to this subject, and that the judgment of Mr. Justice Bowen was the right one upon the matter, and, therefore, the Order must be reversed. As we reverse the order, setting aside the cognovit, the cognovit will stand good.

[427] The order will be to discharge the rule. We presume the costs will be costs in the cause. Where there is a difference of opinion in the Courts here, the rule is not to give costs.

The report of their Lordships, which was confirmed by Her Majesty, was, "that the judgment of the Supreme Civil Court of the Island of Trinidad, dated the 23rd of August, 1849, ought to be reversed, and the rule *nisi* discharged with costs, in the Court below."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

JOHN POLLOCK and Others.—*Appellants*: DUNCAN McALPIN,—*Respondent* *

[June 24, 1851].

"THE LOCHLIBO."

The owners of a vessel having a duly licensed pilot on board are protected by the Pilot Act, 6 Geo. IV. c. 125, s. 55, from liability for damage solely occasioned by the fault of the pilot.

Aliter. If the blame is mutually imputable to the pilot, and master and crew [7 Moo. P.C. 428].

Where a collision was occasioned by the improper sailing and steering of a vessel, the exclusive act of the pilot, the owners of the vessel were held (reversing the judgment of the Court below) entitled to the exemption provided by the Statute, 6 Geo. IV. c. 125, s. 55.

This was an appeal from the Court of Admiralty, in a cause of damage, civil and maritime, promoted [428] by the Respondent, the master and sole owner of the vessel "*Aberfoyle*," against the ship "*Lochlibo*" case reported *nom.* "*The Lochlibo*," 3 W. Rob. 310).

The facts of the case, the principal arguments urged, and authorities cited upon the appeal, are fully set forth in the judgment.

* Present: The Chief Baron of the Exchequer (Sir Frederick Pollock), the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Sir Herbert Jenner Fust, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

The appeal was argued by Sir Fitzroy Kelly, Q.C., and Dr. Bayford, for the Appellants; and Dr. Addams, and Dr. Twiss, for the Respondent.

Judgment was delivered by

The Right Hon. T. Pemberton Leigh (July 14, 1851).—In this case an action was entered by the owners of the ship "*Aberfoyle*," against the owners of the "*Lochlibo*," for damage.

The "*Aberfoyle*" was lying at anchor in the Downs, on the night of the 14th of December, 1849, when, about eleven o'clock, she was struck on the starboard side with great violence by the "*Lochlibo*," which was proceeding up the channel.

In the Court below it was contended by the Defendants, that the damage was owing in part to the fault of the "*Aberfoyle*." It was said, that she was not lying in the proper anchorage, and had not proper lights displayed, and that there was no blame attributable to the "*Lochlibo*."

In the argument before us, these grounds of defence were abandoned; it was admitted, that no blame was attributable to the "*Aberfoyle*," and that some blame was attributable to the "*Lochlibo*;" but it was contended, that such blame was attributable exclusively [429] to the pilot, and that, therefore, by virtue of the Act of Parliament, 6 Geo. IV. c. 125, the owners are discharged from their responsibility.

The Court below was of opinion, that the "*Lochlibo*" sailed through the Downs at a time and with a speed which made it hardly possible that she should pass without danger to other vessels, and that such sailing was improper; but that her so sailing was exclusively the fault of the pilot.

Their Lordships entirely concur with the Court below on both these points, and they think that this improper proceeding was the primary cause of the accident. But that alone is not sufficient to dispose of this case. If it appears that the subsequent accident was owing, even in part, to the misconduct of the master and crew, the owners could not protect themselves from liability, on the ground, that the pilot was also to blame, although, by directing the ship to sail at such a time and with such a speed, he was the principal author of the misfortune.

The Act of Parliament only exonerates the owners from liability, for the ignorance and misconduct of the pilot, and if the orders of the pilot are disobeyed, or the duties which belong to the master and crew are not properly performed, and an accident under those circumstances occurs, the owners remain liable.

This was distinctly decided in the case of the "*Diana*," when the decision was confirmed by this Court, and the principles on which it proceeds very clearly explained by Lord Brougham, in the judgment reported (4 Moore's P.C. Cases, 11). In the subsequent case of the "*Christiana*," which was brought here by appeal, *Hammond v. Rogers* (7 Moore's P.C. Cases, 160), the same principles were acted upon, [430] and it was held, that there might be circumstances in which the measures to be adopted were so obvious, that though the pilot ought to have ordered them, his neglect to do so was no excuse for the master and crew omitting to adopt them.

It was contended at the bar that, in this case, the impropriety of sailing through the Downs was so manifest, that the captain ought to have refused, in spite of the pilot's opinion, to permit the ship to proceed. But we cannot assent to this. It would be very dangerous to hold, that there can be any divided authority in the ship with reference to the same subject, and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide.

The owners here have undertaken to show that their master and crew did their duty, and that the accident arose entirely from their obedience to the orders of the pilot. The question is, whether upon the whole case this is made out.

The Court below has been of opinion that proof of this has failed on these grounds.

First. That sufficient evidence has not been produced to prove that a look-out was kept by the "*Lochlibo*:" such as the state of the weather required.

Second. That the starboarding the helm, under the circumstances, was an improper measure, and that such measure was not the exclusive act of the pilot, but that there was an improper interference with him.

Upon the first point, two reasons only for holding that there was not a sufficient

look-out were urged at our bar; one, that the two men who were employed on the look out in the bows, have not been examined; the other, that it appears that neither of those men [431] first signalled the ship ahead, but it was first signalled by the boatswain.

We are far from thinking that there is not considerable weight in these observations, but we must examine the evidence which there is, in order to judge whether, without further proof, it is or is not sufficient.

Now, the evidence is very strong upon this point. It is sworn by the master and by the two mates, and by the boatswain and two seamen, not only, in general terms, that a good look-out was kept, but they state what was done; that two men were placed, one on each bow of the ship, and that in addition to this, the boatswain was stationed in the knighthead at the bowsprit, for the same purpose. This account is fully confirmed by the pilot, and it is remarkable that Wilson, the chief mate, who, in other respects, has given material evidence against the parties who produced him, states that he has no doubt that a good look-out was kept. In addition to this, it is sworn, and not contradicted, that the pilot and the master were in constant communication with the men on the look-out, and keeping up their attention to their duty.

The fact, that notwithstanding a good look-out was kept, the "*Lochlibo*" came so near the "*Aberfoyle*," without perceiving her, seems to be accounted for by the circumstance, that the "*Lochlibo*" had turned from her course, in order to avoid another ship, which was between her and the "*Aberfoyle*," and it seems not improbable that this other ship would, for some time, intercept the view of the "*Aberfoyle*."

Even the evidence on the part of the "*Aberfoyle*" seems to us to show that, although a good look-out was kept, the "*Lochlibo*" might well approach dangerously near to the "*Aberfoyle*" without seeing her. [432] The allegation on the part of the claimants is, that they kept a good look-out and descried the "*Lochlibo*" when she was at a distance of a quarter of a mile. Now, the "*Aberfoyle*" was a ship of 416 tons, lying at anchor. The "*Lochlibo*" was a ship of about 1000 tons, under sail, and we are informed by the masters of the navy who assist us, that the latter ship might be seen at twice the distance at which the former would be visible.

We cannot say, therefore, that the circumstances of the case are such as to induce us to disbelieve the positive evidence on this point, on the part of the "*Lochlibo*." That the boatswain should first see the ship might be mere accident; the whole interval between seeing the ship and the collision was one of but a few minutes.

We proceed then to consider whether the act of starboarding the helm was, under the circumstances, an improper act, and if so, whether it was the act of the pilot alone, or whether there was any interference with him on the part of the master or crew.

The masters of the navy are inclined to think that, under the circumstances, considering that the "*Lochlibo's*" helm had just before been put hard-a-port, and that she was then very close to the "*Aberfoyle*," it was a wrong measure to starboard the helm, they doubt whether, in the then position of the ship, any manœuvre could have avoided the collision. But assuming the act to have been erroneous, the material question is, was it the act of the pilot alone, or was there, as held in the Court below, an improper interference with him?

This interference must consist, either in what was said by the seamen on the first discovery of the ship, [433] calling out to starboard the helm; or in the orders represented by Wilson to have been given by the master. The latter ground alone was relied upon in the argument before us; and it appears to us impossible that the exclamation of the boatswain, when he found that they were close upon the "*Aberfoyle*," and suggesting the manœuvre which seemed to him necessary to avoid her, can be considered as an interference. He cannot be considered as giving orders; he was not in a situation to give any. The master and the pilot were by the helm, and if what was done was done by the orders of the pilot, acting upon the best judgment which he could form, in the circumstances in which the ship was placed, with such information and advice as were given to him in the hurry of the moment, the act must be deemed exclusively his act.

The other act of interference referred to is that imputed to the master. This depends entirely upon the evidence of Wilson. He being examined on the part of

the Defendants, states a clear case of interference on the part of the master; for he states not suggestions made to the pilot, but that the pilot having given orders to port the helm, the master ordered it to be starboarded, and that in consequence of these contradictory orders, nothing was done, or at least nothing was done effectually with the helm, and in consequence the collision took place.

But this evidence is in direct contradiction to the testimony of every other witness on board the "*Lochlibo*." The master distinctly swears that he never interfered in any way. The pilot, whose interest would rather seem to be to remove the blame from himself, not only says, that there was no interference [434] with him, but he swears that he immediately ordered the helm to be starboarded, and that in his judgment, at the time of his examination, that measure was the proper measure, and did, in fact, though it could not prevent the collision, materially diminish its violence.

Now, Wilson states in his examination on interrogatories, that the pilot and the master not only gave contradictory orders, one directing the helm to be ported, the other ordering it to be starboarded, but "that each of them were then singing out to the men at the wheel, first one way and then another, so that the helmsman did not know what to do, and heaved the helm first one way and then another."

Now if this were so, not only the master and the pilot must be guilty of direct perjury, but what was said must have been heard by other seamen as well as Wilson; at all events by the men at the wheel. Cole, one of the witnesses, was at the wheel, and his evidence is quite inconsistent with Wilson's statement. He says, "Immediately after the '*Aberfoyle*' was so reported, the pilot sang out to us to put the helm hard a-starboard. He said, 'Hard-a-starboard' at once, and not first 'Starboard,' and then 'Hard-starboard;' we immediately obeyed his orders and put the helm hard-a-starboard accordingly, the captain being on the poop at the time, and standing by to see that we did it." This is confirmed by Anderson and by Fraser, and we must disbelieve all these witnesses, as to a matter on which their statements, if untrue, must be wilfully false, unless we disbelieve the account given by Wilson. The only piece of evidence which is supposed at all to confirm him, namely, the statements of Anderson, that the master said to the pilot immediately after the [435] collision, "I know you did wrong," does not at all show that the master had himself given any orders the contrary to those of the pilot.

Upon the whole, therefore, their Lordships are of opinion, that the original and principal cause of the damage was the improper sailing of the "*Lochlibo*," which was the act of the pilot exclusively; that if any subsequent fault was committed by the improper steering of the ship, that also must be imputed exclusively to the pilot; and that the owners are, therefore, protected by the effect of the Statute referred to.

The result is, that we must tender our advice to Her Majesty, to reverse the judgment in the Court below, and to dismiss the suit, but without any costs, either in this Court or in the Court below.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION: 10. *Compulsory Pilotage*; a. *Generally*; d. *Duties of Pilot*. S.C. below, 3 Rob. W. 310. Approved as to relative duties of crew and pilot, in *Wood v. Smith, The City of Cambridge*, 1874, L.R. 5 P.C. 451; and *The Oakfield*, 1886, 11 P.D. 34.]

[436] FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM LAIT,—*Appellant*; WILLIAM BAILEY,—*Respondent* * [June 26, 1851].

Before a party can be admitted to appeal *in forma pauperis* to the Judicial Committee of the Privy Council, from the Courts in Doctors' Commons, he must

* Present: The Chief Baron (Sir Frederick Pollock), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

have a certificate of an advocate of the bar of those Courts, that he has a just and probable cause of appeal.

Upon such certificate, and taking the usual oath as a pauper, the Surrogate may admit an appeal *in forma pauperis*.

This was an application respecting the admission of Lait to appeal *in forma pauperis*, from the sentence of the Prerogative Court of Canterbury. Lait had presented a petition to Her Majesty, praying to be permitted to appeal *in forma pauperis*, which petition had been referred to the Judicial Committee under the general order of reference. When he appeared before the Surrogate, in order to take the oath, the proctor for Bailey objected, and the Surrogate referred the matter to the Judicial Committee. In these circumstances,

Dr. Addams, for Bailey, moved that their Lordships would allow the Appellant to show cause why he should be admitted to appeal *in forma pauperis*, to dispose of the question. He did not oppose Lait taking the oath.

Lait appeared in person, and prayed their Lordships to admit him to sue *in forma pauperis*, offering to take the usual oath of being a pauper.

[437] Sir Frederick Pollock.—In the Common Law Courts precaution is taken to ascertain that there is good ground of litigation; parties ought not to be vexed with a suit which must entail expense. We require a certificate from a gentleman at the bar that there is good ground for appeal, and the pauper is required to make oath to the facts of the ground alleged.

Mr. Pemberton Leigh:—It is clear that there ought to be some check upon parties applying for leave to appeal *in forma pauperis*. We will consider this application, and see if we can make some general order.

Judgment was delivered on the following day (27th of June), by

The Right Hon. Dr. Lushington.—Their Lordships consider that a certificate signed by Counsel, that the cause is a proper one for appealing, ought to be produced, when their Lordships, if they think fit, will order the Surrogate to admit the appeal in the usual way. This rule is to be general, and apply to all pauper appeals.

The following minute was made thereon. Their Lordships direct Lait to be admitted by any one of their Surrogates to sue, on his taking the usual oath, but for the purpose only, in case his admission should be objected to, of determining the question of such admission, but absolutely in case he should not be objected to, and further provided he shall exhibit a certificate of an advocate of the bar of Doctors' Commons, that he has a just and probable cause of appeal.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; 1. Appeals *in forma pauperis*.

[438] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

CORNELIA AUGUSTA CONNELLY.—*Appellant*; The REV. PIERCE CONNELLY, —*Respondent* * [June 27 and 28, 1851].

American subjects, born and domiciled in the State of Pennsylvania, contracted a marriage in that State, in the year 1831, being, at the time, members of the Protestant Episcopal Church in America. Afterwards, the husband was appointed Rector of a Church in the State of Mississippi, where he resided with his wife till 1835. At that time the wife became a convert to the Roman Catholic faith. In 1836, both parties went to Rome, where they abjured the Protestant faith, and were formally admitted members of the Roman Catholic Church. They afterwards, in 1838, returned to America,

* Present: The Chief Baron (Sir Frederick Pollock), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

and resided in the State of Louisiana. In 1843, they again went to Rome, and upon the rescript and allowance of the Pope, on the joint petition of the husband and wife, the husband and wife (with his concurrence) took the vows of perpetual chastity and religious professions, the husband ultimately taking orders; and the wife entered into a religious house as a nun, taking the vows of poverty and obedience, whereupon they separated and lived apart. In 1846, they came to England; the husband became private Chaplain in a Catholic family, and the wife the Superioress of a religious community. In 1848, the husband recanted the Roman Catholic faith, and again became a Protestant, when he applied to his wife to return to matrimonial cohabitation, which she refused; thereupon he instituted a suit for restitution of conjugal rights, to which the wife pleaded, as a bar, that the rescript of the Pope, and the acts of the parties at Rome, had the force and effect of a judicial sentence of separation, *a mensa et thoro*. The Judge of the Arches Court rejected the allegation, on the ground, that the facts pleaded would not, even if proved, constitute a bar to the husband's right to a sentence for restoration of conjugal rights. Upon appeal to the Judicial Committee, the allegation was admitted, and directed to be reformed, by pleading the law of Pennsylvania as applicable to the circumstances, in case the suit had been brought to adjudication there, and also the domicile of the husband at the time of the transactions at Rome.

This was a suit for restitution of conjugal rights, promoted by Rev. Pierce Connelly, clerk (the Re-[439]-spondent), against the Appellant, his wife. The wife put in a responsive allegation, pleading in bar to the suit a rescript of the Pope of Rome, which she alleged operated as a sentence of separation, *a mensa et thoro*, and she further pleaded, that she was a nun in a religious house, having taken, with her husband's consent, the vow of chastity.

The history of the parties, and the circumstances which led up to this suit, are fully detailed in the allegation, the rejection of which by the Court below, after having been reformed by its direction, was the subject of this appeal.

The libel given in on behalf of Mr. Connelly pleaded, that he was married to Mrs. Connelly on the 1st of December, 1831, in the city of Philadelphia, in the United States of America, according to the rites and ceremonies of the Protestant Episcopal Church in the United States, the same being identical with the rites and ceremonies of the Church of England, by the Bishop of the diocese of Pennsylvania. That five children, three of whom were then living, were the fruit of the marriage. That Mr. and Mrs. Connelly cohabited together in the United States, until the end of the year 1835, and afterwards in Rome, until June, 1846; that in September, 1846, they came over to England, where they both had ever since resided, but that Mrs. Connelly, in October, 1847, without any lawful cause, withdrew herself from cohabitation with her husband, and refused to return to cohabitation with him, and the libel concluded by praying, that Mrs. Connelly might be compelled to return home to her husband.

The libel was admitted without opposition, and the marriage confessed.

[440] An allegation responsive to the libel was given in on behalf of Mrs. Connelly. It was opposed, and afterwards, upon the suggestion of the Dean of the Arches that it should be reformed, it was entirely subducted, and a new allegation brought in, consisting of twenty-one articles, with seven exhibits annexed, in verification of the statements contained in it. This allegation, as reformed, pleaded:—

I. That Pierce Connelly and Cornelia Augusta Connelly his wife (formerly Cornelia Augusta Peacock, spinster), were born respectively of American parents, at Philadelphia, in the State of Pennsylvania, one of the United States in America, and intermarried at Philadelphia, on the 1st of December, 1831, according to the rites of the Protestant Episcopal Church of the United States in America, being at that time members of that church

II. That Connelly, who at the time of his marriage was a priest in holy orders of the Protestant Episcopal Church of the United States in America, with cure of souls in Pennsylvania, immediately after his marriage, was appointed rector of the church at Natchez, in the State of Mississippi; that in the same month of December,

1831, he and his wife went to and took up their residence at Natchez, and continued to be so resident at Natchez from such time until the month of October, 1835.

III. That for some time previous to the month of October, 1835, Connelly, and also through his inducement, or with his perfect approval, Cornelia Augusta, his wife, had been disposed to become Roman Catholics, but that he was desirous, in the first instance, of considering the points in controversy between the two churches with such aids and assistances as he might [441] be able to procure at Rome itself; that, accordingly, in that month, he and his wife quitted Natchez, and went to New Orleans, to embark for Europe, on their way to Rome, but were detained there accidentally for about six weeks. That whilst at New Orleans, in the month of November, 1835, Cornelia Augusta Connelly, having, by degrees, become and then being a thorough convert to the Roman Catholic faith, became unwilling to embark for Europe until she had made a formal profession of that faith, which she did at New Orleans, abjuring the Protestant faith, and being formally received thereon into the Roman Catholic Church. That she took that step with the full sanction and approval of her husband, who was present on the occasion of her reception, and of her making her first communion as a member of the Roman Catholic Church.

IV. That in December, 1835, Connelly and his wife embarked for Europe, on their way to Rome, for the purpose aforesaid, and where they arrived on the 24th of February, 1836, and that there on Palm-sunday, the 27th of March, in that year, he was also, on his solemn abjuration of the Protestant faith, received into the Roman Catholic Church; that in January, 1838, he and his wife, having in the interval been resident successively at Rome, Vienna, and elsewhere on the Continent of Europe, returned to America, and settled at Grand Coteau, in the State of Louisiana, where they continued to be resident from such time until the month of May, 1842.

V. That in the month of October, 1840, whilst resident at Grand Coteau, Connelly proposed to his wife that henceforth they should live in constant and perfect chastity, abstaining from sexual intercourse [442] with each other, in order to the more fully devoting themselves mutually to the service of God, and with a special view to his then declared wish and intention to take Holy Orders in the Roman Catholic Church. That she, Cornelia Augusta Connelly, acceded to her husband's proposal, and that a verbal agreement to that effect was then entered into between them, and which agreement was ever after stedfastly maintained.

VI. That in furtherance of his, (Connelly's), declared wish and intention, and as probationary to the final separation, thereafter mentioned, in the month of May, 1842, he placed his wife in the convent of the Sacred Heart, at Grand Coteau, and again left America, and proceeded a second time to Rome, for the avowed purpose of further proving himself as to his vocation to the ecclesiastical state, and in order, if proved, to make certain preparations in that behalf antecedently necessary, in respect of his being a married man, by the laws of the Roman Catholic Church.

VII. That in July, 1843, he returned to Philadelphia, in the neighbourhood of which place his wife rejoined him, she having for that purpose, by his order, left the covenant of the Sacred Heart at Grand Coteau, where he had placed her, and where she had resided during his absence. That, in the month of August, 1843, Connelly, accompanied by his wife, quitted Philadelphia, and again proceeded to Rome, at which city they arrived together on the 7th of December, 1843, and where they lived together in the same house, but observing perfect chastity as aforesaid, until Easter-monday, the 8th of April, 1844; that the sole object of such their visit to Rome was the obtaining of a formal decree, tantamount to or in effect being a sentence of separation from each other, [443] such being necessary, in order to their carrying out their several ulterior objects, to wit, on the part of Connelly, that of embracing the ecclesiastical state, or taking Holy Orders in the Church of Rome; and on the part of his wife, that of entering into religion in that Church, or becoming a nun: that, accordingly, the petition of Connelly, embodying the requisite statements, and setting forth such their several objects, was presented to the then Pope, Gregory XVI., and was by him referred, with all necessary faculties, to the Cardinal Vicar General and Judge Ordinary of Rome, who, after duly examining into the facts of the case, pronounced in effect, a sentence of separation accordingly, and that thereupon, on the 8th of April, 1844, he, Connelly, placed his wife in the

convent of the Sacred Heart Trinitia dei Monti, at Rome, and on the following day he entered himself in the Collegio di Nobili in that city, and on the then next day, the 10th of April, 1844, received the first clerical tonsure and assumed the ecclesiastical dress.

VIII. That, in part supply of proof of the premises pleaded, the party proponent exhibited a certain paper writing (marked A) (*post*, p. 450), and alleged and propounded the same to be an official copy extracted from the Register Book of Decrees of the Court of Vicariate of Rome, of the petition, presented by Connelly to the Pope, Gregory XVI., the papal rescript thereon, and the form of the vow of chastity in and by the rescript prescribed and afterwards taken in pursuance thereof, together with a notarial translation of the petition, rescript, and form of vow, and did allege and propound that all and singular the contents of that exhibit [444]-bit were true, that all things were had and done as in the exhibit is contained.

IX. That, in further supply of proof of the premises, the party proponent exhibited a certain paper writing (marked B) (*post*, p. 455), and alleged and propounded the same to be an official copy, extracted from the Register Book of Decrees of the Court of the Vicariate of Rome, of proceedings had by the Cardinal Vicar of Rome and his delegate, in pursuance of the before-pleaded petition and papal rescript, together with a notarial translation thereof.

X. That by the month of June, 1845, Connelly had completed his course of study, and was about to take holy orders in the Roman Catholic Church; that it being necessary, however, according to the Canons of the Roman Catholic Church in that behalf, that his wife should first bind herself by a solemn vow of perpetual chastity, she accordingly, on the 18th of that month, pronounced or took with the requisite formalities, and signed a solemn written vow (in the French language) of perpetual chastity, being the very vow prescribed by the papal rescript before pleaded, and that she so did with the full knowledge and approbation (testified by his signature at the foot of such written vow) of her husband, although she had previously warned him of the difficulties and trials of the state into which he was about to enter, and had represented to him the nature of the obligations to which he was about to bind himself irrevocably, and offered to release him from all such difficulties and trials by returning to their previous mode of life, and thereby sacrificing any wish or will of her own; that he per-[445]-sisted, however, notwithstanding such warnings and representations; and accordingly, on the 22nd of June, received sub-deacon's orders, and on the 29th of the same month deacon's orders, and on the 16th of July following priest's orders, all of the Church of Rome, at the hands of the Cardinal Vicar of Rome.

XI. That in part supply of proof of the premises in the next preceding article pleaded and set forth, the party proponent exhibited a certain paper writing (marked C) (*post*, p. 460), and alleged and propounded the same to be an original duplicate of the vow of perpetual chastity, pronounced or taken by Cornelia Augusta Connelly, as in that article is set forth; that the signature "Pierce Connelly" thereto set and subscribed was and is of the true and proper handwriting and subscription of Mr. Connelly, party in this cause.

XII. That in further supply of proof of the premises, the party proponent exhibited a certain paper writing (marked D) (*ibid.*), and alleged and propounded the same to be and contain an official certificate in the Latin language, issued by the Cardinal Vicar aforesaid, of the successive ordinations of Pierce Connelly, in accordance with the papal rescript, and by the authority therein conceded, together with a notarial translation thereof, that "*Petrum Ignatium Connelly*," in the letters or ordination mentioned, and Pierce Connelly, party in this cause, was, and is, one and the same person.

XIII. That in May, 1846, Pierce Connelly left Rome and came to England, where he became and officiated as private chaplain to the Roman Catholic Earl of Shrewsbury; that in the previous month of April, in [446] the same year, Cornelia Augusta Connelly also left Rome, in the first instance, for Paris, and that after being three months there (in the convent of the Assumption), she also came to England, and in the month of October following, founded at Derby, in that country, a community of religious women (since removed to Hastings, in Sussex, of which she afterwards became and now is the Superioress), under the title of the "Congregation of the

Holy Child Jesus;" that she had brought with her to England rules for the government of such community, which had been submitted to and sanctioned by competent ecclesiastical authority, before she quitted Rome.

XIV. That the time having arrived, and the necessary arrangements having been made, for Cornelia Augusta Connelly completing her entrance into religion, by taking the necessary vows of poverty and obedience, supplementary to that of chastity theretofore taken by her as aforesaid, she, on the 21st of December, 1847, solemnly took the vows of poverty and obedience (at the same time renewing or repeating her former vow of perpetual chastity), in the house then occupied by the community at Derby, as aforesaid, in the presence and with the sanction of the Roman Catholic Ordinary of that house and community.

XV. That in part supply of proof of the premises, the party proponent exhibited a certain paper writing (marked E) (*post*, p. 462), and alleged and propounded the same to be and contain a true copy of the vows of poverty and obedience pronounced and taken by Cornelia Augusta Connelly; that the same had been faithfully copied from the original vows preserved of record in [447] the Congregation of the Holy Child Jesus, at Hastings, in the county of Sussex, and had been carefully collated and examined with the original then there remaining, and had been found to agree therewith.

XVI. That, early in (particularly in the month of April) 1847, he, Connelly, had been anxious, and had so expressed himself, that his wife should take the vows of poverty and obedience without delay; that later however in that year he dissented from the vows being so taken by his wife, on the ground, that he was responsible for debts contracted by her; and himself drew up and sent to the Rev. Dr. Asperti, the spiritual director of the aforesaid community, to be by him presented, if necessary, to the Ordinary of the community, a written protest against the vows being so taken by his wife: that the protest was sent by him to the said Dr. Asperti, from Alton Towers (at which place it was written), the residence of the Earl of Shrewsbury, and at which place Dr. Asperti, a few days afterwards, met Connelly, at his request, when and where the several matters connected with such the taking of the vows aforesaid by Cornelia Augusta Connelly, and his expressed dissent therefrom, for the reason expressed, were discussed by and between him and the Rev. Drs. Winter and Asperti, then and there present; that in the result, he, Connelly, withdrew his protest, and signified his wish that it should not be (as the same accordingly was not) presented to the Ordinary, or any step taken thereupon; the result of the whole being that Cornelia Augusta Connelly solemnly took the aforesaid vows of poverty and obedience, at the same time renewing her former vow of perpetual chastity.

XVII. That the party proponent exhibited a cer-[448]-tain paper writing (marked F) (*post*, p. 463), and alleged and propounded the same to be and contain the original protest in the last article mentioned.

XVIII. That, in the month of January, 1848, Connelly again went abroad, and again visited Rome, but returned in the month of May in that year, and shortly after his return, in the same month, or in the beginning of June following, he presented himself at the convent at Derby, and then and there required and insisted upon an interview with Cornelia Augusta Connelly; that no preventive whatever to such required interview was interposed, save by Cornelia Augusta Connelly herself, who declined to see Pierce Connelly, and so communicated to him through the medium of Dr. Asperti, and whose "affectionate sympathies" with him on that occasion, he, Connelly, afterwards, on the 5th of June, acknowledged in a letter or note of that date.

XIX. That the party proponent exhibited a certain paper writing, and alleged and propounded the same to be the original letter or note in the last article mentioned (*ibid.*): that the whole body, series, and contents of the letter, together with the subscription thereto, were of the true and proper handwriting and subscription of Pierce Connelly. And the party proponent expressly alleged that by the words "Reverend Mother" in the letter or note, was meant and intended Cornelia Augusta Connelly, party in this cause.

XX. That, notwithstanding the premises, on the 25th of January last (1849), Cornelia Augusta Connelly was served, at Hastings, in Sussex, whither the aforesaid

community, of which she is the Superioress, had then removed, and at which place it was then [449] established, with a decree by letters of request from this Court, in a suit for restitution of conjugal rights, at the promotion of Pierce Connelly.

XXI. That the following are the rules of the Roman Catholic Church, applicable to the question at issue between the parties in this cause, derived from and regulated by written laws or Canons, in that behalf, and of which the principal are to be found in the *Decretals*, Liber III., *Titulus XXXII. De Conversione Conjugatorum*, to wit:—"First, that a husband and wife, *post matrimonium consummatum*, may lawfully separate by mutual consent, in order that they may enter into religion severally, to wit, by the husband taking Holy Orders, and the wife making a vow of perpetual chastity, and entering a religious house or there being professed and taking the veil. Second. That a separation founded on such mutual consent, and for such purpose as aforesaid, ever after such orders have been taken, and such vow or profession made, though not annulling such *matrimonium consummatum*, debars the parties "*in perpetuum ab omni usu ejusdem*," and from that time forth "*alter alterum repetere non protest*." Third. That a separation of husband and wife by mutual consent, for such views and objects as aforesaid, must be approved of and allowed by the Pope, upon the petition of the parties, and his rescript of such approval and allowance upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or religious profession of the wife as aforesaid, has all the force of a judicial sentence, such rescript being deemed a conditional sentence from the time of its issue, but having its full force and vigour from the moment that the conditions mentioned or referred to in the rescript have been [450] fulfilled. And so much was and is well known to the Judges and Advocates presiding or practising in Roman Catholic Ecclesiastical Courts, and others of reputation for their skill and knowledge of the law as there administered, and is also laid down by divers authors of eminence and authority on that subject.

The following are translations of the Exhibits annexed to this allegation.

EXHIBIT A,

Referred to in the eighth article of the allegation, being the official copy of the petition of Pierce Connelly to the Pope, the papal rescript thereon, and the form of the vow of chastity taken in pursuance thereof. Translated from the Latin.

I, the undersigned Secretary of the Court of the Vicariate of the city of Rome, do certify by these presents, that in the Register of Decrees for the year of grace, 1845, at page 233 and following ones, deposited at the office of the said Vicariate, are found the entries of the following tenor, to wit: Translated from the Italian.

Most Blessed Father,—Since the time when Peter Connelly, a native of Philadelphia, after having been nine years a minister of the sect of the Episcopalians, was so happy as to abjure his errors here at Rome, in 1836, and to unite himself to the true Church of Jesus Christ, together with his wife Cornelia; both of them had nothing more at heart than to live up to the sanctity of the faith they had embraced, and to follow without reserve the suggestions of that Divine grace which had drawn them with such mercy to the only ark of salvation.

The constant and powerful motions of this heavenly [451] grace had the effect of producing the stedfast resolution, which, three years and a half ago, they both formed, with the fullest mutual consent, to live in a state of perfect chastity, a resolution to which they have ever since adhered, in order thus to prepare themselves for the grace of the religious vocation to which they both felt themselves drawn by the Lord. During these three years they have sought to learn still more fully the Divine will, by persevering prayers to the Giver of all light, and by submitting themselves entirely to the guidance and counsels of enlightened and pious directors, who, in America, as well as here in Rome, have always recognised in both of them, the most evident signs of the heavenly call. It may suffice here to mention only the Right Reverend Bishop Flaget, of Kentucky, in whose approbation of the matter there are some extraordinary particulars.

The two married parties, therefore, being now in Rome, and everything tending by the Divine goodness to facilitate the speedy execution of their most stedfast determination, they respectfully submit to your Holiness what has been done to that end. The wife of the petitioner, being now thirty-four years of age, has already

been accepted in the convent of the ladies of the Sacred Heart, at Trinitia dei Monti, where she will enter as a postulant, on making at once a solemn vow of perpetual chastity.

The petitioner, aged thirty-nine years, has also been graciously accepted by the Reverend the Superior General of the Society of Jesus, for the purpose of entering as a member of that body, to which he feels himself specially called by the Almighty. A provision has also been made in the most suitable manner for the education and future welfare of the three children [452] granted to them by Divine Providence. The son, of eleven years of age, is placed at the college of Stonyhurst, in England, which is under the management of the Jesuit Fathers, and the Earl of Shrewsbury has expressly engaged to take special care of him. The daughter, aged nine years, is being educated in the aforesaid convent of the Sacred Heart, here in Rome, where her mother is to take the veil.

There is also a son three years of age, who will be placed, in due time, where he may be taken care of, and be brought up with every attention, and may also receive, while his tender years require it, the assistance of his mother herself. The Prince Borghese has been pleased to take a generous interest in the future welfare of this last-mentioned child, and besides this, the petitioner will assign a capital out of his own private estate for the benefit of each of the said children.

Thus, the divine goodness, by graciously and powerfully directing matters to their end, now enables the two married parties to complete at once that perfect sacrifice of themselves to which the same divine goodness strongly impels and leads them, as was recently the case with two married parties, Mr. and Mrs. Chaudet, natives of Switzerland, who were converted to the Catholic faith, the one having joined the Lazarists, and the other having become a novice in the convent of the Sacred Heart.

In order to accomplish the wishes of your humble petitioner, there remains one favour which he now implores from your Holiness. With the acquiescence of the very Reverend the Superior General of the Society of Jesus, he proposes, before entering that body, to be promoted to the priesthood; and, therefore, [453] immediately afterwards, during the present Lent, to take minor orders. It is necessary, however, that your Holiness should be pleased to permit the petitioner to be promoted to the aforesaid orders here in Rome, by the hands of his Eminence the Cardinal Vicar, without having recourse to the Bishop of Philadelphia for letters dimissory, which would occasion a very long delay, and might, perhaps, give rise to some embarrassment in so delicate an affair.—On the cover: To His Holiness, our Sovereign Lord, Pope Gregory XVI. By the within written petitioner, 15th of March, 1844. To the Cardinal Vicar with Faculty. Translated from the Latin.

Upon audience of His Holiness, the 16th of March, in the year 1844, His Holiness has graciously acceded hereto, and granted to me, the relator, the requisite faculties to this effect, that without letters dimissory from the Right Reverend the Bishop of Philadelphia, the petitioner may be promoted to Holy Orders as far as to that of Presbyter inclusive at Rome, for this special reason, that he is considered as no longer having his domicile in the diocese from which he came, not having resided therein since his conversion to the Catholic Church. But, as respects the mode and time to be appointed for his ordination, His Holiness has considered that it will be proper to confer with the very Reverend Father the Superior General of the Society of Jesus. Finally, he has ordered that before the petitioner be promoted to the Holy Order of sub-deacon, his wife must take the vow of chastity.—C. Cardinal Vicar.

Here follows another entry, as under, namely: Translated from the French.

Almighty and Eternal God, I, Cornelia, the lawful [454] wife of Peter Connelly, trusting in Thine infinite goodness and mercy, and animated with the desire of serving Thee more perfectly, with the consent of my husband, who intends shortly to take Holy Orders, do make to Thy Divine Majesty a vow of perpetual chastity at the hands of the Reverend Father, Jean Louis Rozaven, of the Society of Jesus, delegated for this purpose by His Eminence the Cardinal Vicar of His Holiness for the city of Rome, supplicating Thy Divine Goodness, by the precious blood of Jesus Christ, to be pleased to accept this offering of Thy unworthy creature, as a sweet smelling savour, and that as Thou hast given me the desire and the power to make

this offering to Thee, so Thou wouldest also grant me abundant grace to fulfil the same. Rome, at the convent of the Sacred Heart of Jesus, on the 18th of the month of June, in the year 1845.

Translated from the Latin.

So it is, Jean Louis Rozaven, of the Society of Jesus. So it is, Peter Connelly Victorine Bois, Religious of the Sacred Heart of Jesus. Loide de Rochequaيرة, Religious of the Sacred Heart of Jesus.

Thus it is in the aforesaid Register of Decrees, to which, etc. In faith whereof, etc. Given at the aforesaid office of the Secretary of the Vicariate of Rome, this 23rd day of the month of January, in the year of grace, 1849. So it is, Jos. Cano Tarnassy Teny.

Translated from the Italian.

Registered at Rome the 23rd of January, 1849, on three pages, without marginal references, vol. 526 of Private Acts, fol. 123 (case 3 and 4). Received forty Bajocchi.

G. Durathì, Registrar.

[L. S.] Register Office in Rome.

[455] In the name of God. In the Pontificate of our Lord the Pope, Pius the Ninth. It is certified by me, Tomaso Gradassi, undersigned, Notary Public of the College, having my office in the *Via Ponte Quattro Capi*, No. 37, that the above signature and subscription are truly and identically those of the Rev. Canon Don Joseph Tarnassy, Secretary of the Vicariate of this sacred city of Rome; and that he is such, is fully and indubitably attested by me, the undersigned notary, and also that the seal bearing the arms of His Eminence, the most Reverend Cardinal Vicar, both affixed at foot of the above written Act, duly registered, is authentic, I having a perfect knowledge of the whole. In faith whereof, given at Rome, in my office, situated as above, this 24th day of January, 1849.

Tomaso Gradassi, Public Notary of the College.

[L. S.]

Registered at Rome, the 24th of January, 1849, on two pages without marginal references, vol. 245 of the Public Acts, folio 46, v. case 7. Received twenty Bajocchi.

J. Compagnani.

Register Office at Rome.

Here follows the legality of the British Consular Agent at Rome.

The within paper writings contain a true and faithful translation of the document, also hereunto annexed, from the Latin, Italian and French languages, into English.

D. Burwash, Notary Public.

[L. S.] London, the 8th of June, 1849.

EXHIBIT B,

Referred to in the ninth article of the allegation, being an official copy of the proceedings had in pursuance of the papal rescript, etc., above set forth.—Translated from the Latin.

I, the undersigned Secretary of the Court of the Vicariate, in the city of Rome, do certify by these presents, that in the Register of Decrees for the month of April, in the year of grace, 1844, at page 476 and following ones, deposited at the office of the said Vicariate, is found an entry of the following tenor, to wit:

Translated from the Italian.

In the name of God, Amen. His Holiness our Sovereign Lord, Pope Gregory the Sixteenth, having been pleased to assent to and approve of the application made by the married parties, Peter Connelly, son of the late Henry and of the living Mrs. Elizabeth Pierce, a native of Philadelphia, who has entered the bosom of the Holy Catholic Church, after having abjured the errors of the heretical Episcopalians, in the year 1836, here in Rome, as well as that made by the same writing on behalf of his wife, Cornelia Pico, daughter of the late Raphael and of the late Maria Suopp, also of Philadelphia, the which married parties have determined to live in perfect chastity, after mature deliberation, and in pursuance of the counsels of most respectable Ecclesiastics, and are now stedfast in their intention of carrying their resolution into effect, that is to say, the former, Mr. Peter Connelly, to enter into the Institute of the Society of Jesus, having been already accepted by the very Reverend

Farker the Superior General of that Society, and to devote himself wholly to the ecclesiastical state, and to be promoted to Holy Orders; and the latter, Mrs. Cornelia, to embrace the Institute of the Ladies of the Sacred Heart, having been already accepted by the community of the Holy Trinity of Monti, in order to live in constant and perpetual chastity, having provided for the future education and subsistence of three children, Mercer, Adelina Maria, and Peter Francis. His Holiness himself, in the audience of the 16th of March last, committed all the necessary and suitable faculties to his Eminence the Most Reverend Cardinal Constantino Patrizi, his Vicar-General, to the intent, that on observing the required formalities, the wishes of both petitioners may be complied with; His Most Reverend Eminence, therefore, by virtue of the aforesaid apostolical faculties, being desirous that the pious wish of the two said married parties may be accomplished, has, by a special Act, registered in the Archives of the Secretariate of the Vicariate, on the 1st of April, deputed me, the undersigned Promoter Fiscal of the said Tribunal, for the purpose of receiving from the aforesaid married parties, Peter Connelly and Cornelia Pico, the necessary and proper mutual consent, in conformity with the sacred Canons, by which they may freely consent, each for his or her part, to allow of the fulfilment of the above-mentioned determination to live perpetually in a state of perfect chastity. Mr. Peter Connelly and Mrs. Cornelia Pico having, therefore, appeared before me at their present residence, situated in the Via di Ripetta, at the civic number 115, on the first floor, I interrogated them as to whether they are now steadfast and constant in the determination expressed and humbly represented to the holy Father, and they having replied in the affirmative, I further interrogated them as to whether they were or are induced by any worldly respect to carry out the aforesaid determination, to which they replied that no worldly consideration had induced or [458] does induce them thereto, but solely the Divine inspiration and the desire of greater perfection; these protestations premised, I called upon Mrs. Cornelia Pico, the wife of Mr. Peter Connelly, freely to give her consent to her husband, Mr. Peter, and to permit him to enter the Institute of the Society, to live perpetually in perfect chastity, and to be promoted to Holy Orders, as far as to the priesthood, whereupon she gave her full consent thereto. Mr. Peter Connelly, the husband of Mrs. Cornelia Pico, being thereupon called upon to permit her to enter the Institute of the Ladies of the Sacred Heart, to live perpetually in perfect chastity, he likewise gave his full consent thereto. Their mutual consent having been pronounced as above, to be ratified within the term of one year, or even sooner, with the requisite special apostolical faculties, both the married parties were called upon to sign the present Act, together with two witnesses, who are present, namely, the Reverend Don Giuseppe Boccacani, priest of the diocese of Narni, son of Mr. Constantino and of Mrs. Maria Ventura, domiciled in the incumbency of St. Roque, at Rome; and of Mr. Robert Berkeley, of Spetchley, in Worcestershire, in England, son of Mr. Robert and Mrs. Henrietta Bentfield, domiciled in the same parish. An Act done as above—this 1st day of April, 1844, I, Peter Connelly, give consent as above. I, Cornelia Connelly, give consent as above. I, Giuseppe Boccacani, was witness to the said consent. I, Robert Berkeley, was witness to the said consent. Francesco Anivitti, Canon Promoter Fiscal, delegated as aforesaid. Thus it is in the above-mentioned Register of Decrees, to which, etc. In faith, whereof, etc. Given at the secretary's office of the Vicariate of the city, this 21st day of January, [459] in the year of grace, 1849. So it is, Joseph Canon Tarnassi Tendy. Registered at Rome, the 23rd of January, 1849, on two pages without marginal references, vol. 526 of the Private Acts, folio 123, case 5. Received twenty Bajocchi.

G. S. Puratti, Registrar.

[L. S.] Register Office at Rome.

In the name of God, in the Pontificate of Our Lord the Pope Pius the Ninth. It is certified by me, Tomaso Gradassi, undersigned Notary Public of the College, having my office at No. 37, in the Via Ponte Quattro Capi, that the above signature and subscription are truly and identically those of the Reverend Canon Don Joseph Tarnassi, Secretary of the Vicariate of this sacred city of Rome; and that he is such, is fully and indubitably attested by me, the undersigned Notary; as also that the seal with the armorial bearings of his Eminence the Most Reverend Cardinal

Vicar, both affixed at foot of the above written Act, duly registered, is authentic. I having a perfect knowledge of the whole. In faith, whereof, etc. Given at Rome, in my office, situated as above, this 24th day of January, 1849.

Tomaso Gradassi, Public Notary of the College.

[L. S.]

Registered at Rome this 24th day of January, 1849, on two pages without marginal references, vol. 245 of the Public Acts, folio 46, case 8. Received twenty Bajocchi.

V. Compagna.

[L. S.] Register Office at Rome.

Here follows the legality of the British Consular Agent at Rome.

The within paper writings contain a true and faithful translation of the document also hereunto annexed, [460] from the Latin, Italian and French languages into English.

London, the 8th of June, 1849.

D. Burwash, Notary Public.

EXHIBIT C.

Referred to in the eleventh article of the allegation, was a duplicate of the vow of chastity taken by Cornelia Augusta Connelly, and already set forth in the Exhibit annexed to the eighth article (*ante*, p. 453).

EXHIBIT D.

Referred to in the twelfth article of the allegation was the official certificate of the successive ordination of Pierce Connelly, in accordance with the papal rescript.—Translated from the Latin.

Constantine Patrizi, Cardinal Priest of the Holy Roman Church, of the title of St. Sylvester in Capite, Archpriest of the Most Holy Patriarchial Liberian Basilica, Vicar-General of our Most Holy Lord the Pope, Judge Ordinary of the Court of Rome and the district belonging thereto, etc.

To all and singular to whom these presents shall come, we certify and declare that we, Constantine Patrizi, Cardinal Priest of the Holy Roman Church, Vicar-General of our Most Holy Lord the Pope, in this city, did, in the private chapel of our residence, on the 10th day of April, 1844, promote the Reverend Peter Ignatius Connelly, of Philadelphia, in America, domiciled at Rome, to the first clerical tonsure, on the 1st day of May, in the same year, to the four minor orders in the Church of the Most Holy Trinity, on the Pincian Hill; and on the 22nd day of June, in the [461] year 1845, in the same Church, on a patrimonial title to the Holy Order of Subdeacon; also, in our chapel, on the 29th day of the said month, in the same year, to the Holy Order of Deacon; and, finally, on the 16th day of July, in the aforesaid year, to the Holy Order of the Priesthood, in the Church of the most Holy Trinity above-mentioned, by apostolic dispensation as to time, after publications, spiritual exercises and examinations had. In witness whereof, etc. Given at Rome, at the house of the Vicariate, in the year 1849, the 26th day of the month of February.

J. Angelini, pro Vicar-General for the Very Reverend Canon *Joseph Tarnassi*, Secretary, the Canon *Francis Anwildi*, Sub-Secretary.

[L. S.]

Translated from the Italian.

Registered at Rome, the 14th of March, 1849, in one page, vol. 527, folio 61 R, case 1. Paid twenty Bajocchi.

G. Durathi, Registrar.

Register office in Rome.

Translated from the Latin.

I, Notary Public, do certify that the within written document is issued by the tribunal of the Vicariate of this city. And I further testify, that the Very Reverend Joseph Angelini is what he describes himself to be under his own hand. Given at

Rome, in my office, situate in the Platea di Pietro, No. 43, this fourteenth day of March, 1849.

Aloysius Hilbrat, Notary, as above-mentioned.

[L. S.]

Translated from the Italian.

Registered at Rome, the 14th day of March, 1849, [462] in one page, without references, vol. 246 of Public Acts, fol. 27 R. case 6. Received twenty Bajocchi.

P. Compagni.

Register office in Rome.

Faithfully translated from the annexed Latin and Italian documents into English.

Doctors' Commons, June 18, 1849.

Frederick Capes, Notary Public.

EXHIBIT E.

Referred to in the fifteenth article of the allegation, being the vow of poverty and obedience, taken by C. A. Connelly.

Almighty and everlasting God, I, Cornelia Connelly, being most unworthy of Thy Divine regard, but confiding, nevertheless, in Thy infinite pity and mercy, and moved by the desire of serving thee, vow in the presence of the Most Blessed Virgin Mary, and of all the heavenly Court, to Thy Divine Majesty, poverty and obedience (renewing also my vow of chastity formerly made), in the congregation of the Holy Child Jesus, and I promise to enter it, to live and die in it, intending to do all things according to the constitutions of this congregation. And this vow I make in the presence and under the sanction of the Right Reverend N. Wiseman, Bishop of Melipotamus, coadjutor of the Right Reverend the Vicar Apostolic of the Central District, as Ordinary for the time being of this house and community.

Cornelia Connelly.

Nicholas, Bishop of Melipotamus.

Ste. Asperti Samuele.

December 21, Feast of St. Thomas, 1847.

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EXHIBIT F,

Referred to in the seventeenth article of the allegation, being the protest of Pierce Connelly against his wife taking the vows of poverty and chastity.

Whereas I am responsible for the payment of all debts contracted by, or in the name and with the authority of, my wife, Cornelia Augusta Connelly, I hereby protest against the said Cornelia's being required or allowed to take any vow or vows binding her to any religious congregation whatsoever, before I shall have been fully satisfied of the sure, proper, and permanent endowment, and sufficient means, of the said religious congregation.

This 24th day of November, 1847, at Alton Towers.

Witness, *Henry Winter*.

Pierce Connelly.

EXHIBIT No. 2,

Referred to in the nineteenth article of the allegation.

Alton Towers, June 5th, 1848.

Very dear Don Samuele,

I thank you from my heart for your kind note and its affectionate sympathy. I humbly beg your pardon for the scandal I must have given you in a moment of weakness, at a blow falling on me I never had expected, and was wholly unprepared for. I shall be obliged to you to thank the Reverend Mother for the letter she was good enough to send me from my little boy, the first I have seen for more than five [464] months. I return it to her in case she should wish to keep it.—Ever, dearest Don Samuele, in the bonds of our Lord, your faithful and affectionate,

Pierce Connelly.

Don Samuele Asperti, D.D.

The admission of this allegation was opposed by Mr. Connelly, in reference to

the law pleaded, and was fully argued before the Court below (see case reported, 2 Robert. 201).

On the 23rd of March, 1850, the Dean of the Arches (Sir Herbert Jenner Fust) pronounced the decree of the Court rejecting the responsive allegation, being of opinion, without entering into the law, which the Judge assumed to be correctly pleaded in the twenty-first article, that the facts and circumstances pleaded in the allegation, even if proved, would not be a bar to the sentence prayed by Mr. Connelly, and that the Court was not entitled to withhold from the Respondent the sentence which would entitle him to cohabitation with his wife.

Against this rejection, the present appeal was brought. The Appellant submitted that the allegation rejected ought to have been admitted to proof, for the following reasons:—

First. Because the rescript and allowance of the Pope, on the joint petition of the Respondent and Appellant, set out the first Exhibit pleaded, and the subsequent Ordination of the Respondent, and vows or religious profession of the Appellant, had the force and effect in law of a Judicial sentence, or decree of divorce, or separation, *a mensa et thoro*; at least sufficient to protect the Appellant from the obligation of returning to live with the Respondent, and render him conjugal rights; and,

Secondly. Because over and above, or independent of, any argument adduced from the legal force or effect of that rescript or allowance, the Respondent's whole conduct towards, or in respect of, the Appellant, as set forth in the allegation, has been such as, if established by evidence, ought to preclude him from obtaining the aid of an Ecclesiastical Court to compel the Appellant to a renewed cohabitation with him, and, therefore, that the Court below should have permitted that whole conduct to be pleaded, as it was in the allegation, the rejection of which was the grievance complained of.

The Respondent contended, that the Decree was right, for the following reason:—

Because the matters pleaded in the allegation would, if proved, be insufficient to bar the prayer of the husband in the suit.

Mr. R. Palmer, Q.C., Dr. Addams, and Mr. Bowyer, for the Appellant; and Dr. Bayford and Dr. R. Phillimore for the Respondent.

Dr. Addams, for the Appellant.—The questions raised are,—First, whether the Court will exercise its jurisdiction by compelling a restitution of conjugal rights in a case like the present, and force the wife to re-cohabit with her husband in violation of her vow of chastity; and, secondly, whether the defence set up by the responsive allegation did not in law constitute a direct and legal bar to the suit.

I. Enough appears on the face of the allegation to [466] induce the Court to refuse compliance with the Respondent's prayer. It is pleaded, and is not in dispute, that Mrs. Connelly, in 1845, bound herself by a vow of perpetual chastity, with the full knowledge and approbation of her husband, he at the same time, in conformity with the rescript, taking Holy Orders. Will the Court, under those circumstances, interfere on the husband's behalf, and make the wife break her vow?—[Sir Frederick Pollock. —Was the case argued in the Court below as a religious question? In *Malony v. Malony* (2 Add. 249), it was pleaded, that the wife could not be removed to Ireland, without imminent danger to her health, and that allegation was admitted by the Court, on the ground, that to compel her to go to Ireland, would, in the circumstances, be an act of cruelty. Now, here Mrs. Connelly has taken a vow of perpetual chastity, and if she is a sincere believer in the Roman Catholic tenets, she would view a return to cohabitation with horror. The Court of Arches does not appear to have treated the case as a religious question: but surely, if we tolerate the Roman Catholic religion, we must tolerate it with all reasonable consequences flowing from it.]—It was argued in the Court below that Mrs. Connelly was under religious obligations. It would be more cruel to compel Mrs. Connelly to return to her husband than it would have been to send Mrs. Malony to Ireland. The conduct of the Respondent in inducing her to take the vow has been such as to bar him from coming into Court and asking for a sentence for restitution for conjugal rights. *Dunn v. Dunn* (2 Phill. 403), *Forster v. Forster* (1 Cons. Rep. 144), *Hawke v. Corri* (2 Cons. Rep. 280), *Malony v. [467] Malony* (2 Add. 249). [Mr. Pemberton Leigh.

Suppose a separation on the ground of cruelty, and the wife relents, is the husband bound to take her back again?—No. The Court would not decree a restitution under such circumstances. [Dr. Lushington. —Has the Court any discretion at all? Lord Stowell, in *Dalrymple v. Dalrymple* (2 Cons. Rep. 137), says, "It is impossible to conceal from my own observation the distress which the sentence may eventually inflict upon one or perhaps more individuals; but the Court must discharge its public duties, however painful to the feelings of others, and possibly its own." But has there ever been a case in which restitution has been refused, unless connivance has been proved?—If there is no precedent, the Court, in circumstances justifying it, will make one.

H. The material question, however, is, whether the rescript pronounced at Rome is not, for the purpose pleaded, a valid sentence of separation between the parties to the suit, although it might not be for all other purposes. It was a sentence pronounced by a competent *forum*. It is true that the Papal rescript on the petition presented by Connelly to the Pope, was not in the form of a decree in a cause of divorce in the Ecclesiastical Courts in this country, but it was equivalent to it. The Canon Law of Rome, applicable to this point, is fully pleaded in the twenty-first article of the allegation. Instead of the rescript being, as was represented in the Court below, nothing more than a dispensation from the Pope, of the necessity of obtaining letters dimissory from the Bishop of Philadelphia, it was to all intents and purposes a sentence of separation, emanating from a competent *forum*, to which the Re-[468]-spondent had drawn his wife, which *forum* had as much right to adjudicate on the matrimonial obligations of the parties at that time, as the Arches Court had in entertaining this suit for restitution of conjugal rights. Indeed, the parties ought to be treated as foreigners, accidentally residing in this country, and there being a foreign sentence of separation between them, it would be utterly at variance with legal principles, that a Court in this country should enter into a matter disposed of by a competent Court of another country.—[Mr. Pemberton Leigh.—What was the domicile of the parties at the time of procuring the rescript? Rome, I apprehend. The question really is one of the *forum*, whether it was competent. The Court below said, that if it had been a sentence of separation at Rome, it would have been entitled to every respect by the Court (2 Robert. 258). Such a sentence, in fact, did exist, but the learned Judge has mixed up two questions, the *status* of the parties, and the validity of the separation, which are distinct. In cases of marriage by British subjects abroad, the validity of such marriage is governed by the *lex loci contractus*. *Shrimshire v. Shrimshire* (2 Cons. Rep. 395). This is undoubted, and the same rule must apply to the sentence of divorce *a mensa et thoro*. The Court will give effect to a sentence of a foreign Court. A foreign sentence can be impeached only for want of natural justice, jurisdiction, or fraud, in obtaining the sentence. Not one of the grounds urged against the sentence in this case.

Mr. R. Palmer, Q.C., on the same side.—The real question is, whether Courts in this country will recognise the proceedings pleaded, as [469] tantamount, for the purposes of this suit, to a sentence of the Ecclesiastical Court of separation *a mensa et thoro*. I submit that the rescript of the Pope ought to have been treated as a foreign sentence pronounced by a competent tribunal. If so, then inquiry ought to have been made respecting the validity of such sentence, by the law in force at Rome. The learned Judge of the Arches Court, upon the authority of a *dictum* of Lord Stowell's, in *Sinclair v. Sinclair* (1 Cons. Rep. 297), took upon himself to determine an abstruse question of foreign law, without evidence of such law, and rejected an allegation, which expressly pleaded the law applicable to the case, and which could have been established by competent witnesses. If the allegation had been admitted, the rules of the Roman Catholic Church, applicable to the question at issue, and the effect of the vows of chastity, could have been proved. *Joanis Devoti Institutionem Canonicarum*, 1 vol. 557-8. The vow of chastity was the principal issue. Surely, arriving at a conclusion of foreign law without evidence, is not the mode of satisfying an English Court of the validity of foreign procedure.—[Mr. Pemberton Leigh: In *Swift v. Kelly* (3 Knapp's P.C. Cases, 257), the question was, whether a marriage solemnized at Rome by British subjects, who had simulated the Catholic faith to get married, was valid. In that case evidence

of qualified persons was received.]—The case of the *Earl Nelson v. Lord Bridport* (8 Beav. 527), is a strong authority upon this point, as it shows the mode in which English Courts admit the effect and proof of foreign law. Lord Langdale expressly lays it down, that it is a rule of English law, that no knowledge of foreign law is to be imputed [470] to an English Judge sitting in a Court of mere English jurisdiction. That case establishes this position, that on a question of foreign law, or the effect of a foreign legal act or proceeding in a foreign country, the Court can only be informed by witnesses. Our proposition is, that this sentence was made by a competent authority, in a country where the party was then residing and domiciled, for a sufficient cause, and that such sentence ought to have been admitted by the comity of nations in this country, as a conclusive bar to this suit. A divorce granted in a country where the parties are *bona fide* residing, the cause arising in that country being sufficient, according to such law, to produce that effect, is recognised and regarded by every other country, without reference to the place of the contract of marriage. Thus, in *Warrender v. Warrender* (9 Bli. 89; S.C. 2 Clk. and Fin. 488), the House of Lords affirmed the jurisdiction of the Court of Session, in Scotland, to decree a divorce *a vinculo*, from an English marriage, which, by the law of England, is indissoluble, the parties having a Scotch domicile. Story (Conf. of Laws, ch. vii. § 226 b. (2nd Edit.)) confirms this principle, and refers, in addition to this authority, to Lolley's case (Fac. Coll. March, 1812, and Russ and Ry. C.C. 237), and to Ferguson (On Marriage and Divorce, 283-5), a writer of authority on this point.—[Dr. Lushington: In *Harford v. Morris* (2 Cons. Rep. 423), the validity of a Danish marriage was decided by the *lex loci*.]—The effect of domicile, upon the question of marriage, was fully considered in *Monro v. Monro* (7 Clk. and Fin. 842). There is nothing to show that Mr. and Mrs. Connelly were not domiciled [471] at Rome, when the sentence was passed, and that such domicile does not so continue. Their residence in this country is transitory. This voluntary separation took place at Rome, and, according to the law of that country, such separation was equivalent to a sentence of divorce *a mensa et thoro*, leaving the matrimonial *status* the same as before, but entitling Mrs. Connelly to refuse to return to cohabitation. It must be noticed that there is a material distinction between a divorce and a separation, and many difficulties which might apply to a divorce, cannot apply to a separation by consent. Cohabitation is a claim of a personal nature, and may be ceded by the personal acquiescence of the husband. If the separation of Mr. and Mrs. Connelly had taken place without any view of defrauding the law of the country they owed allegiance to, then it will be contrary to the comity of nations for Courts of justice to refuse to take cognizance of it. Great inconvenience would flow from holding a contrary doctrine. What was the domicile of Mr. and Mrs. Connelly? Their domicile of origin was Pennsylvania. Their marriage also took place there; they first settled in Natchez, and appear to have acquired a domicile in Mississippi, for there may be as many domiciles in America as there are States, and the law of marriage varies in each State. Subsequently they went to Rome, and became domiciled there, subject of course to its laws. It cannot be urged that it is contrary to the *jus gentium*, or the laws of morality, to recognise the acts done there. All Europe was Roman Catholic until the Reformation, and sentences of voluntary separation, such as this, were well known. The question, therefore, is, can the husband, under the circumstances here pleaded, sue for a restitution of conjugal [472] rights? I apprehend and submit that that question can only be determined by reference to foreign law. If you go back to America, the original domicile, the Court must still be guided in their determination by foreign law.

Another question to be considered, is, the conduct of the Respondent. It would be most extraordinary, that a Court Christian, after the husband had led his wife to enter into the solemn vows of chastity, should afford its aid to enable the husband to compel her to break those vows. It would be the highest cruelty that could be exercised by the Court, to compel her, under such circumstances, to re-cohabit with her husband. *Malony v. Malony* (2 Add. 249) cannot stand for a moment, if this decree is sustained. No question can arise about Mr. Connelly's liability for debts contracted by his wife; he can protect himself against any suit in the usual way.

Dr. Bayford, for the Respondent. The case rests upon a very narrow principle, and does not involve those considerations suggested by the Appellant. By the law of this country, married persons are bound to live together. No divorce can take place except upon the ground of adultery or cruelty. English Courts take no cognizance of voluntary agreements entered into by parties to live separate from each other. *Barlee v. Barlee* (1 Add. 305). The ground on which it is sought to evade the duty which the law casts on all married persons in this country to live together, is, that Mr. Connelly has taken orders in the Church of Rome, and Mrs. Connelly the vow of chastity. I submit, however, that vows of poverty, [473] obedience, and chastity, have nothing to do with the matter; and that the Court can take no judicial cognizance of such vows. The rules of the Roman Catholic Church respecting the celibacy of priests even in Catholic times were not binding in this country. Statutes, 2nd and 3rd Edw. VI., c. 21, and 5th and 6th Edw. VI. (repealed by 1 Mar. (Sess. 2), c. 2, revived by 2 Jac. c. 25). Neither the Catholic Emancipation Act, 10 Geo. IV., c. 7, nor the recent Statutes for the relief of Roman Catholics, have altered the common law. Lyndwood (Provinciale, Lib. 3, tit. 2, "Si qui Clerici" shows that, as early as the twelfth century, clerks were permitted to cohabit with their wives. The argument that the vow of chastity is binding on the conscience of Mrs. Connelly cannot prevail, as the common law takes no notice of monks and nuns. *Rex v. Portington* (1 Salk. 162). Now, it cannot be denied that the head of the Roman Catholic Church may dispense with vows taken by members of that Church, and why should not such dispensation be exercised in a case like this? Again it is said, on the other side, that a sentence of restitution, which would bring the parties together in the same house, would necessarily involve a breach of the vow of chastity. That is not so. *Orme v. Orme* (2 Add. 382), *Forster v. Forster* (1 Cons. Rep. 154). The Court cannot compel husband and wife to do more than reside under the same roof; it can compel cohabitation, but nothing more, and Mrs. Connelly may, therefore, live with her husband without any infringement of the vows taken by her. Why is it to be presumed [474] that the wife will keep and the husband commit a breach of the vow of chastity? They had lived together two years and four months without violating their vows; so that if the argument of the Appellant is well founded, and Mr. Connelly enforced a breach of the vow, it might come under the definition of legal cruelty, but it would be no answer to this suit.—[Sir Frederick Pollock: Is the Court to bring the parties together, and then, if the necessary consequences resulting from it ensued, separate them again?]

Now, it is strongly urged, that there was a formal decree, tantamount to, and being in effect, a separation *a mensa et thoro*. It is not pretended that it was an actual sentence of separation. In none of the Exhibits is there anything like a sentence. Indeed, it could not be. Nor is the decree, if decree it is to be called, made in a matrimonial suit, but if in any suit at all, in a suit of orders. It cannot, therefore, be treated as an adjudication of a competent Court in a matrimonial suit, but put at the highest, it is only a Court as to orders. The law as pleaded in the twenty-first article does not say, that a decree in a suit, such as is here sought, could not be had by the law of Rome, namely, a restitution without cohabitation. Where a formal deed of separation is executed, there is nothing to prevent the law of the land bringing the parties together. Such deeds, when brought before a Spiritual Court, are always set aside. The domicile of the wife is that of the husband. If any weight is to be attached to the question of domicile, the consequence would be that the allegation must be admitted, but it must be reformed by pleading the law applicable to such a case.

[475] Dr. R. Phillimore, on the same side.—It is admitted that the substantial question at issue is one of domicile. Now, there can be no doubt as to the original domicile of the parties. Their domicile of origin and marriage is Pennsylvania. —[Mr. Pemberton Leigh: If Mr. and Mrs. Connelly left America without any intention of returning, would Rome become their intervening domicile?—They were never domiciled at Rome. If they intended to give up their American domicile, it was with a view of residing in England; they went to Rome to accomplish a certain object, and as soon as that was accomplished they came to England. It is universally allowed that the contract of marriage is governed by the *lex loci contractus*; but the consequences resulting from marriage involve

different considerations.—[Mr. Pemberton Leigh: The operation of the law of domicile upon the question in dispute is most important in determining what effect the law of the domicile would give to this sentence.]—The general principles of international law relied upon by the Appellant's counsel, are not denied, but no case can be found in which the law of a foreign country has been held binding on a country where it is sought to enforce the obligations of the original contract. Those consequences form no part of the *jus gentium*. It is nowhere shown that religious obligations peculiar to a particular State, which form no part of the *jus gentium*, are necessarily taken notice of by other countries in which individuals reside. The Court below had power to deal with the case according to its own law, and to determine whether the plea set up by the Appellant was sufficient. Story (Conf. of Laws, ch. iv. § 98), in his Commentaries, in support of this [476] proposition, quotes the doctrine laid down by Chancellor Kent, in these words—"The laws of a country have no binding force beyond its own territorial limits; and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate*, or, in the language of Huberus, '*Quatenus sine praejudicio indulgentium fieri potest.*' Every independent country will judge for itself how the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy." The jurisdiction of the Court over the subject-matter cannot be questioned. *Lindo v. Belisario* (1 Cons. Rep. 216). Both parties were resident in England, and the sentence pleaded was examinable by the Court, like a foreign contract. The rule is, that a foreign contract is to be interpreted by the *lex loci contractus*. The *British Linen Company v. Drummond* (10 B. and C. 910), *De la Vega v. Vianna* (1 B. and Ad. 284), *Donn v. Lippmann* (5 Clk. and Fin. 1). But if any question relating to incidents subsequent to the contract arise, the law in force in the country where the remedy is sought governs. *Warrender v. Warrender* (9 Bli. 89; S.C. 2 Clk. and Fin. 488), *Donn v. Lippmann*. Now, no benefit could be obtained by the admission of the allegation, for, whether the law of the place where the marriage is celebrated or the law of the *forum* prevailed, the husband is entitled to a restitution of conjugal rights, as a voluntary agreement could not alter the marriage contract. Story (Conf. of Laws, ch. v. § 109, ch. vi. § 223). Lord Stowell, in *Evans v. Evans* (1 Cons. Rep. 35), states, that the humanity of the Court had repeatedly been invoked, as in this case, but that humanity was the second consideration of the Court, justice the first. Here it is attempted to set up the defence as a religious [477] question, but surely the law of the *forum* will not make it a religious question. The Court cannot set up a rule of its own, upon a suggested violation of conscience, but is bound to administer the law as it finds it. The objection that the Judge of the Court below was not at liberty to investigate the law of the Church of Rome, and to determine whether these regulations of the Roman Catholic Church are binding in this country, but that he ought to have admitted the allegation and heard witnesses, is without weight. The Decretals, Liber III., Titulus XXXII., "*De conversione conjugatorum*," were pleaded in the allegation of Mrs. Connelly, as containing the rules of the Roman Catholic Church upon this subject. These Decretals are accessible, and the Court is as capable of forming an opinion on the law, as any advocates in Europe. But the law, as laid down in the allegation, is not borne out by the Decretals. If this is, however, to be viewed as a sentence obtained at Rome, the marriage having taken place in America, such sentence is not binding in this country. Such a plea is to be considered and dealt with according to English law, the *lex fori*. *Sinclair v. Sinclair* (1 Cons. Rep. 294), *Dalrymple v. Dalrymple* (2 Cons. Rep. 54). It is, therefore, unnecessary to look to the law of Rome, for nothing can bar the husband in a suit for restitution of conjugal rights, except such a defence as would vitiate the original contract. Is there anything pleaded to bring it within that exception? The matter pleaded in bar is put in two forms, first, as a sentence of a competent tribunal, by which the Court below was bound; and, secondly, that if it is not a judicial sen-[478]-tence of divorce, it has the effect of a sentence of divorce *a mensa et thoro*, and of prohibiting the parties from again cohabiting together. Upon the first point, if it is a sentence of a competent Court it is undoubtedly entitled to considerable respect; but I submit, that it does not constitute a sentence of a foreign Court of competent jurisdiction. What is the essence of this alleged

sentence? Nothing but a compliance with certain rules of the Church of Rome, which could be varied at pleasure. Ligoria (*Theologia Moralis de Matrimonialibus*, vol. ii. p. 383 (Edit. Paris, 1834), Schmalzgrueber (*Jus Ecclesiasticum Universum*, vol. i. pp. 223-4 (Edit. Paris, 1844), authorities of great weight, lay it down in clear terms, that a religious vow, under whatever stringency originally taken, may be relaxed or dispensed with by the Pope. If so, how can this be said to have the force of a sentence pronounced by a Court of competent judicature? A sentence passed one morning which might be reversed the next day, cannot be called a judicial sentence. It is a new step attempted to be introduced into Courts of Justice, of making the regulations of the Church of Rome binding, and to be recognized by the *jus gentium*. It is a grave question whether Courts of Justice can take cognizance at all of the rules of these religious institutions. *Fulham v. McCarthy* (1 H.L. Cases, 721).

But the important question is, whether the consequences of the domicile of the marriage of the parties could be varied by any act of their own? The doctrine of marriage is fully treated by Ferguson (on Marr. and Divorce, 360, 397, 399), who in clear terms lays it down, that the contract of marriage [479] differs from all other contracts, as it cannot be dissolved by voluntary agreement of parties, being a matter of municipal regulation, over which the parties have no control; that matrimonial rights, so far as they are *juris gentium*, admit of no modification by the will of the parties; that the law of the place where the marriage is celebrated furnishes a just rule for the interpretation of its obligations and rights (Ferguson "On Marr. and Divorce," 283). Story (Conf. of Laws, ch. v. s. 109, ch. vii. s. 223) adopts this doctrine, and states, that it is the law upon which the American Courts invariably act.—[Mr. Penberton Leigh: Is not that a question worthy of being considered, by reforming the allegation and pleading the effect of such sentence by the law of Pennsylvania?—No good can result from reforming the allegation, as the authorities clearly show that there was no power at Rome to modify the marriage contract. Lord Brougham, in *Warrender v. Warrender* (9 Bli. 107), states the rule, that there is nothing which can be done by parties, to displace the presumption of domicile raised by the marriage; and Lord Lyndhurst in the same case (*ib.*, 144) recognising that doctrine, held that husband and wife could not by any agreement between themselves vary the law of domicile. In truth, this sentence is nothing more than a registered agreement of separation. Even as such it is void. An agreement by husband and wife to separate is invalid, and cannot be noticed. The only legal separation is by judicial sentence, *Evans v. Evans* (1 Cons. Rep. 118). If it was a sentence at all, it was worse than a divorce. Before the Reformation, if a wife took the vow of chastity, and [480] the husband did not, it was competent to him to marry again. Such a sentence would, moreover, be illegal, as it interferes with the domestic interests and policy of the law of this country, and Courts in this country will not permit such sentences to interfere with its domestic interests and policy. Story (Conf. of Laws, ch. iv. s. 99). It is also contrary to the common law, Vin. Abr., tit. "Profession," (A.) Year-book, Edw. VI., vol. vii. *Rex v. Porlington* (1 Salk. 162), which takes no notice of monks or nuns. Neither can profession in religion be tried in our Courts. Co. Litt. (P. 132, b). The Catholic Emancipation Act, 10 Geo. IV., c. 7, gave no sanction to an interference with the obligations of the matrimonial law of the land. The *status* of Roman Catholics in this respect differs not from what it has been since the Reformation. The modern Statutes, 3rd and 4th Will. IV. c. 115, 7th and 8th Vict. c. 101, and 9th and 10th Vict. c. 59, merely place Roman Catholics on the same footing as Protestant Dissenters. This is one out of a class of cases arising out of the present disturbed state of religious parties in this country, and if the proposition is to be laid down that every tolerated religion is entitled to all the consequences flowing from it, the next step may be that the Court will be called upon to grant administration to the next of kin of a person civilly dead. Indeed, in *Fulham v. McCarthy* (1 H.L. Cases, 721), a question was raised, whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, was valid, but the House of Lords gave no opinion upon it. This ought not to be considered as a religious question, as the Court is not competent to entertain it, but must be decided upon

principles of [481] international law. I submit, that the allegation, was properly dismissed, and that no advantage could accrue if it was admitted and reformed.

Their Lordships, without hearing Dr. Addams in reply, delivered judgment, as follows, by

The Right Hon. Dr. Lushington.—Their Lordships are of opinion, that the allegation given in by Mrs. Connelly ought to be admitted, provided it is amended by pleading two facts, first, what was the law of Pennsylvania, if this suit had been brought there for adjudication; and secondly, what was the domicile of the parties at the time the transaction took place at Rome. We pronounce no opinion whatever upon the facts of the case, but if these additions are made, we will admit the allegation, and remit the cause to the Arches Court.

The following Order was made upon the appeal.—“Leave to the said Cornelia Augusta Connelly to reform the allegation given in on her part and behalf in the Court of Arches, and rejected by the Judge of the said Court, by pleading and setting forth, if she shall be so advised, the law of Pennsylvania, as applicable to the circumstances pleaded and set forth in this cause, in case the same had been brought to adjudication there, and also the domicile of the said Reverend Pierce Connelly, clerk, at the time of the transaction pleaded in the said allegation to have taken place at Rome.”

[482] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT MADRAS.

THE EAST INDIA COMPANY.—*Appellants*: NUTHUMBADOO VEERASAWMY MOODELLY,—*Respondents* * [Dec. 5, 1851].

Bill by a party claiming to represent the interests of certain proprietors of land, termed “*Mirasidars*” against the East India Company, for specific performance of an agreement alleged to have been entered into by them to grant compensation for the *mirasi* rights in certain lands taken possession of adversely by the Madras Government for public purposes. Upon appeal, such bill dismissed, the Judicial Committee holding, that there was no evidence of any contract by the East India Company, to sustain a bill in a Court of Equity for the relief sought.

This was a suit for specific performance of an agreement alleged to have been entered into by the Appellants, to pay the *Mirasidars* (a) of the villages of Perambore and Nadambarei, compensation for the loss of their *mirasi* rights in a certain tract of land outside of the walls and fortifications of the Black Town of Madras, which had been taken possession of by the Madras Government for the purpose of forming an esplanade for the military defence of that quarter. The Plaintiff was the executor of one Mangandoo Vencatachella Moodelly, and claimed compensation for certain shares in the *mirasi* rights, which his testator had purchased from some of the *Mirasidars*.

[483] The original Bill was filed by Conjeeveeram Woodundy Moodelliar, as the executor under the Will of Mangandoo Vencatachella Moodelly, on the equity side of the Supreme Court of Madras, against Charles Gandoin, Elizabeth Willins, Tolesinga Moodelly, Curpoora Moodelly, Velliapermall Moodelly, Vengoo Munnapah

* Present: The Right Hon. Dr. Lushington, the Right Hon. G. Turner, Vice-Chancellor, and the Right Hon. Sir Edward Ryan.

(a) The holder or possessor of a heritage. As to the nature of the *mirasi* rights in Madras, see “Replies to seventeen questions proposed by the Government of Fort St. George, relative to the *mirasi* right, by F. W. Ellis, Collector of Madras.”—Madras, A.D. 1818.

Moodelly, Sabaputty Moodelly, Comarasawmy Moodelly, Veerasawmy Moodelly, Sashoo Moodelly, Thyell Unmall, Mootoogoorosawmy Moodelly, Amoortummall, and Rungasawmy Moodelly; and the Appellants. The bill stated that, at the time of the execution of the Malabar deed of sale, thereafter mentioned, the persons who executed it as vendors, and one Yelliapermall Moodelly, were the Mirasidars of the villages of Perambore and Nadumbarei, within the local limits of Madras, and, as such, were the proprietors of the soil of both those villages; and that the ground held by them as Mirasidars of the village of Nadumbarei, contained 37 cawnies, 18 grounds, and 355 square feet, and that the mirasi, or proprietorship of the villages, was divided into thirteen shares, and that such shares were, before and at the time aforesaid, held and enjoyed by the several Mirasidars aforesaid in manner following; that is to say, Tolesinga Moodelly and Vadappah Moodelly held five of such shares, Yelliapermall four shares, Vengoo Munnappah two and a quarter shares, and the remaining Mirasidars each one quarter of a share; that Tolesinga Moodelly, Vadappah Moodelly, Vengoo Munnappah Moodelly, Sabaputty Moodelly, Comarasawmy Moodelly, Veerasawmy Moodelly, Sashoo Moodelly, Sadiappah Moodelly, Ann-chellu Moodelly, and Mootoogoorosawmy Moodelly, so being ten of such eleven Mirasidars as aforesaid, on the 21st of Septem-[484]-ber, 1837 A.D., at Madras, made and executed an instrument in writing, in the Malabar language and character, commonly called a Malabar deed of sale, and thereby, in consideration of the sum of 3630 pagodas, paid to them by Mangandoo Vencatachella Moodelly, for the purchase thereof, sold and assigned to Mangandoo Vencatachella Moodelly fifteen and one-eighth cawnies of ground in the village of Nadumbarei, forming a part of the land belonging to them, and which land, so sold to Mangandoo Vencatachella Moodelly, was included within the 37 cawnies, 18 grounds, and 355 square feet hereinbefore mentioned; that the Appellants had, long previously to the execution of the deed of sale or assignment, assumed possession from the Mirasidars of the whole of the 37 cawnies, 18 grounds, and 355 square feet of land, including the land so assigned to the Vencatachella Moodelly in the village of Nadumbarei, for public purposes, and had agreed to pay for the same the value thereof to the Mirasidars, as the proprietors of the soil, at and after the rate of 240 pagodas, or Rs. 840 per cawny, but that they, the East India Company (the Appellants), had not paid any part of such value, and that, ever since they had been in possession of the ground, they had held a large sum of money in their hands for the payment thereof; the bill then stated a judgment obtained by Myla Chittumbala Venoyaga Moodelly against the ten Mirasidars, and the seizure by the Sheriff of their mirasi rights and interest in the two villages of Perambore and Nadumbarei, including the fifteen and one-eighth cawnies sold to Mangandoo Vencatachella Moodelly, and the sales by the Sheriff of the whole of their mirasi rights and interests to Mangandoo Vencatachella Moo[485]-delly, for the sum of Rs. 9030, and that the share of Yelliapermall Moodelly in the 37 cawnies, 18 grounds, 355 square feet amounted to 11 cawnies, 14 grounds, 1935 square feet; and that Vencatachella Moodelly, under and by virtue of his purchase at the Sheriff's sale, and the assignments by the Sheriff thereafter mentioned, became and was entitled to 27 cawnies, 3 grounds, and 820 square feet (inclusive of the fifteen and one-eighth cawnies) of and in the 37 cawnies, 18 grounds, and 355 square feet (or the value, or compensation, payable by the East India Company in respect thereof), and also to the difference in quantity of land in the villages of Perambore and Nadumbarei between the 27 cawnies, 3 grounds, and 820 square feet, and the quantity which belonged and appertained to the ten Mirasidars, as their nine-thirteenth shares of and in the villages; which last-mentioned quantity amounted to 73 cawnies. And, after stating the nature of the claims to the land in question set up by the Defendants, Gandoin, Willins (the former of whom claimed as a judgment creditor, and the latter under an assignment from Yelliapermall Moodelly), Amoortummall, and Rungasawmy Moodelly, and that Mangandoo Vencatachella Moodelly had compromised the claim of Amoortummall, by transferring to her one and one-eighth share in the 37 cawnies, 18 grounds, 355 square feet, which amounted to 3 cawnies, 18 grounds, 1000 square feet; and that such last-mentioned quantity, being deducted from the 27 cawnies, 3 grounds, 820 square

feet, there remained 22 cawnies, 20 grounds, 2220 square feet ; and that Vencatachella Moodelly thereupon became and was entitled to the 22 cawnies, 20 grounds, 2220 square feet, out of and in the 37 cawnies, 18 grounds, 355 square [486] feet, so assumed possession of by the East India Company, as aforesaid, or to compensation for the same. And, after stating other matters, the Plaintiff charged, amongst other things, that the Appellants ought to be put to make their election, either to pay the Plaintiff so much of the compensation-money as was due for the amount of ground so purchased by Mangandoo Vencatachella Moodelly, deducting the amount so given by him to the Amoortammall, or else to give up to the Plaintiff the possession of the land so belonging to the estate of Mangandoo Vencatachella Moodelly ; and that the Appellants ought to be restrained from paying, and the other Defendants from receiving, the compensation-money, or any part thereof ; and the bill prayed, that Mangandoo Vencatachella Moodelly might be declared to have been in his lifetime and at the time of his death the purchaser, for a valuable consideration, of the nine-thirteenth shares of and in the villages of Perambore and Nadumbarei, less the one and one-eighth share so transferred to Amoortummall ; and that it might be declared that Mangandoo Vencatachella Moodelly was, as such purchaser as aforesaid, entitled, at the time of his death, to 22 cawnies, 20 grounds, and 2220 square feet (inclusive of fifteen and one-eighth cawnies) of and in the 37 cawnies, 18 grounds, and 355 square feet in the village of Nadumbarei, and, as such, entitled to receive all compensation payable by the East India Company in respect thereof ; and that an account might be taken of the compensation-money ; and interest be computed thereon, from such date and at such a rate as the Court should direct ; and that the amount of the share or interest of Mangandoo Vencatachella Moodelly in and to such principal and interest [487] monies might be ascertained, and, when ascertained, paid over to the Plaintiff, as such executor as aforesaid, he being ready and willing, and thereby offering, to execute all such lawful and reasonable deeds or assignments as might be demanded or required by the East India Company ; and that the other Defendants might be decreed to do all necessary and reasonable acts in and about the premises ; and that so much of the pretended assignment of Yelliapermall Moodelly as exceeds his own lawful and rightful share of and in the lands might be decreed to be set aside ; and that the interests, if any, of Gandoin, Willins, and Yelliapermall might be ascertained and declared. But if the East India Company should persist in objecting to the title of the Plaintiff, as the executor of Mangandoo Vencatachella Moodelly, and to the title of Mirasidars, and the Court should be of opinion that there was any defect whatever in their title, that then the East India Company might be decreed to pay so much of such compensation-money or value of the land assumed possession of as aforesaid, as belonged or was payable to the estate of the Mangandoo Vencatachella Moodelly, and such interest, to be so declared, as aforesaid, within a reasonable time, to be fixed by the Court, for that purpose ; and, in default, that the East India Company might be decreed to deliver up possession of the 37 cawnies, 18 grounds, 355 square feet over to the Plaintiff, and Yelliapermall and Amoortummall, or the Plaintiff, and Amoortummall, and Willins, or Gandoin, as the case might be, as representing and taking under the Mirasidars of the villages so originally in the possession of the lands taken possession of by the East India Company ; and that, in such last-mentioned case, it might be referred to the Master to take an account of the [488] rents and profits of the lands ; and that the East India Company might be decreed to pay a reasonable occupation rent for the same ; and that the East India Company be restrained from paying, and the other Defendants, and each and every of them, from receiving, the compensation-money, or any part thereof.

The Appellants, by their answer, stated that they, through their Government of Fort Saint George, and in manner and by the course and for the purpose herein-after next stated, but not otherwise, did take possession of a considerable tract of land, for the purpose of forming and keeping clear the West esplanade on the outer side of the walls and fortifications of the Black Town of Madras, such esplanade being required for the defence in war of the Black Town, the Government of Fort Saint George, in the year 1783, for the purpose of forming such esplanade, and in the assertion of the right of these Defendants as owners of the soil, they did clear such tract of land as aforesaid from all occupations to the extent of six hundred

yards' distance from the walls; that, afterwards, several persons having taken possession of many parts of such tract of land, and occupied the same by cultivation, and in making of salt, and in other ways, these Defendants, through their Government, did, between the years 1813 and 1816, again resume and take possession of such tract of land by clearing the same from all such occupation, and by keeping the same so cleared and in their own occupation from thence hitherto. They admitted that a portion of such tract, and to the extent in the bill mentioned, was, from time to time, and for many years, occupied, and used, and enjoyed, either in cultivation or in making salt, by certain persons called [489] the Mirasidars of the villages of Perambore and Nadumbaree, who claimed so to occupy, use, and enjoy the same in virtue of their mirasi rights. They also admitted that they were willing and directed that a sum of money should be paid for the land taken possession of by them to the parties respectively entitled as Mirasidars to the same, at and after the rate stated in the bill, upon condition of such parties giving to them a full and sufficient conveyance of the land and release of and from all claims upon the Appellants in respect thereof; but they denied that any agreement or promise was made by or between them and those parties respectively, or that they agreed, or promised, or consented to pay, in any manner, or in any other sense save as aforesaid, for the said land the value thereof, and that any money had ever been in any manner set apart for the payment of any such compensation, and stated, that inasmuch as no person had appeared showing any title to any such compensation as in the bill was mentioned, or able to comply with the conditions required by the Appellants, they had not paid any such compensation; but they said that, for the purposes of liquidating any claims which might be from time to time established for compensation under their directions, and upon the conditions as thereinbefore mentioned, they had, since the year 1813, authorised the Treasurer of Fort Saint George to hold disposable various sums of money from time to time, but not any particular sum, for the payment of any such compensation as in the bill mentioned; nor did they hold any large or other particular sum for such last-mentioned purpose. They further said that the Collector of Madras for the time being was authorised to act for them, and in this behalf, [490] with respect to the land in question, so far as to inquire and report to the Board of Revenue upon claims made to it, with a view to the orders of Government thereon, but not otherwise; and that neither the alleged Mirasidars nor Mangandoo Vencatachella Moodelly in his lifetime, nor the Plaintiff since his decease, had ever offered to produce or show to the Appellants a good and valid title to the land, or any part thereof; nor had any of them ever tendered to the Appellants or offered to give and execute a full and valid conveyance of the land, or any part thereof. They also stated that the land in question was barren and unproductive, and was frequently flooded and overflowed by salt-water, and that there had been no profits arising from it.

The other Defendants, except Tolesinga Moodelly, appeared, and put in separate answers, which it is not necessary to notice, as the suit was substantially between the Plaintiff and the Appellants.

Pending the suit, Conjeeveeram Woodundy Moodelliar, the Plaintiff, died, having previously made a Will, whereby he appointed Nuthumbadoo Veerasawmy Moodelly, the present Respondent, his sole executor, who, on the 4th of February, 1844, exhibited a bill of revivor, in the same suit, against the Appellants and the other Defendants.

The hearing of the cause took place on various days in the month of March, 1846, before the Chief Justice (Sir Edward Gambier) and Sir W. Burton, Puisne Judge, when evidence, both documentary and by the depositions of witnesses, was gone into on both sides. The only evidence adduced by the Plaintiff to prove that the Appellants had entered into any agreement or incurred any legal or equitable liability to pay [491] compensation to parties who claimed to be entitled to the land in question, consisted of the documents marked respectively A No. 20, A No. 22, A No. 23, and A No. 24. These documents are mentioned and referred to in the judgment.

On the other hand, the Appellants adduced evidence to prove that the Malabar deed of sale of the 21st September, 1837, was a mere colourable instrument, executed by the Mirasidars, for the purpose of enabling Mangandoo Vencatachella Moodelly

to recover from the Appellants compensation for fifteen one-eighth cawnies of land, which thereby purported to be sold to him, and that no consideration money was paid or intended to be paid by the pretended purchaser.

The Court pronounced the following decree, bearing date the 21st of March, 1846:—"This Court doth order that it be referred to the Master of this Court to inquire, whether the Complainant and Defendants, other than the Defendants, the East India Company, or any of them, can give to the Defendants, the East India Company, a full and sufficient conveyance of such portion of the tract of land forming the West esplanade on the outer side of the walls and fortifications of the Black Town of Madras, taken possession of by the Defendants, the East India Company, in 1783, and again resumed by the Defendants, the East India Company, between 1813 and 1816, and in the pleadings mentioned, as is situated within the village of Nadumbarei: and whether the Complainant and the Defendants, other than the Defendants, the East India Company, or any of them, can give to the said Defendants, the East India Company, a full and sufficient release of and from all claims on the Defendants, the East India [492] Company, in respect of such portion aforesaid: and that the Master do state his opinion thereon to the Court, with liberty to state any special circumstances. And this Court doth order that the Master do inquire and report whether any and what consideration passed between the parties to the Malabar deed of sale, in the pleadings mentioned, and bearing date the 21st September, 1837, or between any of them; and also whether any and what sum or sums of money was or were paid by Mangandoo Vencatachella Moodelly, in the pleadings mentioned, as and for the purchase monies or consideration respectively stated in, and appearing upon the face of, the nine several assignments by the Sheriff, in the pleadings mentioned, and bearing date respectively the 12th of February, 1840."

The Court transmitted to the Judicial Committee of the Privy Council the following reasons for making the above interlocutory decree, so far as concerned the Defendants, the East India Company:—

"1. The parties under whom the Plaintiff claims, or some of them, appear to us to have established their title as Mirasidars of the villages or united village of Perambore and Nadumbarei. This conclusion is founded on the Exhibits, A 20, A 22, A 23, A 24, and upon the evidence of Valoyda Moddelly.

"2. The Plaintiff's equity is analogous to that of a vendor, who comes into Court seeking a discovery from the vendee, offering a conveyance and demanding his purchase-money. And the interlocutory order complained of, is merely a reference to the Master for the purpose of ascertaining whether any of the parties before the Court have such a title to the land as will enable them to make an effectual conveyance of it to [493] the East India Company, and will secure the latter from all further claims in respect of it.

"3. The Plaintiff has a further ground for coming into a Court of Equity; namely, that complete relief could not be given in a Court of Law. Originally, according to the Plaintiff's case, this was a mere trespass; but the aspect of it is now changed. The Defendants, the East India Company, say they hold a sum of money which they directed should be paid by way of compensation for the land to the parties respectively entitled as Mirasidars to the same, upon condition of their giving to the Company a full and sufficient conveyance and release. This sum is not allotted as damages for the trespass. The Mirasidars may waive the trespass and claim the benefit of this engagement, for entering into which the possession of the land by the East India Company is a sufficient consideration: but the Mirasidars can only do this in a Court of Equity, where alone a conveyance and release can be decreed.

"4. Whatever equity the Mirasidars themselves possessed, the Plaintiff, who claims under them, must have the same."

The Defendants, the East India Company, appealed from the above decree.

The Respondent did not appear, and after a day had been appointed for the hearing, the appeal was postponed, at the instance of the Appellants, until the Respondent had been served in India with notice that the appeal would be heard *ex parte* if he did not enter an appearance. No appearance, however, having been

entered, and the Respondent having been personally served, the appeal was set down *ex parte*, and now came on for hearing.

[494] Mr. Wigram, Q.C. (with whom was Mr. Lloyd, Q.C., and Mr. Forsyth, for the Appellants.—No title to relief in equity was established against the Appellants. The bill is for specific performance of a contract, but the evidence adduced by the Respondent in the suit entirely failed to establish any contract or agreement made or entered into on the part of the Appellants, whereby they became liable, legally or equitably, to pay to the Plaintiff, or the parties through whom he claims, the value or compensation for the land taken by the Appellants, *Morgan v. Bernier* (9 Bing. 672). All that the evidence established was, that it was a matter of favour, not of right, to make compensation. The Appellants by their answer admitted that they were willing to make reasonable compensation to persons who could establish, to their satisfaction, that they had originally a title to the land taken by them on behalf of the Government in 1783, and if, therefore, the original Plaintiff considered himself entitled to claim compensation, he ought to have submitted his claim to the Solicitor for the Appellants, to whom all such claims had been referred. But even if this is to be viewed as a contract between a vendor and purchaser, as the Court below treats it, the decree is erroneous: it ought to have directed the purchase-money to be paid into Court, *Wickham v. Evered* (4 Mad. 53; and see *Blackburn v. Stace*, 6 Mad. 69), as the purchaser took possession without the consent of the vendor.

The Vice-Chancellor Turner. It does not appear to their Lordships to be necessary to hear any other Counsel on the subject. This [495] is in the nature of a bill for the specific performance of an agreement. The allegation of the bill on which the whole equity is founded is this:—“That the East India Company had, long previously to the execution of the assignment or deed of sale therein mentioned, assumed possession from the Mirasidars of the whole of the 37 cawnies, 18 grounds, and 355 square feet of land, including the land so assigned to Vencatachella Moodelly, in the village of Nadumbareil, for public purposes, and had agreed to pay for the same the value thereof to the Mirasidars as the proprietors of the soil at and after the rate of 204 pagodas or Rs. 804 per cawnie, but that the East India Company had not paid any part of such value, and that ever since they had been in possession of the ground, they had held a large sum of money in hand for the payment thereof.” It is incumbent upon the Plaintiff, therefore, in order to maintain any right to relief in equity, to prove that agreement.

The documentary evidence upon which the agreement is attempted to be founded consists of four documents. The first document, A. No. 20, seems to have no reference whatever to any case of contract between the Company and the Mirasidars, but rather refers to the case of some agreement between them in respect of a lease of the property there mentioned. The second, A. No. 22, is a sunnud by the Company to Cundah Pillay and Mirasi Conicopoly, of the villages of Perambore and Nadumbareil. It is as follows:—“Upon your seeing this takeed, or order, you must immediately take the account of the shares of the mirasi of the said village, and attend our Huzzoor Cutcherry with the same.” It is quite clear that that account might be taken for very many [496] other purposes than the purposes of the alleged agreement.

The next document, A. No. 23, in truth proves that it was so intended; it is in these terms: “You must call at our Huzzoor Cutcherry, and be in attendance at 10 o'clock in the morning of Saturday, the 22nd instant, and bring and produce all such accounts in your possession which give a particular account of the privilege and right by which you are entitled to continue to hold and enjoy the villages called Perambore and Nadumbareil. If the afore-mentioned villages are divided, and if the shares thereof are continued to be held and enjoyed separately, then you must acquaint us with full particulars, when and by whose orders such division took place, and on whose account such shares were first made. As a correct registry book is to be opened under the orders of Maharaja Rejustry, the members of the Board of Revenue, it is necessary that the Circar should know the full particulars of this matter.” It is obvious, therefore, that what the parties had in view in this document was, that there was a correct Registry Book to be opened, and it was

necessary that correct admeasurements should be made for the purpose of this Registry; it does not, therefore, amount to any evidence of contract between the parties.

The fourth document, A. No. 24, does refer to some question of compensation: it is addressed to Tolesinga Moodelly and Yelliapermall Moodelly, Mirasidars of Perambore and Nadumbare, and others, and is in these terms: "You are hereby commanded, that is to say, as the lands for which you have solicited and claimed compensation are again to be measured by the surveyor attached to our department, you must, there-[497] fore, proceed there to-morrow morning about gun-firing, and show to the surveyor, Mr. Gantz, all such and such lands which you declare to be your own." That document is put forward as a statement on the part of the parties who are now represented by the present Plaintiff, that those parties had solicited and claimed compensation. But it is no admission on the part of the Appellants in this appeal, that any such claim had been in any degree recognised by them.

Looking at the parol evidence in the case, it does not appear to their Lordships that that evidence carries the case at all further. There is no proof of any parol contract. It is clear, that the East India Company, in the first instance, had entered upon this land for public purposes, adversely, and it is not, therefore, a case where possession having been taken under contract, it became necessary to ascertain the terms on which that contract was founded. There are cases in which the Court will go to a great extent in order to do justice between the parties where possession has been taken, and there is an uncertainty about the terms of the contract. But here the possession was originally taken adversely, and there is no reason, therefore, why the Court should extend its equitable jurisdiction for the purpose of dealing with what appears clearly to be a mere legal question between the parties.

With reference to the reasons which are assigned for the conclusion which the Court below has arrived at, we think that the statement of learned Judges, "that the Plaintiff's equity is analogous to that of a vendor," is not well founded. If there be any equity at all, it must be founded upon a contract and nothing [498] else. It must be upon that alone the equity is founded. The second paragraph of the reasons for the judgment falls to the ground. The reference to the Master ought not to be made, unless there was some equity upon which it could be founded, and that must depend simply upon the question of contract, or no contract. With reference to the further reason, contained in the third paragraph, for coming into a Court of Equity, namely, "that complete relief could not be given in a Court of Law," it does not always follow that relief can be given at equity because relief cannot be given at law. There must be a case made out for such relief in equity. So with reference to the argument founded upon the assumption, that the East India Company had themselves appropriated money for the purpose of answering this contract, there is no evidence of any communication being made to these parties that any such appropriation had been made. The appropriation itself is evidence of an intention on the part of the East India Company to contract for the purchase, but it is no evidence of any such contract having been actually made.

Their Lordships, therefore, are of opinion, that the decree cannot be maintained.

We do not think it is a case for giving costs in the Court below: the parties have mistaken their remedy. The East India Company have been in possession of the land for a long time. The proper course will be to dismiss the bill without costs.

[499] *In re* BRIDSON'S PATENT * [Dec. 23, 1851; Feb. 7, 1852].

Application, under the Statute 14 and 15 Vict., c. 99, sec. 6, by parties who opposed an extension of Letters Patent, for production and inspection of the Petitioners' accounts previous to the hearing of the petition refused, with costs.

Costs given to all the Opposers upon Petitioners abandoning petition before hearing.

Where the petition is abandoned, it is not necessary that the Opposers should serve the Petitioners with notice of their intended application to the Court for costs of opposition.

A petition in this case was presented for extension of the term of Letters Patent, dated the 26th of May, 1838, for improvements in machinery, or apparatus, for stretching, drying and finishing woven fabrics. The petition set forth the merits of the invention, the want of adequate remuneration, occasioned in some measure by extensive litigation concerning the validity of the Letters Patent. Caveats were entered by several parties, and objections lodged against an extension. The objectors afterwards lodged in the Council Office, notices which they served upon the Petitioners, that the Petitioners should be ordered to produce, within fourteen days before the day on which the Court should fix for the hearing of the petition, all such accounts relating to the patent, as the Petitioners intended to give in evidence before the Committee on the hearing of the petition, and that the Petitioners might be ordered to furnish to the Objectors, on the request and at the expense of the Objectors, their solicitors or agents, a copy of the accounts, or of such part or parts thereof as they shall think fit, in three days from any such request. Affidavits were filed in support of the motion, stating, that the accounts were very large and intricate, and [500] required to be fully and fairly investigated, to ascertain what profits had been made by the invention, and that if the accounts to be produced at the hearing of the petition could not then be investigated and attested, without an adjournment of the hearing; that upon a careful investigation of the accounts it would appear that ample remuneration had been received by the Petitioners and other parties beneficially interested therein, for the skill, time, labour, trouble, and expense bestowed on the invention.

An application having been made, and a day fixed for hearing of the petition, the motion for production of the accounts was made, in pursuance of such notice.

Mr. Forsyth and Mr. Webster for the Objectors.—This application is founded upon the Statute, 14th and 15th Vict., c. 99. By section 6 of that Statute, power is given to the Common Law Courts to compel inspection of documents, on application by either party, and to investigate all documents in the custody or control of the other, and to take and examine copies of the same. Great inconvenience has been experienced by this Court from the complexity of the accounts, and the hearing of petition has been adjourned to enable the accounts to be investigated. The production and inspection of the accounts in this case before the hearing, would obviate any such delay.

Mr. Atherton, Q.C., and Mr. Edmund F. Moore, for the Petitioners, *contra*.—Although by the Statute, 5th and 6th Will. IV., c. 83, secs. 1 and 4, any person can enter a caveat against an extension, and thus obtain a *locus standi* to be heard [501] in opposition, yet it cannot be contended that the Statute, 14th and 15th Vict., c. 99, sec. 6, applies to a case like the present. The consequences would be most mischievous if it were so held. A stranger, by merely filing a caveat, might call upon a Petitioner applying for an extension, to produce his accounts; in fact, to show how he was going to make out his title, in which he has no interest. *Ivy v. Kekewich* (2 Ves. Jun. 679; and see 2 Daniel's Ch. Prac. p. 63; Edit. 1841). Nothing can be more dangerous than to allow production to satisfy curiosity. The Newcastle case (cited in *Cock v. St. Bartholomew's Hospital*, Chatham, 8 Ves. 41). It is unprecedented, and would be most unjust. The inconvenience suggested, is visionary:

* Present: Lord Cranworth, the Right Hon. Sir George Turner, Vice-Chancellor, and the Right Hon. Sir Edward Ryan.

it is for the Court, at the hearing, in its discretion, to determine whether the accounts furnished are satisfactory or not.

Lord Cranworth.—Their Lordships are clearly of opinion, that they ought not to allow this application for the inspection of the Petitioners' accounts. The effect of the application is, that they are to furnish the Opposers with the means of making out that the Patentees, the Petitioners, have no case for coming here.

Nothing can be more absurd than to say that we are to hear no evidence, unless you have previous notice. The petition is for an extension of the term of Letters Patent, and when the matter comes before the Judicial Committee to be decided upon, the Petitioners must make out their case to our satisfaction. It may be that the [502] evidence is not satisfactory, and that some further inquiry will be necessary, but that is for their Lordships to determine at the hearing. The application is quite wild, and must not only be refused, but with costs.

The petition for prolongation was afterwards withdrawn by the Petitioners, and no hearing took place. Two only of the Objectors served the Petitioners with notice of their intention to apply to the Court for costs of opposition.

Feb. 7, 1852.* Mr. Forsyth and Mr. Webster, for the Objectors, applied for costs; they relied upon Macintosh's Patent (1 Webs. Pat. Rep. 739, n.).

Mr. Edmund F. Moore, in opposition, submitted, first, that it was a case for indulgence, as the petition was withdrawn before the hearing, costs in the case cited being given only at the hearing; and, secondly, urged, in the alternative, that only those of the Objectors, who had given notice of their intended application, were entitled to costs.

Lord Cranworth.—It appears that there is no practice which renders it necessary for Opposers to give notice of their intended application for costs: neither is there anything which can justify us in refusing costs of opposition. [503] The costs, therefore, of all the Objectors opposing the petition must be paid by the Petitioners (*a*).

[Mews' Dig. tit. PATENT; F. CONFIRMATION, &c.; 2. *Renewal and Extension*; d. *Account of Profits*; e. *Practice on application for*. See note to *Milner's Patent*, 1854, 9 Moo. P.C. 39.

In re HORNBY'S PATENT † [June 16, 1853 ‡].

On a petition for prolongation of Letters Patent, a day was fixed for hearing. Objections were lodged against an extension. Before the hearing the Petitioners abandoned the prosecution of the petition. In such circumstances, costs of opposition allowed to Opposer.

In this case a petition for prolongation of the term of Letters Patent granted to Hornby, in 1839, for improvements in machinery, was presented, and a day appointed for hearing. Objections were lodged against an extension. Afterwards the Petitioners abandoned their intention of proceeding with their application for a prolongation, and served the Objectors with notice of the abandonment. An objection being made to the payment of the Objectors' costs.

* Present: Lord Cranworth, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

(*a*) In Westrupp and Gibbin's Patent, 1 Webs. Pat. Rep. 556, costs of the Opposers were given at the hearing. So in Downton's Patent, *ib.* 567, costs, occasioned by an unsuccessful opposition, were allowed to the Petitioners. See the next case.

† The same point being involved in this case as in the preceding, it is thought advisable to insert them together.

‡ Present: The Lord Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

Mr. Hindmarch, for the Objectors, applied, on motion, for costs of the opposition occasioned by the petition. He cited Macintosh's Patent (4 Webs. Pat. Rep. 739, n.; and see "*In re Bridson's Patent*" *ante* [7 Moo. P.C.], p. 499), and Statute, 3rd and 4th Will. IV., 41, sec. 15.

[504] Their Lordships directed that the costs of the opposition should be taxed by the Registrar of the Privy Council, and paid by the Petitioners.

[Mews' Dig. tit. PATENT; F. CONFIRMATION, &c.; 2. *Renewal and Extension*; c. *Practice on application for*. See note to *Milner's Patent*, 1854, 9 Moo. P.C. 39.]

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